

## Equal Remuneration Case underway at Fair Work Australia

The Full Bench of Fair Work Australia has issued an initial [Statement & Directions](#) in relation to an application which if successful, will dramatically increase award wages in the social and community services sector. The case, known as the *Equal Remuneration Case* will be heard over the next 6 months and if successful will increase minimum wages on average by more than \$9,000 per employee per year.

The case has been initiated by the Australian Services Union after its attempt to incorporate higher rates of pay into the modern award failed. The Australian Government has supported the union to file the application currently before Fair Work Australia.

Fair Work Australia has the power to order higher award rates of pay to ensure in any particular case, there is equal remuneration for work of equal or comparable value. This means equal remuneration for men and women for work of equal or comparable value.

Most employers may be confused as to the underlying reason for this application. The modern Social Community Home Care and Disability Services Award doesn't prescribe different rates of pay between men and women. However, the union doesn't have to show inequality in award rates paid to men and women working alongside each other performing the same job. It must demonstrate inequality in wage outcomes between the award rates prescribed under the Social Community Home Care and Disability Award 2010 and the award rates for a *comparable or like set of occupations* and that the difference is due to gender. In other words, it must demonstrate the rates are unequal because social and community service work has traditionally been seen as 'women's work' and therefore paid less than award rates for an occupation predominately made up of men.

The Australian Services Union conducted a successful equal pay case in the Queensland Industrial Relations Commission in 2008.

If you are covered by the Social Community Home Care and Disability Services Industry Award 2010 then you should ensure that you are either

represented in this case or at least aware of the proceedings as they progress throughout the year.

Details of the case and how to participate in it are available on the [Equal Remuneration Case website](#).

## Annual award wage safety net review

The 2009–10 annual wage review is being conducted by the Minimum Wage Panel of Fair Work Australia. Submissions have been received from various interested parties including the ACTU and employer bodies. The Panel is assessing these claims and will accept submissions in reply up until 30 April 2010. The Minimum Wage Panel has also issued a statement in relation to additional material for the Annual Wage Review 2009–10.

The ACTU is seeking a \$27 per week increase to the federal minimum wage (FMW), and all award and transitional award wages.

There will be an opportunity for consultations with the members of the Minimum Wage Panel in the week commencing 17 May 2010. The consultations will be in Melbourne with the possibility of video links to other cities if required. Time will be limited and parties wishing to take part in the consultations should express their interest in doing so by 3 May 2010.

A decision is expected in June and whatever result will commence effective from 1 July 2010.

[\[More\]](#)

## One in five employees are casual

In November 2009, one in five, or 20% of Australian workers were casual employees, that is, they did not have paid holiday or sick leave entitlements. This represents over two million people and was a 0.7 percentage point increase from November 2008.

According to the ABS report – *Forms of Employment Australia November 2009 (6359.0)* - the majority (61%) of employed people were employees with leave entitlements, while a further 10% were independent contractors and 9% were other business operators.'

[\[More\]](#)

## Guidance on Transitional Pay Rates – Public consultation

The Fair Work Ombudsman has released a draft guidance note on how pay rates in modern awards will be phased in over the next four years.

The note details the Fair Work Ombudsman's interpretation of transitional arrangements created by Fair Work Australia.

The principles set out in the Guidance Note will underpin a range of practical tools that the FWO is developing to assist employers and employees to implement transitional arrangements. These include step-by-step guidance, consisting of detailed examples and industry-specific information, as well as online wage and rates calculators.

The FWO has consulted with peak employer and union bodies in the development of this Guidance Note and is now calling for submissions from the public. Members of the public who are interested in submitting their views on this draft Guidance Note can email their responses to [FWO-submissions@fwo.gov.au](mailto:FWO-submissions@fwo.gov.au)

Submissions must be received by **12 May 2010**. All submissions will be made public.

The FWO will finalise the Guidance Note by 1 June 2010 to enable employers and employees time to prepare for the commencement of modern award pay rates commencing on 1 July 2010

[\[More\]](#)

## TIP OF THE MONTH: Understanding the new rules for absorption of over award payments

Historically, Australian Courts have allowed employers to 'set off' or 'absorb' particular obligations under an applicable award against wages or salaries paid to an employee in excess of the award rate. Such arrangements have generally been expressed in individual employment contracts without reference to any particular legal form. However, the introduction of *Individual Flexibility Arrangements* (IFA) in modern awards and enterprise agreements under the Fair Work Act seems to have overtaken the less formal common law principle in favour of more stringent statutory obligations.

