DECISION

Fair Work Act 2009
s.739—Dispute resolution

Susha Semenikow
v
Express Freighters Australia (Operations) Pty Ltd
(C2024/8047)

COMMISSIONER CRAWFORD SYDNEY, 7 MARCH 2025

Dispute about whether the base rate of pay in an enterprise agreement exceeds the base rate of pay in a modern award – whether addition to salary payments in the modern award fall within the meaning of base rate of pay – dispute determined in favour of employer

BACKGROUND

[1] Susha Semenikow is currently employed by Express Freighters Australia (Operations) Pty Ltd (**EFA**) as a Training Captain. Mr Semenikow was formerly engaged by EFA as a First Officer on an Airbus A321 narrow body jet aircraft and then as a Captain on this same type of aircraft. EFA is a freight airline based in Sydney which is part of the Qantas Group. The *Express Freighters Australia Operations Pty Ltd Enterprise Agreement 2021*[1] (**EA**) *applies*[2] to Mr Semenikow in relation to his employment with EFA. The *Air Pilots Award 2020* (**Award**) *covers*[3] Mr Semenikow's employment with EFA, but the Award does not *apply*[4] to Mr Semenikow's employment with EFA. Section 206 of the *Fair Work Act 2009* (**FW Act**) states that an employee's "base rate of pay" under an enterprise agreement that applies to the employee must not be less than the "base rate of pay" in a modern award that covers the employee. Mr Semenikow has raised a dispute under the dispute resolution procedure in clause 19 of the EA regarding whether his base rate of pay under the EA exceeds his base rate of pay under the Award. Mr Semenikow has requested that the Commission arbitrate his dispute pursuant to its powers in clause 19 of the EA and s.739 of the FW Act.

[2] Mr Semenikow is a member of the Australian Federation of Air Pilots (**AFAP**) and has been represented by the AFAP in relation to the dispute. Other employees of EFA are likely to be affected by the outcome of the dispute. As a result, the Australian and International Pilots Association (**AIPA**) has an interest in the dispute and has supported the position advanced by Mr Semenikow and the AFAP.

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[1] AE517229.
[2] *Fair Work Act 2009* (Cth) s 52.
[3] Ibid s 48.
[4] Ibid s 57.

[3] There is no dispute between the parties that the Commission has jurisdiction to arbitrate the dispute and that the relevant prerequisite steps in the dispute resolution procedure[5] have been followed. However, there is some dispute about the relief that can be granted if the dispute is resolved in Mr Semenikow's favour.

[4] Directions were issued for the filing of evidence and submissions, and the dispute was listed for hearing in Sydney on 27 February 2025. Jared Marks (Senior Legal and Industrial Officer – AFAP) represented Mr Semenikow and the AFAP at the hearing. Jane Cleary (Senior In-House Lawyer) represented AIPA. I granted permission for EFA to be represented by Matthew Follett KC and Matt Garozzo of counsel, instructed by Ashurst Australia. This was not opposed. I was satisfied granting permission would enable the matter to be dealt with more efficiently.

EVIDENCE

Mr Semenikow

[5] Mr Semenikow provided a witness statement dated 20 December 2024. Mr Semenikow was not required for cross-examination.

[6] Mr Semenikow states his current minimum salary as a Captain for EFA under the EA is $193,157. Mr Semenikow states he was advised by Simon Lutton (Executive Director – AFAP) that the minimum salary for a Captain of an A321 under the Award effective from 1 July 2024 was $195,653. Mr Semenikow explained that the Award rate is derived by adding the following amounts:

i. The minimum salary rate for a Captain of a narrow body aircraft in Schedule A.1.2 of the Award = $168,634.

ii. The flying a turbo jet aircraft allowance (**aircraft allowance**) in Schedule A.1.3(d) of the Award = $13,219.97.

iii. The Airline Transport Pilots Licence (**ATPL**) in Schedule A.1.3(b) of the Award = $6,238.17.

iv. The Command or Class 1 instrument rating allowance (**rating allowance**) in Schedule A.1.4 of the Award = $7,560.17.

