

**Senate Standing Committee on Education Employment and Workplace  
Relations**

**QUESTIONS ON NOTICE  
Additional Estimates 2009-2010**

**Agency - Fair Work Ombudsman**

**DEEWR Question No.EW0958\_10**

**Senator Abetz asked on 10/02/2010, Hansard page 46.**

**Question**

*FWO INFO LINE SCRIPTS*

Senator ABETZ—Right. But there must be a set number, as we speak, of scripts that have been prepared ready for these info line workers. So we have got a certain sum of scripts. Just dump them, download them, whatever the term is, and put them on a bit on a bit of paper for us and bring them to the committee, please. Mr Wilson—We will check and, if it is possible, we will provide them.

**Answer**

*The Fair Work Ombudsman has provided the following response:*

The Fair Work Ombudsman prepares a range of articles to assist Fair Work Infoline staff in providing information to the public. Whilst these articles can be referred to as “scripts”, they do not in fact constitute set texts which the Fair Work Infoline staff must recite.

The articles provide Fair Work Infoline staff with access to succinct information, summaries, interpretations and clarifications of complex issues across the spectrum of workplace relations matters, including legislation, awards and transitional arrangements amongst others.

There are currently 1687 such articles available to Fair Work Infoline staff. The content of these articles form the basis of a number of materials, such as Frequently Asked Questions, which the Fair Work Ombudsman will make available to the public through [www.fairwork.gov.au](http://www.fairwork.gov.au) to assist in their understanding of Commonwealth workplace relations laws. The intention of the Fair Work Ombudsman is to progressively make the content that forms the basis of such knowledge articles available to the public through [www.fairwork.gov.au](http://www.fairwork.gov.au) over the next 12 months, in a form which will be most easily understood by the general public who do not necessarily have a technical level of workplace relations knowledge.

The articles are included in a database of information used by Fair Work Infoline staff. This database also contains the industrial instruments relevant to the Commonwealth workplace relations system. There are currently 101,539 such instruments on the database, including modern awards, transitional instruments, agreements, variations and so on.

Provided in the attachments below are four examples of articles used by Fair Work Infoline staff, each of which relate to a specific award:

Cleaning Services Award 2010 [MA000022]	K220132 –Attachment 1
Health Professionals and Support Services Award 2010 [MA000027]	K220472 – Attachment 2
Hair and Beauty Industry Award 2010 [MA000005]	K220468 - Attachment 3
Security Services Industry Award 2010 [MA000016]	K220225 – Attachment 4

## **Attachment 1**

**K220132**

### **Cleaning Services Award 2010 – RDO's, overtime, working on public holidays**

We note that modern awards have not yet commenced operation and there is no case law to guide us in our interpretation of how they will operate. The following advice is based solely on our reading of the instrument and how it may operate.

#### **Short answers:**

This advice covers the following topics, listed in order:

#### **Part-time employment on public holidays**

It is our view is that a part-time employee receives both the 15% part-time allowance and the public holiday penalty rate for work performed on public holidays.

#### **Casual employment on public holidays**

The total penalty rate for a casual employee working on a public holiday is 275% of the ordinary full-time rate.

#### **Overtime rates for casuals**

The casual loading is applicable to overtime for casual employees and the overtime penalty is paid on the basic rate, not the casually loaded rate (ie. it is not compounded).

##### **Example calculation:**

Suppose the ordinary hourly rate is \$16; suppose the overtime penalty is time and a half; the casual loading is 25%

$$\$16 \times (150\% + 25\%) = \$16 \times 175\% = \$28 \text{ per hour}$$

#### **Clause 28.2 "Overtime, worked from midnight Sunday to midnight Saturday"**

In our view there is no error in Clause 28.2. Overtime worked from Midnight Sunday to Midnight Saturday essentially covers overtime that may be worked from Monday to Saturday. The following clauses (28.3 and 28.4) prescribe entitlements for overtime worked on Sundays, and on public holidays. Combined, these clauses cover a full 7 day week and public holidays, which appears to be the intention of those clauses.

#### **Adjustment of expense-related allowances**

These are not adjustments required to be calculated by individual employers. They will be updated in the modern award by FWA.

#### **Rostered days off and part-time employment**

In our view the award does not permit a rostered day off system to be used for part-time employees.

SQ10-000532

### **Rostered days off – replacement by a casual**

in our view a casual can regularly replace a weekly employee who is rostered off.

### **Days off per week and casual employment**

Clause 24.4 states that 'each employee will be entitled to two consecutive full days off within each seven day cycle.' We do not see any indication in the award that this is not intended to apply to casual employment.

### **Shiftwork and overtime**

In our view a permanent night shift employee working overtime would be entitled to both the permanent night shift penalty of 30% and the relevant overtime penalty.

