



9 June 2023

Ms Narelle Koteff
Director – People & Culture
NSW Rural Fire Service
4 Murray Rose Avenue
Sydney Olympic Park
NSW 2127

By email: narelle.koteff@rfs.nsw.gov.au

Without Prejudice

Dear Ms Koteff,

RE: Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Industrial Relations Secretary, on behalf of the NSW Rural Fire Service [2023] NSWIRComm 1052

1. We refer to the above decision of Commissioner O'Sullivan which was handed down on 30 May 2023 and which made the following recommendation under s 136(1)(a) of the *Industrial Relations Act 1996*:

"The parties are to confer with a view to agreeing on the requirements of what work is to be treated as overtime and paid as such for the purposes of cl 7.9 of the Crown Employees (Rural Fire Service) Award 2019 and what work is to be the subject of hour for hour time off (under a local arrangement or LA time).

The above requirements should distinguish between the requirement to work the hours as required by the respondent and work performed at the hours at the request of the employee(s)."

("the Recommendation")

2. In accordance with the recommendation, the PSA proposes the following set of 'requirements' to determine what work should attract overtime and what work should attract hour for hour time off. This proposal is provided on a **without prejudice** basis.
3. The following proposal only identifies when overtime applies under cl 7.9 of the RFS Award. Separate entitlements to overtime arise in different circumstances and under different award provisions (e.g. see cls 13.8 and 15 of the *Crown Employees (Rural Fire Service) Award (RFS Award)* and cls 91 and 92 of the *Crown Employees (Public Service Conditions of Employment) Reviewed Award 2009 (Conditions Award)*). Accordingly, this proposal is not a comprehensive list of all circumstances in which overtime applies.

PSA's Proposal

4. In respect of additional hours worked **between** 7:30am and 6pm Monday to Friday (excluding public holidays):
 - a. Employees who are not in receipt of the annualised conditions allowance (**ACA**) in lieu of programmed overtime are entitled to hour for hour time off, **other than** in respect of hours which are compensated by cl 13 of the RFS Award (after hours allowance).
 - b. Employees who are in receipt of the ACA in lieu of programmed overtime are entitled to hour for hour time **other than** in respect of any hours that are programmed overtime.
 - c. No overtime entitlement arises under cl 7.9 in respect to additional hours worked between 7:30am and 6pm Monday to Friday (excluding public holidays).
5. In respect of hours worked **before** 7:30am or **after** 6:00pm Monday to Friday (excluding public holidays):
 - a. An entitlement to overtime **does not** arise under cl 7.9 in respect of:
 - i. Time worked without approval or direction.
 - ii. Programmed overtime in respect of employees who receive the ACA in lieu of programmed overtime.
 - iii. Time worked which is compensated by cl 13 of the RFS Award, except in accordance with cl 13.8.
 - iv. Time worked which is compensated by cl 92 of the Conditions Award (on-call conditions), except in accordance with cl 92.1.2.
 - b. An entitlement to overtime **does** arise under cl 7.9 in respect of:
 - i. Time worked at the express or implied direction of the RFS (directed overtime).
 - ii. Time worked at the request of the employee and if that request is approved by the RFS (approved overtime).
 - c. An entitlement to hour for hour time off (local arrangement) arises in respect of:
 - i. Time worked at the request of the employee and if that request is approved, and the employee separately and specifically agrees to receive hour for hour time off in lieu of overtime. This will displace the employee's entitlement to overtime for the specific work performed.
6. In respect of hours worked on a weekend or a public holiday:
 - a. An entitlement to overtime **does not** arise in respect of:
 - i. Time worked at the request of the employee, irrespective of whether that request is approved. That time is compensated by hour for hour time off under a local arrangement.
 - ii. Programmed overtime in respect of employees who receive the ACA in lieu of programmed overtime.