[7] There is no dispute between the parties that Mr Semenikow would be entitled to receive the amounts identified above if the Award applied to his employment rather than the EA.

[8] Mr Semenikow provided a copy of a table outlining the current rates paid under the EA and an example of one of his payslips. The payslip confirms Mr Semenikow receives a 5% all-purpose allowance in accordance with clause 4.8 of the EA. That amount is paid in addition to the salary rate of $193,157, making a total minimum salary of $202,815.

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[5] *Express Freighters Australia Operations Pty Ltd Enterprise Agreement 2021* cl.19.2(a)(b).

Simon Lutton

[9] Mr Lutton provided a witness statement dated 14 February 2025. EFA objected to this statement being admitted into evidence on several bases including relevance. I decided to admit the statement into evidence and deal with the objections as a matter of weight. Mr Lutton was not required for cross-examination.

[10] Mr Lutton states he has not encountered a pilot paid under the Award receiving a lower rate of pay when they took leave or when they were paid redundancy entitlements during 25 years of work in industrial relations. The purpose of Mr Lutton's evidence appears to be to demonstrate that EFA's interpretation of the meaning of "base rate of pay" has not been applied in practice in relation to employees paid under the Award. Even if that evidence is correct, it could be explained by a range of factors. I do not consider Mr Lutton's evidence assists in interpreting the FW Act and the Award.

Ryszard (Richard) Hardonin

[11] Mr Hardonin (Head of Flying Operations and Chief Pilot – EFA) provided a witness statement dated 31 January 2025. Mr Hardonin was not required for cross-examination.

[12] Mr Hardonin states EFA employs around 120 pilots as either captains or first officers on A321 or A330 aircraft. Mr Hardonin confirms that EFA pilots would be entitled to receive the aircraft allowance under the Award because the A321 and A330 are "turbo jet" aircraft. Mr Hardonin states all EFA Captains must hold an ATPL, but this is not contractually required for First Officers. Mr Hardonin states some First Officers may hold an ATPL. Mr Hardonin states all EFA pilots are required to hold an instrument flying rating of Command or Class 1.

SUBMISSIONS

[13] Mr Semenikow relied on an outline of submissions prepared by the AFAP dated 20 December 2024. Mr Semenikow also relied on reply submissions prepared by the AFAP dated 14 February 2025. Mr Marks made oral submissions during the hearing on 27 February 2025. The AIPA supported the submissions made by the AFAP on behalf of Mr Semenikow.

[14] EFA relied on an outline of submissions dated 31 January 2025. Mr Follett KC provided oral submissions during the hearing on 27 February 2025.

[15] I have reviewed and considered all the submissions made by the parties in writing and during the hearing on 27 February 2025.

CONSIDERATION

[16] The issue in dispute is whether the aircraft allowance, ATPL payment, and the rating allowance form part of Mr Semenikow's base rate of pay under the Award. If these payments are included within Mr Semenikow's base rate of pay under the Award, the safeguard in s.206 of the FW Act is potentially triggered because Mr Semenikow's base rate of pay under the Award would be $195,653, whereas the minimum salary rate for a Captain under the EA is $193,157. However, even if Mr Semenikow is right about his base rate of pay under the Award,

a further issue arises concerning whether an all-purpose allowance of five percent which is prescribed in clause 4.8 of the EA forms part of Mr Semenikow's base rate of pay under the EA. If the all-purpose allowance is included, Mr Semenikow's base rate of pay under the EA would be $202,815. The protection in s.206 of the FW Act would therefore not be engaged.

Statutory provisions and case law

[17] The term "base rate of pay" is defined in the following terms in s.16 of the FW Act:

> "General meaning
>
> (1) The ***base rate of pay*** of a national system employee is the rate of pay payable to the employee for his or her ordinary hours of work, but not including any of the following:
>
> (a) incentive - based payments and bonuses;
> (b) loadings;
> (c) monetary allowances;
> (d) overtime or penalty rates;
> (e) any other separately identifiable amounts."

