



# SIGNAL SEVEN

22 February 2021

## Settlement Reached in Federal Court Case

In December 2018, the UFU raised concerns about rostering practices and related alleged underpayments. The concerns related primarily to the practice of rostering shifts between nightshifts. The concerns were related to issues we had raised some two years prior about establishment, and the reliance on overtime to fill shifts.

The UFU contended that where a shift commenced within 9 hours of a previous shift concluding, the second occurring shift should attract the penalty rate of 200%, because of the enterprise agreement provisions governing fatigue management and rest relief after overtime.

On Wednesday 17 February, UFU Secretary Greg McConville and ESA Commissioner Georgeina Whelan signed a Deed of Settlement, concluding litigation brought by the UFU against the Act Government. The signing of the Deed concludes a bitter chapter in relations between the UFU and the ESA and puts to rest a significant legacy issue of the previous administration. We are thankful and greatly appreciative of the efforts of ESA Commissioner Georgeina Whelan, A/g Chief Officer Glenn Brewer and previous A/g Chief Officer Chris Zeitlhofer in settling this matter.

The Deed of Settlement can be accessed by using this [link](#).

The agreement reached will affect 2 matters: past underpayments and future rostering and payment practices. The effect of the settlement is as follows.

### **Rostering, Rest and Payments**

Annexure 2 of the Deed of Settlement sets out a comprehensive description of how the “Rest Relief After Overtime” and “Fatigue Management” provisions of the enterprise agreement are to be applied. Members are strongly encouraged to read the entirety of Annexure 2, by following the link set out above.

In summary, the matter primarily concerns recall to duty shifts that are worked between rostered nightshifts. Annexure 2 states:

“Clause E9 applies where an employee works overtime between ordinary rostered shifts, which are described in clauses D2 and D3 in the EA, and when an employee does not have an appropriate period of rest between the two rostered shifts in a single roster cycle.

Clause E9 is only activated when overtime is worked between ordinary rostered shifts in a single roster cycle without an appropriate period of rest.

Where Overtime is worked immediately before an employee’s ordinary rostered first day shift, clause E9 is not triggered.”

Annexure 2 continues:

“Where circumstances result in an employee not having an appropriate rest between ordinary rostered shifts, due to working overtime following an ordinary rostered shift, that employee is provided, either

- a break before commencing the next ordinary rostered shift, to achieve the appropriate rest period, without loss of pay; or
- payment at 200% of the ordinary rate of pay for the next ordinary rostered shift.

The reason for the overtime being worked is not relevant in the application of the provisions in E9.

The 200% of an employee’s ordinary rate of pay referred in clause E9.3.1 is only applicable to an employee’s ordinary rostered shift as described at clauses D2 and D3 in the EA, or where clause E9 has been activated for an ordinary rostered shift and additional overtime is worked without the employee having an appropriate break. Clause E3 sets out the conditions and rates of payment for overtime.

The 200% rate of pay is not overtime pay and nor is the rostered shift to which the 200% pay rate applies overtime. The additional payment received is, in effect, recompense for not receiving a sufficient break.”

### **How will the outcome affect rostering practices?**

Annexure 2 of the Deed sets out the following:

“To manage fatigue, it is always preferable to provide an employee with a continuous 9-hour break (including travel time) between ordinary rostered shifts.

The roster and ordinary hours of work documented at clauses S1.4, D2, D3 and S3.4 of the EA are generally considered a direction by the employer to attend ordinary duty.

