

Article Information

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Fair Work Commission decides that changes to the Professional Employees Award 2020 are necessary to meet the modern awards objective - What do employers need to know?

Two recent decisions of the Fair Work Commission^[1] have resulted in amendments to the *Professional Employees Award 2020*. These decisions will vary clauses regarding hours of employment, overtime, and coverage, and may impact employers who engage professional employees in the science, information technology or quality auditing industries, or who engage professional engineers. The Fair Work Commission has deemed these changes necessary to ensure that the *Professional Employees Award* meets the modern awards objective under the *Fair Work Act 2009* (Cth).

In March 2022, the Fair Work Commission (FWC) commenced a matter on its own motion to vary the *Professional Employees Award 2020* (PE Award) in order to achieve the modern awards objective.^[2] The FWC intended to deal with two issues:

1. Hours of employment and overtime, as highlighted by a Full Bench decision issued on 22 April 2020 as part of the 4 yearly review of modern awards;^[3] and
2. Coverage of the PE Award, identified by a separate Full Bench decision in *Zheng v Poten & Partners*.^[4]

The FWC issued a draft determination on 20 January 2023 that proposed variations to hours of work, overtime including penalty rates, the insertion of the model clause for time off in lieu of overtime (TOIL), and record keeping, and clarifying coverage of the PE Award. Relevant parties were invited to file submissions in response to the draft determination.

On 16 March 2023, the FWC handed down a second decision considering this feedback, and varying some of the proposed changes. The outcome of the changes to the PE Award from these two decisions are summarised below.

Hours of Work

Clause 13.1 will be varied to clarify that the ordinary hours of 38 per week will be paid in accordance with the minimum wages prescribed in the PE Award, and removing reference to the NES.

The PE Award currently stipulates that these hours can be averaged over a cycle, but provides no definition of a cycle. The new clause 13.2 will allow an employer and employee to agree that the employee's ordinary hours of work will be averaged over a period of up to 13 weeks.

Clauses 13.3-13.6 will be deleted as they very vaguely refer to "compensation" for additional hours without any clear obligations or parameters. There was also no evidence before the FWC that any employees are actually provided with additional monetary compensation provided for by clause 13.3-13.6. Instead, clause 13.7 regarding transfers will be renumbered to 13.3, and the more prescriptive overtime provisions outlined below in a new clause 18 will be implemented.

These changes will take effect 6 months after the 16 March 2023 decision, therefore commencing on **16 September 2023**.

Overtime and penalty rates

A new clause 18 will be inserted into the PE Award, providing for overtime and penalty rates because there is currently no enforceable minimum standard for working additional/unsociable hours.

These new provisions will enable employers to request employees work reasonable additional hours, and specify that employees must be paid the appropriate hourly rate for all hours worked in excess of 38 hours per week. This will include work on or in connection with call-backs and work performed on electronic devices or otherwise remotely.

The FWC's model TOIL clause will be inserted, allowing employers and employees to agree in writing to the employee taking time off in lieu of payment for working overtime hours. The period of time off that an employee is entitled to take is the same as the number of overtime hours worked (e.g. if an employee works two hours of overtime they will be entitled to two hours' time off).

There will also be penalty rates for "*all hours worked at the direction of the employer*" during specific times. Hours worked before 6:00 am or after 10:00 pm on Monday - Saturday will attract a penalty rate of 25% (or 50% for casuals), and any time worked on Sundays or public holidays will attract penalties of 50% (or 75% for casuals).

Finally, new record keeping obligations will be implemented, requiring employers to keep records of all hours worked by an employee in excess of 38 hours per week, before 6:00 am or after 10:00 pm on any day Monday to Saturday, or on a Sunday or public holiday.

However, the provisions related to payment for overtime, TOIL, penalty rates and record keeping will not apply to employees covered by the PE Award who have a contractual entitlement to an annual salary that is 25% or more in excess of the minimum annual wage for the appropriate classification.

These changes will also commence on **16 September 2023**.

Coverage

The Full Bench in *Zheng* identified concerns with the way in which the coverage of the PE Award is described, noting there has been excessive litigation as to whether unfair dismissal applicants are covered by the PE Award.

The sentence appearing immediately under the heading of Schedule A has already been repealed and replaced with the following:

"An employee performing professional engineering duties, professional scientific duties, professional information technology duties or quality auditing must be classified in one of the following classifications provided that the employee is not employed in a wholly or principally managerial position."

This change clarifies that Schedule A applies to professional employees in these specific occupations, rather than those simply performing "*professional duties*." The change also introduces the categorical exclusion of managerial roles from its coverage. The FWC noted that these modifications were intended to more clearly explain the circumstances in which an employee will be covered by any of the classifications, without either expanding or contracting the coverage of the PE Award. It was also noted by the FWC that none of the classifications extend to positions which are principally managerial in nature, so the change merely makes this explicit.

This amendment was not disputed by any parties, and took effect 7 days after the March 2023 decision.

Implications

- For employers that pay employees covered by the Award more than 25% above the minimum rates prescribed by the PE Award, the variations proposed will have no impact, other than to ensure pay rates are sufficiently above Award rates from time to time.
- In respect of employees earning less than 125% of the minimum rates, the variations do not cause the employer to incur any additional cost if the employee's hours of work are confined to 38 hours per week, Monday to Saturday, between the hours of 6.00 am and 10.00 pm.
- Conversely, even where the employee works hours in excess of 38 within that time span, this will not require any additional payments to be made if the TOIL provisions are properly accessed.
- The variations will establish a minimalist regime for overtime payments at single time and modest penalty payments for late night, early morning, Sunday and public holiday work.
- The coverage of the PE Award was not broadened or narrowed, but merely clarified. The decision confirmed that none of the classifications in Schedule A had applied to a managers prior to the changes.

Employers with staff covered by the PE Award should review their arrangements to ensure they are ready for the new

requirements later in the year.

[1] [2023] FWCFB 13; [2023] FWCFB 58

[2] Fair Work Act 2009, s 157.

[3] [2020] FWCFB 2057

[4] [2021] FWCFB 3478 at [45]-[46] and [58]