

# Workplace Relations Alert

## April 2010

### Understanding Modern Awards

Four months into the new modern award system, there are still many unresolved issues. Employers who appreciate those issues will be better equipped to comply with their award obligations and avoid award breaches.

In this Alert, we look at:

- the new approach to award flexibility and;
- the first judicial commentary on the 'no reduction in take home pay' principle.

#### **Award flexibility: could your part-time employees be entitled to overtime?**

Employers may not be aware that many modern awards require the ordinary hours of part-time employees to be agreed in writing. For any hours worked outside the hours agreed in writing, part-time employees are entitled to overtime pay.

By way of example, a part-time employee who has a written agreement to work 8 hours on a Monday and 8 hours on a Tuesday (and no other day) would be entitled to overtime rates if the employee was then required, on a one-off basis, to work 8 hours on a Wednesday. This will be so even though the employee will not have worked more than 38 hours in that week.

There is a way to vary certain award terms. Modern awards require that an employer and employee enter into an Individual Flexibility Arrangement (IFA) if they wish to vary specific award entitlements. Under an IFA, an employee can agree to forego certain award entitlements relating to arrangements for when work is performed, overtime rates, penalty rates, allowances and leave loading, provided an arrangement is in place whereby an employee is 'better off overall'.

For example, an employer and employee could agree that overtime provisions are not to apply in exchange for the employer paying the employee a base rate that is above the award rate.

The same concept applies to full-time employees. Employers should be conscious that payment of an annualised salary in excess of the award rate will not of itself avoid the obligation to pay additional overtime and penalty rates.

Set-off clauses in employment contracts might avoid a successful underpayment

claim, but not a penalty for breach of an award; only an IFA will absolutely ensure that specific award entitlements do not apply.

Failing to pay award entitlements without an IFA in place could have expensive consequences. Employers would most likely be required to back pay additional award entitlements, even where above-award base rates have been paid. In addition, employers could face fines of up to \$33,000 for each breach of a term of a modern award.

Employers should consider the part-time, overtime and penalty rates provisions of relevant modern awards and determine whether it is necessary to make IFAs with their employees.

#### **A reduction in hours does not necessarily equate to a reduction in take home pay**

The transitional provisions – under which award rates are adjusted over a 5 year period to accommodate the new modern award pay rates – are complicated. One issue currently causing upheaval is the concept of 'no reduction in take-home pay', which is now beginning to be tested by Fair Work Australia.

The legislation allows an employee to seek a 'take-home pay order' if, as a result of a modern award coming into operation, the employee's take-home pay for working particular hours or doing a particular quantity of work has been reduced.

The first application for a take-home pay order has been heard by Deputy President Ives of Fair Work Australia. In this case, a part time cleaner who, before January 2010, was engaged in accordance with the Health Services Employees Award (NAPSA), alleged that she had suffered a reduction in take home pay as a result of



award modernisation and the introduction of the Cleaning Services Award 2010, which replaced the NAPSA.

Before the introduction of the modern award, the employee worked 27.25 hours a week over 6 days. Under the modern award, the employee was working 22.25 hours a week because the modern award requires 2 consecutive days off within each 7 day cycle. In effect, the employee lost a day (five hours) of work.

Fair Work Australia held that the reduction in working hours was not capable of being the subject of a take-home pay order.

The implication is that there is no award entitlement to continue to work the same hours each week as before modernisation. It is just that, if an employee does work the same hours, she or he is entitled to at least the same pay.

The decision is silent on whether a reduction in hours might be a breach of contract, depending on the circumstances – that is another discussion entirely.

**If you require advice about award entitlements applicable to your employees or the use of IFAs, please do not hesitate to contact us.**

**You might also consider joining us at our 'Understanding Modern Awards' workshop next week. Places are still available.**

**For further details please [click here](#) to view our Workplace Training Program 2010 brochure.**

## For further information please contact:



**Mark Branagan**  
Partner  
+ 61 3 8080 3638  
mark.branagan@thomsonplayfordcutlers.com.au



**Karl Luke**  
Partner  
+ 61 8 8236 1280  
karl.luke@thomsonplayfordcutlers.com.au



**Jacquie Seemann**  
Partner  
+ 61 2 9020 5757  
jacquie.seemann@thomsonplayfordcutlers.com.au



**Tony Vernier**  
Partner  
+ 61 2 8248 3471  
tony.vernier@thomsonplayfordcutlers.com.au



**David Brand**  
Consultant  
+61 2 8248 5833  
david.brand@thomsonplayfordcutlers.com.au



**Jacinta Lane**  
Senior Associate  
+ 61 3 8080 3648  
jacinta.lane@thomsonplayfordcutlers.com.au