Where overtime is allocated to an employee between their nightshifts that would result in there not being a 9 hour break before the 2<sup>nd</sup> nightshift, agreement concerning the effect on the 2<sup>nd</sup> nightshift should be reached at the time of allocation of overtime as to whether:

1. The employee is stood down for so much of the 2<sup>nd</sup> nightshift as is necessary to effect a 9 hour break; or
2. The standing direction (in the form of the roster and dispositions) to attend the 2<sup>nd</sup> nightshift remains, resulting in application of the 200% penalty rate described in Clause E9.3.1”

Annexure 2 also contains the following guidance:

“Fatigue management in practice

- Where an employee is offered overtime the employee must notify the Comcen Station Officer by telephone that they will not have had a 9 hour break if they commence at the usual roster start time (S5.2).
- Unless specifically directed by the employer for this occasion, or otherwise agreed at the time of allocation of overtime, the employee is not required to attend their ordinary rostered shift until their 9-hour break is completed. This period of non-attendance will be referred to as ‘rest relief’ and will be without loss of salary (E9.2).
- The vacancy caused by the rest relief will be filled in accordance with clause S2 – Filling of Temporary Vacancies to be arranged by the shift Commander.

- The employee should attend for duty at the time the 9-hour break is completed.
- If the employer determines that for operational reasons or impracticability of other options (after other options have been considered) the employee is required to attend their ordinary rostered shift without having had a 9 hour break, they may direct the employee to report for duty at the commencement of their next ordinary rostered shift.
- Any direction to the employee to attend duty will be given orally and must be recorded in writing by the shift Commander. The shift Commander will notify the relevant Superintendent.

Where the employee is directed to return to their ordinary rostered shift (without appropriate rest), the provisions of E9.3.1 will apply to that shift.”

On 16 February 2021, ACTF&R provided the UFU with a redrafted proposed “Overtime Policy HR-12”. The UFU will provide further comment on that draft policy once we have reviewed it and addressed any questions we have to ACTF&R. Notwithstanding that, we have received spoken assurances from the ESA Commissioner and the A/g Chief Officer (including through the Local Consultative Committee in January) that the 200% penalty rate will not be a reason for not offering shifts to firefighters.

The arrangements will be monitored, and members are asked to convey any issues or difficulties to the UFU as soon as they arise.

#### **How will underpayments be addressed?**

Annexure 1 of the Deed sets out examples which identify areas of possible underpayment. The Deed establishes a working party which will oversee a wages assessment across the period 8 March 2012 to 4 March 2021. The working party will consist of Territory and UFU representatives and will be assisted by a professional services provider in overseeing the wages assessment. The specific tasks of the working party include:

- a. develop and settle the process to identify and rectify the Underpayment Claims for the Wages Underpayment Period using the Terms of Reference set out in Annexure 1 of this Deed;
- b. resolve any issues raised by the Employees, the Territory and/or the UFU in relation to the Wages Assessment;
- c. settle the arrangements for the making of payments to the Employees and the timeframe for Employees to raise queries regarding any underpayment;
- d. oversee and guide, as necessary, those undertaking the assessment of the data and information to be used to identify and rectify the Underpayments Claims; and
- e. operate on the basis of consensus and in the event of a dispute will be bound by the Dispute Resolution clause set out in this Deed.

Where underpayments are identified, they will be rectified along with the payment of interest calculated using Federal Court of Australia pre-judgement interest rates. Those interest rates can be seen by using the following link: <https://www.fedcourt.gov.au/forms-and-fees/interest-rates>.

We estimate that the quantum of underpayments is in the vicinity of \$2mil.

The Deed of Settlement also makes provision for payment of a significant proportion of the legal costs incurred by the UFU in this case.

The working party is to be formed within 3 weeks of the date of signing of the Deed. We will provide further detail about the wages assessment and processes related to underpayments once the working party is formed.

### **Conclusion**

The reaching of this settlement represents the conclusion of a significant body of work. Certainty around the rostering practices going forward and the rectification of past underpayments will benefit all members. Although we are yet to see the intended increases in crewing under the enterprise agreement come to fruition, increased crewing and the increased relief factor should result in a lower reliance on rostering between nightshifts, and improved availability of leave.

Members with questions or concerns about this matter are asked to contact the Secretary.

### **Strength in Unity**

**Authorised by Greg McConville, Secretary, UFU, A.C.T. Branch.**

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