

# TWO RECENT DECISIONS HAVE FAR-REACHING CONSEQUENCES.

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## Introduction:

Two recent decisions, the first by the High Court of Australia, and the second, by a full-bench of the Fair Work Commission (FWC), as part of the *Four Yearly Review of Modern Awards*, potentially will influence the way business owners in the **fitness industry** will structure their workforces in the '*post-pandemic*' economy'.

## **Calculation of personal/carer's leave:**

The High Court has overturned a decision of the Full Federal Court of Australia, in relation to the entitlement to personal/carer's leave, provided under the National Employment Standards (N.E.S).

He N.E.S provides for "*10 days of personal/carer's leave.*" This is a statutory minimum for all weekly employees.

Previously, it had been argued, and the Federal Court agreed, that this entitlement should be interpreted to give an employee accruals based on ten (10) calendar, ordinary working days (i.e, possibly fixed as a maximum of 76 hours each calendar year for a full-time employee), regardless of how many or how few hours that each individual would be rostered, on any given day of absence.

In the event an individual worked a consistent number of ordinary hours across rostering cycles, or throughout the year, this posed no problem. However, problems do arise if an individual works shifts of varying ordinary hours, within a fixed cycle. The value of 'a day' (in hour terms), might change from, e.g, 4 -6 -12 ordinary hours.

The High Court has now ruled that the clear intent of the legislation is to give all employees (fulltime, part-time, waged or salaried), 10 days of personal/carer's leave to be calculated **as 1/26 of an employee's ordinary hours of work in a year.**

This outcome will not impact employers party to **Enterprise Agreements** or employees party to **Individual Flexibility Agreements (IFAs)**, that provide more generous prescriptions than the N.E.S.

## **Four yearly review of Modern Awards (overtime for casuals):**

This decision of a full-bench of the F.W.C was concerned with the identification and resolution of potential ambiguities in a number of modern awards (for the purposes of this article – the '*Amusements, Events and Recreation Award 2020*', and the '*Fitness Industry 2010*' awards ) in relation to the overtime entitlements of casual employees.

The issue in contest in relation to the predecessor to, and hence the new, '*Amusements, Events and Recreation Award*' concerned whether the casual loading is payable on overtime.

The Full-bench had regard to the historical industrial context in order to resolve the identified ambiguity; they reasoned that *“it was apparent the two pre-modernisation awards from which the relevant provisions of the ‘Amusements, Events and Recreation Award’ were derived the casual loading was not payable on overtime.”*

*“.. in the context of the current (2020) award to be resolved... we conclude.... **The casual loading is not payable on overtime.**”*

In relation to the ‘Fitness Industry Award 2010’, two concurrent issues were in play:

- Did overtime apply to casuals? And
- In what way should the casual loadings prescribed in the award be used in calculating overtime entitlements if it did apply to casuals??

The A.W.U had submitted that the award does not adequately prescribe ‘*the ordinary hours for casual employees*’, and thereby raised doubts about the entitlement of casual employees to overtime.

A number of employer groups made submissions opposing any changes to the hours provision in respect of casual employees. The ASSA and earlier in the process, ASCTA, argued that in respect of Swim School Operations, that the award did not currently provide overtime entitlements for casual employees, and that it should not be varied to establish such entitlements. In the alternative, it was submitted that *“any overtime entitlement for casual employees should apply only where a casual worked in excess of 38 hours per week averaged over 4 weeks.”*

The Commission determined that:

*“we consider that casual employees are currently entitled to overtime penalty rates.”*

The Full-bench addressed the current wording of sub-clause 24.1 (wherein a full-time employee *“may be worked over on any 5 days of the week, between 5am and 11pm on Monday to Friday and between 6am and 9pm on Saturday and Sunday.”* Further, sub-clause 24.2 provides that ordinary hours for weekly employees *“must not exceed 10 hours on any one day.”*

The Commission went on to determine that *“work performed .... outside the span of hours specified in sub-clause 24.1, work in excess of 38 hours in a week averaged over 4 weeks, or work in excess of 10 hours in any day... are currently entitled to overtime.”*

In relation to the issue of ‘casual loadings’; the Commission found *“that the specified penalty rates do not include the casual loading, either on a cumulative or compounding basis.”*

#### **IMPACT OF THE DECISION:**

The FWC have issued draft orders relating to all Modern awards encompassed by the decision, for comment by parties, (21 days after August 18, and in the absence of further proceedings, the Commission will vary the individual awards.

Whilst the decision will be 'prospective', the findings relate to the current '*Fitness Industry Award 2010*'; therefore, in contested proceedings, it may reasonably be argued that obligations to employees go back, possibly to the full extent under the '*Fair Work Act 2009*' (up to 6 years).

Employers operating under an Enterprise Agreement (which is either current or expired), are arguably not impacted, unless or until their Agreement is replaced or rescinded.

Employers entering into a first Agreement with their workforce, will need to take the amendments arising from the decision, into consideration, in order to fulfill the requirements of the '*Better Off Overall Test*'.

For operators in the general '*Fitness Industry*', offering 24/7 services, the overtime decision , potentially has large cost impacts, equally, with Swim Coaches/Schools offering training to elite (early start) squads.

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