

Workplace Law

So much to do, so little time:
Six key considerations when
onboarding new starters

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Overview

- Six key considerations:
 1. Modern award coverage and classification;
 2. The National Employment Standards;
 3. Modern award entitlements;
 4. Annual leave entitlements;
 5. Annualised salaries and auditing; and
 6. Payroll's responsibilities.

Award coverage and classification



Award coverage

- Types of modern awards:
 - **Industry awards** – e.g. *General Retail Industry Award 2010*
 - **Industry and occupational awards** – e.g. *Health Professionals and Support Services Award 2010*
 - **Occupational awards** – e.g. *Clerks – Private Sector Award 2010*
- Every modern award contains a **coverage clause** which sets out the employers and employees covered by that modern award.
- Look to the coverage clause of the modern award – does the business or the employee's position fit within the coverage clause and the definition of the industry or work set out in the modern award?



Award classification

- **The Principle Purpose Test:**

- What is the “major and substantial function” of the employee’s work? i.e. what is the principle purpose for which the employee was hired?

Carpenter and Corona Manufacturing Pty Ltd (2002) 122 IR 387 at paragraph 9:

In our view, in determining whether or not a particular award applies to identified employment, more is required than a mere quantitative assessment of the time spent in carrying out various duties. An examination must be made of the nature of the work and the circumstances in which the employee is employed to do the work with a view to ascertaining the principal purpose for which the employee is employed.



Award classification

***McMenemy v Thomas Duryea Consulting Pty Ltd T/A Thomas Duryea Consulting* [2012] FWA FB 7184**

- The employee claimed that he was unfairly dismissed. The employer argued that he was not modern award covered and was not protected from unfair dismissal.
- To determine whether the employee was covered by the *Professional Employees Award 2010*, Fair Work Australia (as it was then) applied the principle purpose test.
- In the first instance and then on appeal, FWA found that the principle purpose of the employee's employment was managerial and therefore outside the scope of the award classification.



Award coverage and classification

- **Checks and balances**

- Employers should ensure that the responsibility for determining modern award coverage and classification is clearly delegated.
- Award classification should be regularly reviewed – an employee may progress through different classifications during their employment.

National Employment Standards



National Employment Standards (NES)

- The NES are contained in Chapter 2 Part 2 of the *Fair Work Act 2009* (Cth) (**FW Act**).
- The NES are the 10 minimum safety net conditions that apply to all national system employees in Australia.
- The NES are:

▪ Maximum ordinary weekly hours	▪ Community service leave
▪ The right to request flexible working arrangements	▪ Long service leave
▪ Parental leave	▪ Public holidays
▪ Annual Leave	▪ Notice of termination and redundancy pay
▪ Paid personal/carer's leave, compassionate leave and unpaid family and domestic violence leave	▪ The Fair Work Information Statement



How do the NES apply to employers?

- The NES are non-negotiable:
 - Employers must apply the minimum standards set by the NES and provide the minimum entitlements under the NES.
 - The NES apply to all national system employees, including casuals although casuals cannot access all the NES entitlements (such as annual leave).
- Employers and employees cannot contract out of the NES:
 - The NES “cannot be displaced.”
 - For example, an employer and an employee cannot agree to a higher rate of pay in lieu of personal/carer’s leave entitlements.
- The NES apply regardless of whether they are referred to in an employment contract or enterprise agreement.



Modern Awards and the NES

- Modern awards may contain terms which are supplementary to the NES.
 - For example, the maximum ordinary hours of work for a full-time employee are 38 hours per week. Some modern awards may state how these ordinary hours may be worked:
 - 38 hours per week, Monday to Friday, spread over a period of four weeks;
 - 152 hours over a four week period; or
 - four days of 9.5 hours per day (exclusive of meal breaks) within a spread of 12 hours.
 - For example, the NES provides that employees are entitled to be absent on a public holiday.
 - Many modern awards contain terms about how employees can agree with their employer to take a substituted day off if required to work on a public holiday.
- Supplementary terms cannot remove or interfere with the NES.



Industrial instruments and the NES

- It is not only modern awards which must comply with the NES, employment contracts and industrial instruments such as enterprise agreements cannot contain entitlements which are less than the NES.
- This is particularly relevant to remember when:
 - Interpreting agreement-based transitional instruments.
(These are agreements which were in force before the commencement of the FW Act, including certified agreements, collective agreements; and preserved state agreements).
 - Drafting employment contracts.
 - Drafting enterprise agreements.



