



Modern Awards

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About Us

- Part of The EI Group
- An experienced team of workplace lawyers dedicated to providing workplace relations advice and legal representation in employment law and industrial law matters
- “OneStopHR” as a cost-effective and efficient way of getting the workplace relations legal support that you need
- Our legal services include:
 - Industrial Relations
 - Contracts, Policies
 - Enterprise Agreement Making
 - Terminations and Adverse Action
 - Compliance
 - Legal Representation
 - Training

About the Presenter

- Sophie Tallis – Workplace Relations Consultant
- Qualifications in Law, Industrial Relations and International Legal Practice
- Provides practical solutions to businesses workplace relations problems

Agenda

1. How to determine the coverage and application of Modern Awards to your business
2. The process of transitioning from Pre-Reform Awards to Modern Awards
3. The flexibilities available in respect to Modern Awards
4. High Income Earners and Modern Awards
5. The interaction between Modern Awards and the NES

Modern Awards

- Modern Awards commenced operation on 1 January 2010 for companies
- Modern Awards now apply to all non-incorporated entities (except in Western Australia)
- 122 industry and occupational Modern Awards
- Industry Awards (eg. Banking Finance and Insurance Award 2010)
- Occupational Awards (eg. Clerks (Private Sector) Award 2010)
- Coverage and/or application of an Award to an employee

Coverage vs Application

- An Award will still '**cover**' an employee's employment but the terms and conditions of the Award may not '**apply**' to the employee's employment
- In circumstances when:
 - *The employee is covered by an enterprise agreement*
 - *High income earning employees, who have entered into a high income guarantee*

How do you know which Modern Awards cover your business?

1. Audit
2. Coverage
3. Definition
4. Exclusions
5. Classifications

Audit

Your Business = which Awards?

Tech Parts Pty Ltd (manufacturers of computer components)

Adam – Qualified Engineer	Professional Employees Award 2010
Bob – Electrical Engineering Technician	Manufacturing & Associated Industries and Occupations Award 2010
Claire – Admin Assistant	Clerks (Private Sector) Award 2010
David – Delivery Driver	Road Transport and Distribution Award 2010

Coverage

- Analyse “coverage” clause of Modern Award

Example: Professional Employees Award 2010

“This award covers employers throughout Australia principally engaged in the information technology industry, the quality auditing industry or the telecommunications services industry and their employees who are covered by the classifications in Schedule B.”

Definitions

- Check relevant definitions arising out of coverage clause and/or industries covered by the Modern Award

"information technology industry" means:

- (a)*** *the design and manufacture of computers and computer peripherals;*
- (b)*** *the design and manufacture of telecommunications equipment;*
- (c)*** *the design and manufacture of computer software;*
- (d)*** *computer system installation, repair and maintenance;*
- (e)*** *computer consultancy services;*
- (f)*** *computer programming;*
- (g)*** *system analysis services;*
- (h)*** *the design, development and maintenance of online internet architecture and the facilitation of online content management; or*
- (i)*** *activities which are incidental, ancillary or complementary to the activities set out in this definition."*

Exclusions & Classifications

- Check exclusions in Modern Award “coverage” clause to ensure business not expressly excluded
- Check job classifications to ensure specific job, responsibilities and functions you are looking for are encompassed by the Modern Award
- Coverage of professionally qualified and senior roles – always check all levels in the job classifications in the Modern Award

Mandatory Clauses

3 Mandatory Terms contained in every Modern Award:

- Dispute Resolution Clause
- Consultation clause
- Flexibility Clause

Terms and Entitlements

Check the applicable Award for:

- Minimum Wages
- Monetary Obligations :
 - Evening Penalty
 - Weekend Penalty
 - Allowances
- Non-Monetary Obligations:
 - Meal & Rest Breaks
 - Hours of Work
 - Classifications

Types of Employment

Permanent Full Time – works designated full time hours per week

Permanent Part Time – less than 38 hours a week in a regular and systematic shift pattern

Casual – works different hours, days and shifts each week in an irregular shift pattern

Transitioning

- Incremental phasing-in of the following (in 5 equal installments of 20%) until 2014:
 - Minimum wages
 - Piecework rates
 - Industry allowances
 - Casual/part-time loadings
 - Saturday/Sunday/Public Holiday penalties
 - Evening and other penalties
 - Shift allowances

Transitioning Example 1.