### **Time off in lieu of overtime not taken within four weeks of accrual**

Any time off instead of overtime payment not taken within four weeks under this type of arrangement must be paid at the overtime rate.

### **Detailed answers:**

#### **Part-time employment on public holidays**

Clause 12.4(b)(iii) of the Cleaning Services Award states a part-time employee 'receives, in addition to the hourly rate for a full-time employee, an allowance of 15% of the hourly rate.'

We also note clause 12.4(e), which states

Subject to clause 12.4(b)(iii), a part-time employee receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.

This appears to indicate that a part-time employee would generally be entitled to the same pay and conditions on a public holiday that a full-time employee is entitled to. Clause 27.3 provides as follows regarding public holidays:

For all hours worked on public holidays an employee will be paid double time and one half of the ordinary hourly rate for their classification.

It is therefore our view is that a part-time employee receives both the 15% part-time allowance and the public holiday penalty rate for work performed on public holidays. We note that both of these amounts are calculated on the hourly rate for a full-time employee.

#### **Casual employment on public holidays**

Clause 12.5(a) of the Cleaning Services Award states that a casual employee's casual loading is calculated as follows:

Casual employees will be paid, in addition to the ordinary hourly rates and rates

payable for shift and weekend work that apply to full-time employees, an additional loading of 25% of the ordinary hourly rate for the classification under which they are employed.

There is no indication in this award that the casually loaded rate is intended to be treated as the ordinary rate of pay for casuals for all purposes. In other words, it is our view that the casual penalty rate and the public holiday are both calculated separately on the hourly rate of pay for a full-time employee. The total penalty rate for a casual employee working on a public holiday is therefore 275% of the ordinary full-time rate.

**Overtime rates for casuals; and  
Clause 28.2 "Overtime, worked from midnight Sunday to midnight Saturday"**

All details about these are included in the short answer.

**Adjustment of expense-related allowances**

Clause 17.12 of the Cleaning Services Award sets out a methodology for adjusting expense-related allowances. It indicates that the approach is to adjust in accordance with index figures published by the Australian Bureau of Statistics. Our understanding is that these are not automatic adjustments required to be calculated by individual employers. Rather, the purpose of the clause is simply to set out that Fair Work Australia will follow this approach in making future adjustments.

**Rostered days off and part-time employment**

Clause 12.3 of the Cleaning Services Award indicates that, for a full-time employee, ordinary hours of work can be an average of 38 per week, arranged in accordance with clause 24. Clause 24, in turn, provides several different working arrangements that may be adopted, including the possibility of having a system of banking of rostered days off.

In relation to part-time employment however, clause 12.4(b)(iii) does not give any indication that an employer can average out a part-time employee's hours. This clause stipulates that overtime is payable for a part-time employee after 7.6 hours of work on any given day. There is therefore no indication that a rostered day off system may be adopted for part-time employment.

Further to the above, we note the provisions of clause 28.6 which says that 'all time worked in excess of 7.6 hours per day, five days per week or 38 hours in any week by a part-time employee is overtime.' This is a further indication that the award does not permit a rostered day off system to be used for part-time employees.

**Rostered days off – replacement by a casual**

It is our view that a casual employee can be engaged to replace a weekly employee who is rostered off on the same days every week under the Cleaning Services Award 2010.

The award sets out conditions for casual employment under clause 12.5 it reads as follows:

### 12.5 Casual employment

Casual employees may only be engaged to perform work on an intermittent or irregular basis or to work uncertain hours or to replace a weekly employee who is rostered off or absent.

#### (a) Casual loading

Casual employees will be paid, in addition to the ordinary hourly rates and rates payable for shift and weekend work that apply to full-time employees, an additional loading of 25% of the ordinary hourly rate for the classification under which they are employed.

There is a requirement for casual employees to work:

- o on an irregular and intermittent basis **or**
- o hours of work that are uncertain **or**
- o to replace weekly employees who are absent or rostered off.

It is our view that only one of these requirements needs to be met so a casual employee can be engaged to replace a weekly employee who is rostered off on the same days every week.

### **Days off per week and casual employment**

Clause 24.4 of the Cleaning Services Award states that 'each employee will be entitled to two consecutive full days off within each seven day cycle.' We do not see any indication in the award that this is not intended to apply to casual employment.

### **Shiftwork and overtime**

The early morning, afternoon and non-permanent night shift clause in the Cleaning Services Award states that employees do not receive the shiftwork hourly rates of pay when they are working overtime. No such indication has been made in relation to permanent night shift employment. Clause 27.1(b) states that the shift loading 'will be paid for all hours worked.' It is our view that the phrase 'all hours worked' would include both ordinary hours and overtime hours. Accordingly, a permanent night shift employee working overtime would be entitled to both the permanent night shift penalty of 30% and the relevant overtime penalty.