[18] The following definition of "full rate of pay" in s.18 of the FW Act is also relevant:

> "General meaning
>
> (1) The ***full rate of pay*** of a national system employee is the rate of pay payable to the employee, including all the following:
>
> (a) incentive - based payments and bonuses;
> (b) loadings;
> (c) monetary allowances;
> (d) overtime or penalty rates;
> (e) any other separately identifiable amounts."

[19] The Federal Court has been required to interpret and apply s.16 of the FW Act in two cases that were cited by both parties.

[20] In *Maughan v Cooper*[6], the Full Court was required to determine if an employee had been paid the correct amounts on termination for entitlements including redundancy. The employee's redundancy pay entitlement had to be determined with reference to the definition of "base rate of pay" in the FW Act. The employee's contract of employment stated he was entitled to be paid an annual salary of $43,136.08 which was "inclusive of an 18% penalty rate for afternoon shift work." The employee argued his base rate of pay was the full salary rate of $43,136.08. The employer successfully argued that the 18% penalty rate was a "separately identifiable amount" that was excluded from the calculation of the employee's "base rate of pay" by virtue of s.16(1)(e) of the FW Act.

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[6] *Maughan Thiem Auto Sales Pty Ltd v Cooper* [2014] FCAFC 94; (2014) 222 FCR 1.

[21] The Full Court in *Maughan v Cooper*[7] also stated the following regarding the operation of s.16 of the FW Act:

i. Although the additional payment for working afternoon shift was referred to as a "penalty rate", that does not mean that it is.[8]

ii. The position would doubtless have been different if the contract had been silent as to a shift allowance or had simply stated that the remuneration was inclusive of any or all penalties or allowances.[9]

iii. The argument that s.16(1) was designed only to exclude award-derived penalty rates does not withstand scrutiny.[10]

[22] The other Federal Court judgment the parties referred to is *APESMA v Bulga*.[11] In that case, Wigney J had to determine whether an employee had received their correct long service leave payments upon termination by applying the definition of "base rate of pay" in s.16 of the FW Act. The answer turned on whether the employee's base rate of pay was his "Total Employment Compensation" of $171,500 less superannuation at 9.5%, or whether his base rate of pay was a "Notional Base Salary" of 80% of his Total Employment Compensation. Justice Wigney concluded that the better view was that the employee's base rate of pay was $171,500 minus superannuation at 9.5% because that was the rate payable for his "ordinary hours of work" and "it did not include any loadings, monetary allowances, overtime or penalty rates or any other 'separately identifiable amounts'".[12]

[23] The relevant employee in *APESMA v Bulga* was also paid a Shift/Roster Allowance. The parties agreed this payment did not form part of the employee's base rate of pay.

[24] Mr Semenikow, AFAP, and AIPA relied heavily on the following extract of Wigney J's judgment in *APESMA v Bulga* in support of their argument that the aircraft allowance, ATPL payment, and the rating allowance form part of Mr Semenikow's "base rate of pay" under the Award:

> "The definition of "base rate of pay" in s 16(1) of the Fair Work Act makes it clear that the relevant incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates or other amounts that are excluded from the determination of the base rate of pay are those that are not otherwise part of, or are payable in addition to, the rate of pay payable to the employee for his or her ordinary hours of work. That is particularly apparent from the use of the words "separately identifiable amounts" in

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[7] Katzman J, Greenwood and Besanko JJ agreeing.

[8] *Maughan Thiem Auto Sales Pty Ltd v Cooper* [2014] FCAFC 94; (2014) 222 FCR 1, Katzmann J at [24], Greenwood and Besanko JJ agreeing.

[9] See ibid.

[10] See ibid.

[11] *Association of Professional Engineers, Scientists and Managers Australia v Bulga Underground Operations Pty Ltd* [2019] FCA 1960.