The NES

Mondelez v Automotive, Foods, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers Union (AMWU) [2019] FCAFC 138

- Mondelez applied to the Federal Court of Australia seeking declarations regarding the quantification of the paid personal/carer's leave entitlement under s96(1) of the FW Act.
- Mondelez argued for a notional day quantification – that a “day” under the FW Act should be interpreted as a standard day based on a full-time, 5-day-per-week averaged day (e.g. a notional day for a 38-hour, five day per week employee would be 7.6 hours per day).
- The AMWU argued that this disadvantages employees who work longer days, (such as the employees it was representing) who work 12-hour days. Therefore a “day” should be a calendar day (or 24-hour period).



Mondelez

- The majority of the Full Court of the Federal Court of Australia held that:
 - “Day” must be given its natural meaning and in the context of personal/carer’s leave, must mean a “working day”.
 - The purpose of personal/carer’s leave is to establish a statutory form of income protection for employees who are ill or have to provide care. This protection authorises employees to be absent from work without losing income for that working day.
 - Mondelez’s proposed construction could result in employees suffering loss of income where they work longer shifts and exhaust their entitlement more quickly.
- Therefore, all employees (except for casual employees) are entitled to 10 days of paid personal/carer’s leave to be paid according to the hours the employee would have worked but for the injury or illness.

Award entitlements



Penalties and loadings

- Modern awards also create other entitlements including:
 - Setting out the minimum rates of pay;
 - Penalty rates;
 - Overtime;
 - Allowances; and
 - Shiftwork rates.
- Penalty rates will apply when employees perform work outside the ordinary hours of work, on weekends and public holidays.
- The awards will set out when penalty rates or overtime should be paid – it is important to refer to the applicable award.
- Things to consider: ordinary hourly rate, loaded rate, casual loading.



Allowances

- Awards may also provide for allowances, including those relating to:
 - First aid;
 - Recall to work;
 - Meal allowances;
 - Uniform/laundry allowance;
 - Travelling costs;
 - Transport/vehicle allowance; and
 - Higher duties.
- Some of these allowances are calculated as a percentage of the “standard rate” each week/per hour. The “standard rate” is defined in the award as a particular weekly/hourly wage for a classification.
- As the minimum weekly wage/hourly rate may change each year, it is important to also check the allowance rate.

Annual leave entitlements



Annual leave entitlements

- **Annual leave entitlement**
 - Four weeks annual leave (to be expressed in weeks, not days).
- **Shiftworkers**
 - Shiftworkers are entitled to additional annual leave.
 - The FW Act contains a definition of shiftworker, but modern awards contain supplementary terms defining shiftworkers for the industry or occupation covered by the modern award.
 - The definition in a modern award should be used for assessing whether an employee is a shiftworker and is entitled to additional annual leave.

Salary and auditing



Annual salary provisions

- Some modern awards provide that an employer and employee may agree that the employee will be paid an annual salary to compensate for certain award entitlements.
- Under annualised salary provisions, the annual salary must not be less than what an employee is entitled to under the applicable modern award.
- The modern awards may also set out what is required where an annual salary is to be paid instead of the provisions of the award.
- For example:
 - Whether there needs to be agreement in writing;
 - Whether it needs to specifically stated what the salary is in compensation for;
 - How much the annual salary must be; and
 - What records needs to be kept.



Annual salary provisions

- For example, the *Pharmacy Industry Award 2010* provides that a pharmacist or pharmacy assistant level 4 may agree that the annualised salary satisfies all or any of the following:
 - Overtime
 - Penalty rates
 - Payments for public holidays
 - Payments for annual leave
 - Annual leave loading
 - Meal allowances
 - On premises meal allowance
- This must be an agreement in writing where each party keeps a copy.
- The employer must also keep a record of hours worked each day by the employee showing the start and finishing times.
 - This record must be countersigned by the employee and kept at the place of employment for at least six years.



Annual salary provisions

4 yearly review of modern awards – Annualised Wage Arrangements [2019] FWCFB 4368

- In July 2019, the Full Bench of the FWC decided that model annualised salary clauses would be inserted into modern awards that already deal with the subject (19 modern awards in total).
- A number of variants have been decided upon, but the model clauses all impose a number of consistent obligations on employers, including:
 - An annual reconciliation;
 - Recording of hours worked;
 - Providing details of the salary calculation method to the employee to ensure transparency about the extent of additional hours the employee may be required to work without additional remuneration.
- The implementation date of the model clauses is yet to be determined.