Employers will need to be cautious in how they apply over-award payments in the future. In particular, under the rules prescribed in the Fair Work Act they

will have to enter into an IFA with an employee to ensure the absorption of award entitlements is valid. Failure to adhere to the requirements for making an IFA may render the employer liable for any short-falls in wages or other entitlements.

### The award context

There is both good and bad news for employers to be found in the modern award in relation to absorption of award entitlements in over-award payments

Firstly, the standard transitional provisions of modern awards allow explicitly for '*... the monetary obligations imposed on employers by the award to be absorbed into over award payments. Nothing in the award requires an employer to maintain or increase any over award payment.*'

This is good news.

Secondly, all modern awards must include a provision that allows the employer and an individual employee to agree to vary the application of certain terms of the award to '*... meet the genuine individual needs of the employer and individual employee.*' The objective is to allow some measure of flexibility in the employment relationship that may not otherwise be accommodated by the terms of the award. Where such an arrangement is made, it will override the award in respect of that individual employee.

More good news

Thirdly, the award terms which may be varied in an IFA are limited to:

- Arrangements for when work is performed;
- Overtime rates;
- Penalty rates;
- Allowances; and
- Annual leave loading.

The employer must also ensure that the employee is *better off overall* in comparison to the award.

This in itself is not particularly onerous for an employer that may wish to absorb these entitlement in over award payments. However, the bad news arises from the stringent procedures and documentation required to make a legally enforceable IFA.

### Requirements for making an individual flexibility agreement

The first rule is that an employer and the individual employee must have genuinely made the agreement without coercion or duress. At face value, this is not particularly controversial. However, it means for

example, an offer of employment cannot require the prospective employee to accept an over-award arrangement absorbing award entitlements in an award flexibility agreement.

#### Bad news

Next, the employer seeking to enter into an agreement must provide a written proposal to the employee. Where the employee's understanding of written English is limited the employer must take measures, including translation into an appropriate language, to ensure the employee understands the proposal.

The agreement between the employer and the individual employee must also:

- A. Be in writing, name the parties to the agreement and be signed by the employer and the individual employee and, if the employee is under 18 years of age, the employee's parent or guardian;
- B. State each term of the award that the employer and the individual employee have agreed to vary;
- C. Detail how the application of each term has been varied by agreement between the employer and the individual employee;
- D. Detail how the agreement results in the individual employee being better off overall in relation to the individual employee's terms and conditions of employment; and
- E. State the date the agreement commences to operate.

The employer must give the individual employee a copy of the agreement and keep the agreement as a time and wages record.

These requirements are quite particular and pose a particular risk to the employer that does not have an eye for detail. Failure to adhere to the requirements for making an individual flexibility agreement may render the employer liable for any short-falls in wages or other entitlements.

#### How is the individual flexibility agreement terminated?

There is also a fatal flaw in the period that it takes to undo the terms of an over-award agreement. The agreement may be terminated:

- a. by the employer or the individual employee giving four weeks' notice of termination, in writing, to the other party and the agreement ceasing to operate at the end of the notice period; or

- b. at any time, by written agreement between the employer and the individual employee.

Unless there is an inbuilt incentive to continue the arrangement an IFA is of limited value to an employer. That is, there must be some net value for the employee to continue the arrangement.

#### What if an individual flexibility agreement is not properly made?

If an agreement is not made properly, the terms of the agreement still continue to govern the employee's terms of employment as if it was made properly. This works in favour of the employee as it ensures that employees keep any benefits to which they are entitled under the agreement. However, an employee can terminate an agreement if they believe they are being disadvantaged. The employee will still be able to take action for compensation and penalties in that case.

#### Conclusion and lessons

Consistent with the overall theme of the Fair Work Act, individual arrangements for an over-award agreement between an employer and employee are now subject to strict regulation. It is very clear that the onus is well and truly on the employer to ensure that such an arrangement, if it *absorbs* or even varies in any respect, one or more award entitlements, it must be formalised in an IFA.

It must not only be properly made, but also properly documented. This was not necessarily the case in the past. Critically, the IFA will form part of the employment record enabling a Fair Work Ombudsman inspector to assess the employer's compliance with applicable awards.

If an employer fails to ensure that an individual flexibility agreement is properly made in accordance with the Fair Work Act it may be liable to a penalty of up to \$6,600 for an individual or \$33,000 if the employer is a body corporate.

Don't develop your own IFA without first obtaining advice.

#### Further assistance

Get assistance from [Maguire Consulting](#) wherever you are unsure or would prefer us to guide you.