[12] Ibid [68].

> paragraph (e). That indicates that the incentive-based payments and bonuses, loadings, allowances and overtime or penalty rates that are referred to in paragraphs (a), (b), (c) and (d) must also be separately identifiable; that they are identified or identifiable as payments separate to, or in addition to, the rate of pay payable to the employee for his or her ordinary hours of work.
>
> There is also much to be said for the proposition that the general words "separately identifiable amounts" in paragraph (e) should be read *ejusdem generis* with the specific types of payments or amounts referred to in paragraphs (a) to (d). It would follow that, to fall within paragraph (e), the separately identifiable amounts must be of the same genus or have the same character as the payments or amounts referred to in (a) to (d). That genus would appear to be payments or amounts payable to an employee to compensate them for working beyond or outside the ordinary hours of work, or to compensate them for working in specific circumstances, or for achieving specific outcomes, that otherwise warrant additional compensation or allowance. It would not include payments to an employee for performing his or her ordinary hours of work or ordinary duties."[13]

[25] Mr Semenikow, AFAP, and AIPA argued the aircraft allowance, ATPL payment, and the rating allowance are payments made to Mr Semenikow for performing his "ordinary hours of work or ordinary duties" and hence are not excluded from the definition of "base rate of pay" by s.16(1)(a) to (e) of the FW Act.

[26] For my part, I am not convinced that the judgments in *Maughan v Cooper* and *APESMA v Bulga* stand for much more than the specific issues that were required to be resolved in each case, aside from the three issues I have identified above at [17] which have a broader significance. The answer to what constitutes the "base rate of pay" will inevitably turn on the nature and circumstances of the relevant payments being considered in each case and then an assessment of whether the payments are included or excluded by the definition in s.16 of the FW Act.

[27] I consider the meaning of "base rate of pay" in s.16 of the FW Act to be reasonably clear, with one exception. The base rate of pay only includes amounts payable for "ordinary hours of work". That obviously means that payments for periods of overtime are not included, which contrasts with the definition of "full rate of pay" in s.18. However, not all amounts payable for ordinary hours of work form part of an employee's base rate of pay. Incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates, and any other separately identifiable amounts are not included. That means payments falling within the listed categories do not form part of the employee's base rate of pay, even where the employee is entitled to the relevant payments for working their "ordinary hours of work." I note this summary is consistent with that provided by Wigney J in *APESMA v Bulga* at [56].

[28] The part of the definition of "base rate of pay" in s.16 of the FW Act that I find confusing is the reference to "overtime or penalty rates" in s.16(1)(d). The reference to penalty rates makes sense given it is common for employees to work ordinary hours on the weekend which attract penalty rates. I consider the inclusion of the word "overtime" makes far less sense, if any.

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[13] Ibid [74] and [75].

Overtime payments would already be excluded from the definition of base rate of pay because it is only concerned with rates payable for "ordinary hours of work". Section 16(1)(d) appears to exclude overtime payments that are already not included by the standard definition. Perhaps it was considered sensible to completely replicate the exclusions and inclusions appearing in s.16(1) and s.18(1) of the FW Act.

Characterising the contentious Award payments

[29] I consider the payments identified in Schedule A.1.3 to A.1.14 of the Award meet the description of a "monetary allowance" for the purposes of s.16(1)(c) of the FW Act. The payments meet the ordinary meaning of an allowance which is: "a grant of something additional to ordinary wages for the purpose of meeting some particular requirement connected with the service rendered by the employee or as compensation for unusual conditions of that service."[14] The position is reinforced by Schedule G of the Award which identifies the payments in Schedule A.1.3, A.1,4, A.1.6, A.1.7, and A.1.8 as "general wage-related allowances." These amounts are calculated as percentages of the "standard rate" which is a common approach for wage-related allowances in modern awards. Although the payments in Schedule A.1.5 and A.1.9 to A.1.14 do not appear in Schedule G, I consider that to be because those additional payments are calculated as percentages of the employee's salary rather than the "standard rate." These additional payments also appear to me to meet the ordinary meaning of a monetary allowance.