- Modern Award wages/loading or penalty can be used where the pre-Modern Award equivalent entitlement was lower:

Example 1: Permanent Employee Sunday Penalty

NSW Shop Employees (State) Award = 150%

General Retail Industry Award 2010 = 200%

July 2010 – July 2011	July 2011 – July 2012	July 2012 – July 2013	July 2013 – July 2014	July 2014
160%	170%	180%	190%	200%

Transitioning Example 2.

- Where Modern Award wages/loading or penalty is lower than the pre-Modern Award, transitioning must be used:

Example 2: Casual loading

Liquor and Allied Industries Catering, Cafe and Restaurant Award (ACT) = approx 35%

Restaurant Industry Award 2010 = 25%

July 2010 – July 2011	July 2011 – July 2012	July 2012 – July 2013	July 2013 – July 2014	July 2014
33.33%	31.24%	29.16	27.08%	25%

Questions?



What flexibilities are available in respect to Modern Awards?

- Individual Flexibility Agreement
- Enterprise Agreement
- Offsetting
- Annual Salaries
- High Income Guarantee

Individual Flexibility Agreement (IFA)

- Allows employer and an employee to vary certain Modern Award terms to “meet the genuine needs of employer and employee”
- Model flexibility term permits variation of:
 - Arrangements for when work is performed
 - Overtime rates
 - Penalty rates
 - Allowances
 - Leave loading
- Employee must be “better off” (not assessed by FWA)

IFA Procedural Requirements

- Procedural Requirements
 - Must be recorded in writing (setting out which terms will be varied and how employee “better off”)
 - Must be signed by employer and employee (and parent or guardian if employee aged under 18)
 - Copy of IFA must be given to employee
 - Does not need to be registered
- Written IFA must be kept as time and wages record
- Terminable by either employer or employee on 28 days notice or at any time by written agreement

Enterprise Agreements

- Must be approved by 50% of employees who vote
- Assessed by Fair Work Australia against the Better Off Overall Test (“BOOT”)
- Long term approach to adjusting Modern Award terms and entitlements
- Nominal term of up to 4 years

Set Off

- Set off is where a contract of employment provides for a higher rate of pay compared to the Award minimums, which can be used to set off any applicable monetary entitlements under the Award
- Careful drafting and analysis required to ensure underpayment claims do not arise

Annual Salaries

- Some Modern Awards include salary provisions to absorb certain Modern Award entitlements
 - Example: *Banking, Finance and Insurance Award 2010* states at clause 14.1:

"An employer may pay an employee an annual salary in satisfaction of any of all of the following provisions of the award:

 - Clause 13 – Classification and minimum wage rates*
 - Clause 17 – Allowances*
 - Clause 22 – Overtime and penalty rates*
 - Clause 23.3 – Annual leave loading."*

Where an annual salary is paid, the employer must advise the employee in writing of the annual salary that is payable and which of the provisions of this award will be satisfied by payment of the annual salary."

High Income Earners

- High Income Earners MAY be covered by an Award
- High Income Earners MAY be eligible to bring an Unfair Dismissal claim

e.g. Adam, the Professional Engineer at Tech Parts Pty Ltd, who earns \$120,000pa. He is covered by the Professional Employees Award 2010 and its terms and entitlements all apply to his employment.

High Income Guarantee

- Modern Award terms and entitlements will not “apply” to a high income earner with a guarantee of annual earnings
- Written document guarantees that an employee’s:
 - Wages
 - Non monetary benefits with an agreed value (eg. car, laptop)
 - Amounts paid on behalf of employee or upon their direction,
will **exceed** the high income threshold (currently set at \$113,800) for a specified period