Annual salary provisions

Stewart v Next Residential Pty Ltd [2016] WAIRC 00756

- The employee was employed as an administration coordinator under the *Clerks Private Sector Award 2010* (**Clerks Award**).
- According to the contract, the annual salary of \$78,000 was intended to be inclusive of “*any award provisions/entitlements that may be payable under an award.*”
- The employee lodged a claim against Next Residential Pty Ltd (**the employer**) for unpaid overtime.
- The employer relied upon the annualised salary provisions of the Clerks Award.
- The Industrial Magistrate found that the employer did not:
 - Advise the employee of what award she was covered by; and
 - Comply with the annualised salary provisions as her contract did not state what award provisions were to be satisfied by the payment of the annual salary.



Annual salary provisions

- **Checks and balances**

- Annual salary clauses in a contract should comply with the requirements of the relevant modern award.
- Annual salaries should be regularly reviewed – to ensure that an employee is adequately compensated.



Absorb and offset

- Some employers may wish to pay annual salary or a higher hourly rate of pay to employees (an “over-award” rate) which is then used to absorb other award entitlements.
- If this is done, it must be ensured that the calculation is true and correct. The maths must be able to be demonstrated (to the employee, the FWO or a Union).
- Don't set and forget – annual salary calculations should be regularly checked to ensure that an employee is adequately compensated.

Payroll responsibilities



Payroll responsibilities

- Section 550 of the FW Act:
 - A person who is involved in a contravention of a civil remedy provision of the FW Act is taken to have contravened that provision.
 - A person is involved in a contravention if the person:
 - Has aided, abetted, counselled or procured the contravention; or
 - Has induced the contravention, whether through threats or promises or otherwise; or
 - Has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
 - Has conspired with others to effect the contravention.
- Penalties for individuals are up to \$12,600 per contravention (or \$63,000 per contravention for a company). Higher penalties apply for “serious contraventions”.



Payroll responsibilities

FWO v Blue Impression Pty Ltd & Ors (No.2) [2017] FCCA 2797

- The employer admitted to a number of contraventions of the FW Act in relation to the underpayment of two employees.
- The FWO claimed that Ezy Accounting, a payroll provider, was knowingly involved in those contraventions.
- Ezy Accounting denied liability on the basis that it simply provided services to the employer.
- The Court found that Ezy Accounting was “knowingly involved” in the contraventions and it was ordered to \$53,880 in penalties.
- The Court commented that Ezy Accounting was required to put compliance with the law ahead of its business interests.



Payroll responsibilities

FWO v NSH North Pty Ltd t/a New Shanghai Charlestown [2017] **FCA 1301**

- A Human Resources Manager was ordered to pay penalties for her involvement in contraventions of the FW Act. She argued for a reduced penalty on the basis that she had acted under the direction of her superiors.
- The Court stated:

"...there is a public interest in sending the message that a person's involvement in a contravention will not be excused where he or she seeks to raise the issue of the contravention with superiors, but nonetheless continues to participate in the underlying contravention. Indeed, such a course of action tends to indicate a high degree of knowledge on the part of the contravener that what they are doing is wrong."
- The Court observed that an employee *"should indeed resign if that is the only alternative to continuing to participate knowingly in illegal activity, ideally coupled with reporting the conduct, in a case such as this, to the FWO."*
- The HR Manager was ordered to pay a penalty of \$21,760.



Payroll responsibilities

- **Civil remedy provisions of the FW Act:**

- Payment of wages

- Under s45 a person must not contravene a modern award.
- Under s323 an employer must pay an employee amounts payable to the employee in relation to the performance of work in full.

- Record keeping obligations

- Under s535 an employer must make and keep for seven years, employee records of the kind prescribed by the regulations in relation to each of its employees.
- Under s536 an employer must give a pay slip to each employee within one working day of paying an amount to the employee in relation to the performance of work. The pay slip must be in the form and include any information prescribed by the regulations.

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Thank you for your kind attention.

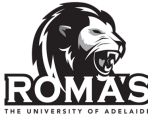
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