[30] I note the Full Court in *Maughan v Cooper* identified that although the relevant additional amount in that case was described as a "penalty rate," that does not mean that it is.[15] I take the Full Court to be saying that it is not always enough to just adopt the description of an additional payment used by the parties in an industrial instrument or contract, the nature of the payment must be considered. However, in this case I am satisfied the label given to the payments in the Award reflects their true nature which is that of monetary allowances payable for certain skills, qualifications, or unusual conditions of service.

[31] In any event, even if the additional payments are not "monetary allowances", they are clearly "separately identifiable amounts" for the purpose of s.16(1)(e) of the FW Act. The amounts are identified separately to the minimum salaries identified in Schedule A.1.1 and A.1.2 of the Award.

[32] The findings above indicate that the additional payments in Schedule A.1.3 to A.1.14 of the Award are excluded from the definition of "base rate of pay" in s.16 of the FW Act.

[33] However, Mr Semenikow, AFAP, and AIPA argued this would be an overly simplistic and semantic approach to the meaning of "base rate of pay" and that attention needs to be given to the purpose of the term within the FW Act.

[34] Mr Marks referred during the hearing to the test for whether a payment falls within the meaning of "base rate of pay" as being whether the amount forms part of the "least that the

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[14] *Mutual Acceptance Co Ltd v Federal Commissioner of Taxation* [1944] HCA 34; (1944) 69 CLR 389 at 396-397 (Latham CJ).

[15] *Maughan Thiem Auto Sales Pty Ltd v Cooper* [2014] FCAFC 94; (2014) 222 FCR 1, Katzmann J at [24], Greenwood and Besanko JJ agreeing.

employee can be paid for performing work" under the Award. Given Mr Semenikow's role and qualifications, the minimum amount he can be paid under the Award includes the aircraft allowance, ATPL payment, and the rating allowance. It was submitted that these amounts are therefore part of his "base rate of pay" under the Award.

[35] I reject this argument. Although it may seem odd that it is possible for the lowest rate an employee can lawfully be paid under an enterprise agreement to be lower than the minimum rate they could be paid under the relevant modern award, the outcome is clearly possible given the definition of "base rate of pay" in s.16(1) of the FW Act.

[36] A compelling example of the potential for what could be viewed as an unfair outcome to arise is in relation to a casual employee. An enterprise agreement may contain a minimum rate of pay of $30 per hour for full-time and part-time employees and a casual loading of five percent. The minimum amount a casual employee could be paid under the enterprise agreement would be $31.50. However, given the definition of "base rate of pay" excludes loadings, the casual employee's base rate of pay under the enterprise agreement would be $30. The modern award which covers the employee may have a minimum rate of pay of $28 per hour for full-time and part-time employees and the standard casual loading of 25%. The minimum amount the casual employee could be paid under the modern award is $35 per hour. However, the casual employee's "base rate of pay" is $28 per hour because the casual loading is excluded from the definition. In this hypothetical scenario, the protection in s.206 of the FW Act is not triggered because the casual employee's base rate of pay under the enterprise agreement is higher than the base rate of pay under the Award. The casual employee could lawfully be paid a minimum rate under the enterprise agreement which is $3.50 per hour lower than the minimum rate payable under the Award. This example highlights the limits of the protection offered by s.206 of the FW Act because of the definition of "base rate of pay" that the legislature has included in s.16 of the FW Act.