High Income Earners & Unfair Dismissals

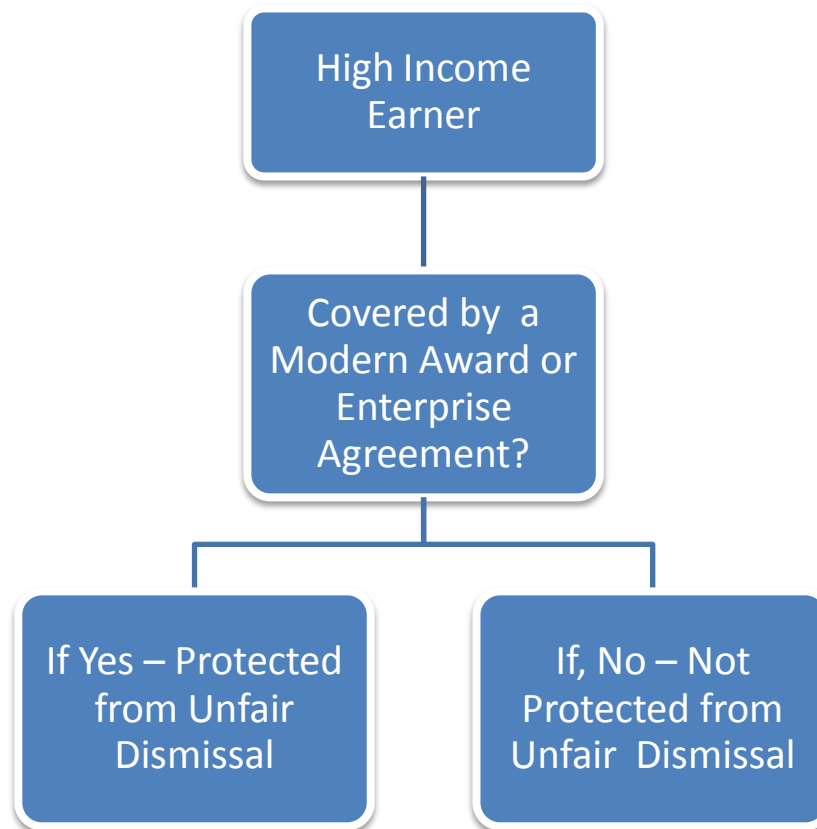
s.382 When a person is protected from unfair dismissal

A person is *protected from unfair dismissal* at a time if:

- (a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
- (b) one or more of the following apply:
 - i. a modern award covers the person;
 - ii. an enterprise agreement applies to the person in relation to the employment;
 - iii. the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

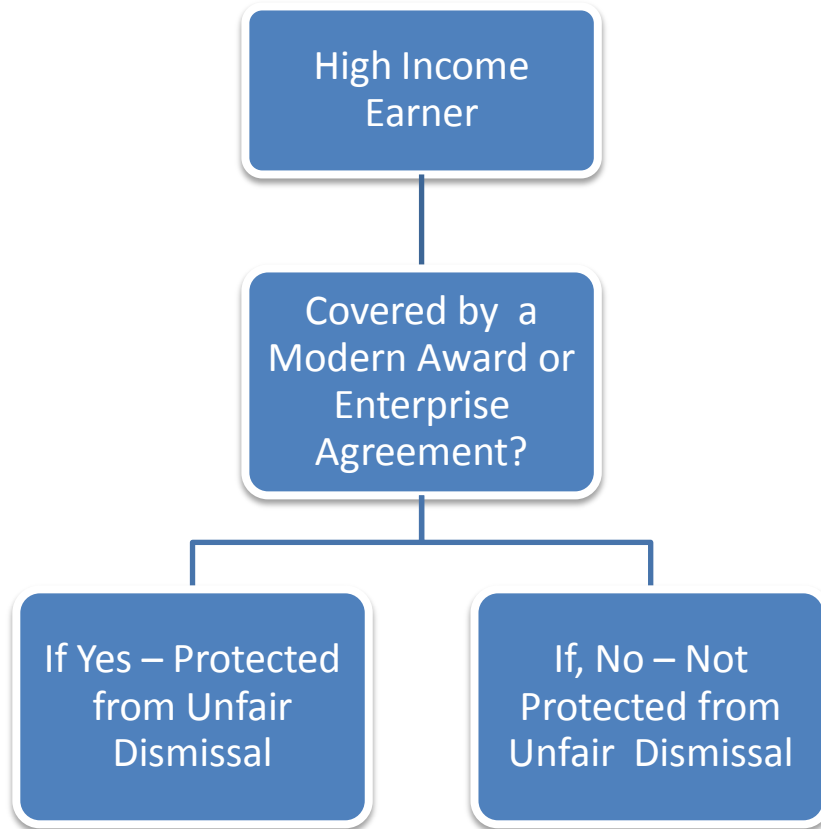
Recent Decisions

- *Sarah Marie Tauri v Flight Centre Limited* [2010] FWA 7718.



Recent Decisions

- *Anthony Taylor-Hunt v Downer EDI Works Pty Ltd* [2010] FWA 4626.