- iii. Time worked which is compensated by cl 13 of the RFS Award, except in accordance with cl 13.8.
 - iv. Time worked which is compensated by cl 92 of the Conditions Award, except in accordance with cl 92.1.2.
 - b. An entitlement to overtime **does** arise in respect of:
 - i. Time worked at the express or implied direction of the RFS (directed overtime).
 - ii. Time worked where overtime has otherwise been approved (i.e. at the discretion of the RFS).
 - c. An entitlement to hour for hour time off (local arrangement) arises in respect of:
 - i. Time worked at the request of the employee and if that request is approved.
- 7. If overtime is **directed overtime**, the employee is entitled to elect between paid overtime (in accordance with cl 90.2 of the Conditions Award) and leave in lieu (in accordance with cl 96 of the Conditions Award). Directed overtime cannot be compensated by way of hour for hour time off under a local arrangement.
- 8. An employee is working 'directed overtime' if they are working at the express or implied direction of the RFS. An express direction includes:
 - a. A request from the RFS to an employee to work, once the employee consents to the request.
 - b. An authoritative instruction, command, order or ordnance from the RFS to an employee to which the employee's consent is irrelevant.
- 9. An employee is working 'directed overtime' under an implied direction if the work the employee is required to complete can only be completed before 7:30am or 6pm Monday to Friday, or at any time on a public holiday or weekend.
- 10. If overtime is **approved overtime**, the employee is entitled to paid overtime (in accordance with cl 90.2 of the Conditions Award), although an employee may agree to accept hour for hour time off in lieu of paid overtime (see [5(c) above]).
- 11. Approved overtime only arises where an employee, at their own initiative, requests to work before 7:30am or after 6pm, Monday to Friday (excluding public holidays).
- 12. For abundant clarity:
 - a. Directed overtime cannot be compensated with hour for hour time off under a local arrangement. Directed overtime can only be compensated with paid overtime or leave in lieu (at penalty rate accrual), with the employee choosing their preferred form of compensation.
 - b. Approved overtime is nominally compensated with paid overtime, however an employee may agree to receive hour for hour time off in lieu of paid overtime.
 - c. If an employee is asked by the RFS to work before 7:30am or after 6pm Monday to Friday (excluding public holidays), and the employee agrees, that is directed overtime

and the employee **can only be** compensated with paid overtime or leave in lieu (at penalty rate accrual).

13. "Programmed overtime" means overtime activities which satisfy the following three conditions: (1) are activities that are identified in advance of an employee receiving the ACA; (2) are expected to be worked within a year and (3) are pre-planned and scheduled.

Consistency Between Proposal and Decision

14. Necessarily, the requirements which the parties agree upon must be consistent with the findings of the Commission. There are two relevant findings. Firstly, the Commission rejected part of the notifier's interpretation at [53]:

The notifiers position that all work performed outside of the hours in cl 7.9 of the RFS Award is "directed" overtime and is to be paid as such irrespective of even if it is at the initiative/request of the employee is contrary to the evidence of Mr Mouwad detailed above as to the reason why such overtime needed to be "directed".

15. Secondly, the Commission rejected the entirety of the respondent's interpretation at [54]:

The respondent's position that the work is only "directed" if there is an authoritative instruction, command, order or ordnance, runs counter to how modern workplaces operates. Further, if this approach is to be accepted, it may inevitably lead to members of the notifier continuously refusing requests to work overtime until such time they instructed etc to do so in order to receive overtime payment.

16. To be consistent with the above findings, the requirements which the parties agree upon must **not**:
- a. provide employees with an overtime entitlement for **all** hours worked outside of cl 7.9 (presumably that means all time before 7:30am and after 6pm on weekdays and all time on weekends and public holidays) at the request of the employee.
 - b. provide that the overtime entitlement is **only** enlivened where an employee worked under a "authoritative instruction, command, order or ordinance".
17. As required under the recommendation, the requirements should distinguish between the requirement to work the hours "as required by the respondent and work performed at the hours at the request of the employee".
18. The proposal draws the appropriate distinction between the work as required by the respondent and work performed at the request of the employee and is consistent with the findings at [53] and [54]. That is, in order for an employee to be regarded as working **directed overtime**, the following requirements must be met:
- a. The work is performed before 7:30am or after 6pm on a weekday or anytime on a public holiday or weekend, **and**:
 - b. Is worked in accordance with either an implicit or express direction.