[37] However, it is important to recognise that the safety net under the FW Act has many elements. The type of hypothetical issue identified above may never arise because any proposed enterprise agreement must pass the better off overall test (**BOOT)**. All loadings, penalty rates, and allowances must be considered as part of the BOOT. An enterprise agreement cannot be approved and commence operating if it does not pass the BOOT. Where a nominally expired enterprise agreement is not replaced with a new enterprise agreement for a lengthy period, s.206 often has important work to do in lifting the enterprise agreement base rates up to the base rates in the relevant modern award. However, that is the limited operation of the protection in s.206 of the FW Act. The provision does not guarantee that an employee can never receive minimum earnings under an enterprise agreement that are below the minimum earnings they could receive under a modern award. That is because of the exclusions from the definition of "base rate of pay" which appear in s.16(1) of the FW Act.

[38] Mr Semenikow, AFAP, and AIPA also relied heavily on the following definition of "addition to salary" in clause 2 of the Award:

> "**addition to salary** means a payment in addition to the pilot's minimum salary, which is regarded as salary for all purposes as if part of the salary, other than the payment of commission for aerial application operations."

[39] The definition means minimum award entitlements will generally be calculated by adding the addition to salary payments to the minimum salary prescribed in the Award. For example, the addition to salary payments must be included in annual leave payments in accordance with clause 23.4 of the Award. The definition may also mean the addition to salary payments have to be taken into account when calculating any entitlement referred to in the Award, including other forms of leave and redundancy payments. This constitutes the Award terms supplementing the NES as permitted by s.55(4) of the FW Act. It does not constitute the Award altering the meaning of the "base rate of pay" in s.16 of the FW Act.

[40] The "base rate of pay" for Mr Semenikow under the Award could be altered if the Award was varied such that the minimum amounts prescribed in Schedule A.1.1 and A.1.2 were increased to include the addition to salary amounts within the prescribed minimum rates, in a way that meant the additional amounts were not separately identifiable. The additions to salary would then lose the character of an allowance or a separately identifiable additional amount and would likely form part of the "base rate of pay." I acknowledge there is force to Mr Marks' submission that this approach would be undesirable because it would add considerable length and complexity to the minimum rates prescribed in Schedule A.1.1. and A.1.2. However, while the current approach may be simpler and more efficient, the legal effect of it is that the additional amounts payable to Mr Semenikow under the Award do not fall within the definition of "base rate of pay" in s.16(1) of the FW Act.

[41] I am not convinced the practical outcome in this case is particularly unfair or unjust for Mr Semenikow and the other affected employees. If the meaning of "base rate of pay" is the "least that the employee can be paid for performing work" as submitted by Mr Semenikow, AFAP and AIPA, then Mr Semenikow's base rate of pay under the EA is $202,815, not $193,157. Regardless of its history, the five percent all-purpose allowance in clause 4.8 of the EA is clearly part of the minimum amount payable under the EA. Mr Semenikow could not lawfully be paid a salary of $193,157, the minimum amount he can be paid is $202,815.

CONCLUSION

[42] I consider Mr Semenikow's base rate of pay under the EA is $193,157, which is the current minimum salary for his classification. The all-purpose allowance is not included in Mr Semenikow's base rate of pay under the EA because it is a monetary allowance excluded by s.16(1)(c) of the FW Act.

[43] I consider Mr Semenikow's base rate of pay under the Award is $168,634, which is the current minimum salary for his classification in Schedule A.1.2 of the Award. The payments in Schedule A.1.3 to A.1.14 are not included in Mr Semenikow's base rate of pay under the Award because they are monetary allowances excluded by s.16(1)(c) of the FW Act. Alternatively, they are other separately identifiable amounts excluded by s.16(1)(e).

[44] As a result, I find that Mr Semenikow's base rate of pay is higher under the EA than it is under the Award and that the protection in s.206 of the FW Act does not apply.

[45] I determine the dispute in favour of EFA for the reasons identified above.

COMMISSIONER

Appearances:
Mr J Marks on behalf of *Mr Semenikow* and the *AFAP*.
Ms J Cleary on behalf of the *AIPA*.
Mr M Follett KC and *Mr M Garozzo* of counsel instructed by *Ashurst* on behalf of *EFA*.

Hearing:
2025.
Sydney.
27 February.

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