### **Time off in lieu of overtime not taken within four weeks of accrual**

Clause 28.9 of the Cleaning Services Award provides that, by agreement, time off can be taken instead of an overtime payment. However, clause 28.9(b) provides that 'Where time off instead is not taken within four weeks of accrual the employer will pay the overtime at the rate provided for in this clause.' It is our understanding that the 'rate provided for in this clause' is referring back to the preceding sections of clause 28 where overtime rates are stipulated. These provisions read as follows:

28.2 Overtime, worked from midnight Sunday to midnight Saturday will be paid at the rate of time and a half for the first two hours and double time thereafter.

28.3 Overtime worked on Sundays will be paid at the rate of double time.

28.4 Overtime worked on Public holidays will be paid at the rate of double time and one half.

Accordingly, any time off instead of overtime payment not taken within four weeks under this type of arrangement must be paid at the overtime rate.

As mentioned above, the advice above is based solely on our reading of the instruments and how they may operate.

**Attachment 2**

SQ10-000532

**K220472**

**Clause 29 of the Health Professionals and Support Services Award 2010 [MA000027] provides that:**

Where the ordinary rostered hours of work of an employee finish between 6.00 pm and 8.00 am or commence between 6.00 pm and 6.00 am, the employee will be paid an additional loading of 15% of their ordinary rate of pay.

**Is this additional loading paid for the entire shift or only those hours outside the span?**

We note that modern awards have only recently commenced operation and there is no case law to guide us in our interpretation of how modern awards will operate. The following advice is based solely on our reading of the instruments and how they may operate.

**Short Answer**

It is our view that the 15% shiftwork loading is paid on the entire shift.

**Long Answer**

There is nothing in the modern award to indicate that the shiftwork loading is only paid for hours worked outside the specified span.

It is typical that a shift worker will be paid shift loadings for their entire shift and given the absence of provisions stating otherwise, we are of the view that the shiftwork loading in this modern award is paid for the entire shift.

Please note that clause 28 of the modern award provides that an employee is not entitled to a shiftwork loading for hours where they are entitled to an overtime penalty.



### **Attachment 3**

**K220468**

**Under the Hair and Beauty Industry Award 2010 [MA000005], is annual leave loading paid on untaken annual leave upon termination of employment?**

We note that modern awards have only recently commenced operation and there is no case law to guide us in our interpretation of how modern awards will operate. The following advice is based solely on our reading of the instruments and how they may operate.

#### **Short Answer**

It is our view that, under the Hair and Beauty Industry Award [MA000005], annual leave loading is not payable on untaken leave at termination of employment.

#### **Long Answer**

We are inclined to the view that section 90(2) of the *Fair Work Act 2009* refers to payment of annual leave under the NES which does not provide for annual leave loading. Annual leave loading is a separate entitlement and as such we would need to look at the terms of the applicable modern award for the payment of annual leave loading on termination provisions.

Clause 32.3 (a) of Hair and Beauty modern award provides that:

During a period of annual leave an employee will receive a loading calculated on the rate of wage prescribed in clause 17 of this award. Annual leave loading payment is payable on leave accrued.

This clause sets out that the annual leave loading is only payable during a period of annual leave. Further to this there are no other provisions in the Hair and Beauty modern award that indicate that it would be payable on termination. Therefore, we are inclined to the view that annual leave loading is not payable on used leave at termination under the Hair and Beauty modern award.

## **Attachment 4**

**K220225**

**Under the Security Services Industry Award 2010 [MA000016], where an employee works overtime on a Saturday or Sunday, are they entitled to both the ordinary time penalties and the overtime penalties?**

### **Short answer**

No. Overtime penalties under the modern award are payable in addition to an employee's ordinary time rate as set out in clause 14.1 of the modern award.

### **Long Answer**

Clause 22.3 of the MA provides that penalty rates apply to certain ordinary hours worked. For example, work undertaken on the Saturday span (0000 – 2400 Saturdays) attracts a 50% penalty in addition to the ordinary time rate.

By definition, overtime hours are not ordinary hours worked. Accordingly, the penalty rates contained in clause 22.3 will not apply to overtime hours worked.

Clause 23.3 provides that overtime penalties are payable in addition to the ordinary time rate. In this regard, we note that clause 24.4 (Payment for annual leave) indicates that ordinary time rates under the security services award are the rates specified in clause 14.1 i.e. the unloaded rates.

On this basis, it is our view that overtime penalties will be calculated on an employee's ordinary time rate as set out in clause 14.1 of the MA