High Income Earners & Unfair Dismissal

“It is the substance of the position and the nature of the work and responsibilities that must be considered and little if any weight should be placed on title”

- *Commissioner Hampton*

Modern Awards & the NES

- Modern Awards cannot exclude or diminish the entitlements provided by the NES
- Modern Awards may contain provisions which are more favourable to employees – which will take precedence over the NES

National Employment Standards

- Apply to all employees in the national system
- Came into operation on 1 January 2010
- 10 minimum standards:
 - Maximum Weekly Hours of Work
 - Requests for Flexible Working Arrangements
 - Parental Leave
 - Annual Leave
 - Personal/Carer's and Compassionate Leave
 - Community Service Leave
 - Long Service Leave
 - Public Holidays
 - Notice of Termination and Redundancy Pay
 - Fair Work Information Statement

Modern Awards & the NES

Changes to note in the following NES provisions:

- Requests for flexible working
- Parental leave
- Annual leave and Personal leave
- Cashing out
- Redundancy
- Fair Work Information Statement

Requests for Flexible Working

- Parent (or person with responsibility for care) of a child under school age, or child under 18 with a disability, may request changes to working arrangements
 - Example: change in hours of work, patterns of work and location of work
- Procedural requirements:
 - Requests must be made in writing, set out details of change/s requested and reasons
 - Employer must respond within 21 days as to whether will grant request
 - Refusal only on “reasonable business grounds”, which must be detailed to employee

Parental Leave

- Applies to married, same sex and de facto couples
- Entitled to 12 months unpaid maternity leave after 12 months of service
- 3 weeks can be taken concurrently



Annual Leave & Personal Leave

- Annual leave and Personal leave both accrue from the day an employee commences employment, on a day to day basis
- No longer an annual cap on carers' leave

Annual / Personal Leave & Cashing Out

- Modern Awards (very few) and EAs may allow for cashing out of annual leave and personal leave
- Cashing out of annual leave may be agreed in writing for Award/Agreement-free employees
- In relation to annual leave - cashing out is only allowed where the remaining leave accrual after the cashing out occurs is at least **four weeks** leave
- In relation to personal leave - the employee must retain a balance of at least **15 days** of untaken paid personal leave after the cashing out occurs
- Cashing out must be recorded by separate agreement in writing on each occasion
- Cashing out should be paid at the employee's ordinary rate of pay

Redundancy - Eligibility

- Employee must have one years' continuous service
- Business must employ 15 or more employees
- Exceptions include: fixed term employees, casuals, trainees, and apprentices
- Statutory table of redundancy entitlement:

Permanent Employee's period of continuous service with the Employer	Severance pay
Less than 1 year	Nil
1 year and less than 2 years	4 weeks' pay
2 years and less than 3 years	6 weeks' pay
3 years and less than 4 years	7 weeks' pay
4 years and less than 5 years	8 weeks' pay
5 years and less than 6 years	10 weeks' pay
6 years and less than 7 years	11 weeks' pay
7 years and less than 8 years	13 weeks' pay
8 years and less than 9 years	14 weeks' pay
9 years and less than 10 years	16 weeks' pay
10 years and over	12 weeks' pay

Redundancy

- Beware of transitional arrangements:
 - Where employees have more generous entitlement under pre-Modern Award than under NES, they are entitled to the more generous entitlement until 31 December 2014 (which may include small businesses with less than 15 employees)
 - Service counted only from 1 Jan 2010 for employees who did not have entitlement at 31 December 2009

Fair Work Information Statement

- A copy of the Fair Work Information Statement must be provided to all employees before, or as soon as practicable after, the employee starts employment
- <http://www.fairwork.gov.au/FWISdocs/Fair-Work-Information-Statement.pdf>



Consequences of Non-Compliance

- Ombudsman has powers to investigate and inspect a workplace
- Common issues:
 - Underpayment of wages and entitlements
 - Failing to keep Employee and Wage Records
 - Neglecting to keep a copy of the NES and applicable Awards in a 'conspicuous place' (*e.g. on a staff notice board or on the intranet*)
- Consequences:
 - Letter of Caution or Compliance Notice
 - Commencement of Litigation
 - Fines of up to \$33,000 per breach for a company

What should I do?



Review, Amend, Comply

- Review wages, contracts of employment, policies and procedures for compliance with an Award and the NES
- Make amendments where necessary
- If you are unsure, seek advice

Take - Aways

- Understand which Modern Awards cover your business and your employees;
- Have you correctly transitioned relevant Modern Award entitlements for any Award covered employees? ;
- Consider how IFA's or Enterprise Agreements could provide your business & employees with the flexibility you require;
- Are your contracts of employment compliant with an applicable Award and the NES?;
- If you are paying above Modern Award rates – do your contracts contain appropriate “set off” clauses?;
- Consider whether your high income earners should enter into a “high income guarantee” ;
- Audit your practices, policies and workplace documentation against the 10 National Employment Standards.

Questions?



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