19. To address the Commission's finding at [54], an implicit or express direction is defined with a view to capture a range of circumstances including:
- a. Work performed at the express request of the RFS and which is then accepted by an employee.
 - b. Work performed under an express authoritative instruction, command, order or ordnance, to which the employee's consent is immaterial.
 - c. Work performed as implicitly required by the RFS where there is no alternative available to complete the work without working before 7:30am or after 6pm or anytime on weekends or public holidays.
20. To use an example for each circumstance:
- a. In respect of (a) above: A District Manager emails all district officers with a timetable of upcoming out of hours brigade meetings. Each officer who agrees to attend a meeting, will be working directed overtime when they attend the meeting.
 - b. In respect to (b) above: A District Manager emails a RFS Officer, that they are required to attend an FCC during a period of increased fire danger on a Saturday. That employee is working under an authoritative instruction and their consent is immaterial. The employee is working directed overtime for all hours on the Saturday.
 - c. In respect of (c) above: An RFS Coordinator is required to conduct engagement events with community groups and volunteers as part of their role. The meetings are scheduled by the community groups on weekends. When the RFS Coordinator attends the community meetings, they are working **implicitly** directed overtime as the duties were not capable of being performed between 7:30am and 6pm on a weekday.
21. Importantly however, and to address the Commission's finding at [53], an employee who works overtime at their own initiative is not regarded as working 'directed overtime' (however, see *approved overtime* below).
22. The proposal also excludes an employee's entitlement to overtime where the employee is otherwise compensated. For example, an employee is not entitled to overtime if the work performed is programmed overtime and the employee is otherwise is receipt of a programmed overtime allowance under the ACA.

Approved Overtime

23. To bring certainty to this arrangement, approved overtime must be addressed notwithstanding that the issue was not addressed in the Decision. By 'approved overtime', we refer to the requirement under cl 7.9 that overtime "is all time approved... to be worked before 7:30am and after 6pm on a normal workday between Monday to Friday". Under the proposal, approved overtime only arises when an employee, on their own initiative, requests to work before 7:30am or after 6pm between Monday to Friday (excluding public holidays) and the request is approved by the RFS. Approved overtime is compensated by overtime pay. However, in order to maximise

flexibility, the employee and the RFS may agree to compensate approved overtime with hour for hour time off under a local arrangement (see [5(c)]).

24. For abundant clarity, if the RFS requests an employee to work before 7:30am or after 6pm Monday to Friday, or indeed any time on a weekend or public holiday, and the employee agrees, the work is regarded as 'directed overtime' and **cannot be** compensated with hour for hour time off under a local arrangement.
25. To illustrate the distinction between approved overtime and directed overtime, we provide the following examples:
 - a. **Approved Overtime:** An area mitigation officer requests to commence work at 7:00am and to finish work at 3pm on a Monday (which is not a public holiday) due to personal carer's responsibilities. If approved, the employee is nominally entitled to paid overtime for 7:00am to 7:30am. To facilitate the request, the mitigation officer elects to receive hour for hour time off under a local arrangement. On the basis that the officer is willing to receive hour for hour time off, the request is approved.
 - b. **Directed overtime:** An area mitigation supervisor asks an area mitigation officer to attend a medal ceremony at 2pm on Saturday and says to the officer "you are not required to attend but if you do attend you will receive hour for hour time off". The area mitigation officer attends the medal ceremony which concludes at 4pm on Sunday. Notwithstanding the area mitigation supervisor's comment, the officer has worked 'directed overtime' because she has worked in response to a request from the RFS and is entitled to either paid overtime or leave in lieu of overtime at penalty rate accrual.

Next Steps

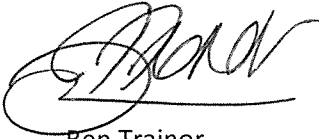
26. In consideration of the all staff email from Ms Trina Schmidt on 30 May 2023, it does not appear that the RFS intends to abide by the Recommendation. Specifically, Ms Schmidt states:

*However, as we have acknowledged previously, the RFS recognises that more needs to be done to ensure consistent and fair application of the Award for all staff. You were also very clear about this in your feedback to us. With this in mind, and **in accordance with the IRC recommendation, we will reinitiate our efforts to finalise the Award draft guidance material, in consultation with staff and the PSA as originally planned.***

27. This suggests that the RFS does not intend to confer with the PSA with a view of reaching a bilateral agreement on the circumstances where overtime is payable under cl 7.9 of the RFS Award (as required by the Recommendation), but rather that the RFS intends to develop guidance material in consultation with the PSA.
28. In light of this apparent reluctance to abide by the Commission's decision, we request that the RFS advise, as a matter of principle, whether it is willing to adhere to the Recommendation by no later than 13 June 2023. In the event the RFS is not willing to abide by the Recommendation, further discussions on the proposal are moot.
29. In the event the RFS wishes to adhere to the Recommendation, we request a substantive response to the proposal by no later than 27 June 2023.

30. The PSA reserves all rights, including its position on back pay.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Ben Trainor', with a large, stylized flourish underneath.

Ben Trainor

Solicitor, Legal Services

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