ARE SALARIES WORTH IT?–WHEN GETTING PAID MORE THAN THE AWARD IS STILL NOT ENOUGH

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Australia Labour, Employment, and Workplace Safety Alert

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On Friday 5 September 2025, His Honour Justice Perram delivered judgment in *Fair Work Ombudsman v Woolworths* and three related proceedings (*FWO v Woolworths*), in one of the most significant underpayment decisions since the commencement of the *Fair Work Act 2009* (Cth) (FW Act). This decision has broad-ranging ramifications which potentially call into question the benefit of paying a higher annual salary to satisfy award entitlements. It is the first clear determination of how far an annualised salary can go to satisfy award entitlements, as well as giving new clarity to record keeping obligations imposed on all employers and the strict requirements for varying instrument conditions, as well as dealing with many issues specific to the *General Retail Industry Award* (GRIA).

Although an appeal is likely once the proceedings are finally determined, every employer should be carefully reviewing and comparing the pay and entitlements of their salaried employees, the offset clauses in their contracts, and their record-keeping practices against the conclusions reached by the court. While the complex and lengthy judgment deals with a large number of issues, we have summarised the most significant findings below.

BACKGROUND

FWO v Woolworths deals with proceedings brought by the Fair Work Ombudsman (FWO) and two class actions against both Woolworths and Coles in respect of salaried employees. These employees were engaged on annualised salaries which were intended to satisfy all award entitlements, and both employers acknowledged they did not satisfy those entitlements in practice. Woolworths and Coles have already made payments of AU$300 million and AU$7 million respectively, however, it was argued that they owed even more based on the way in which those payments had been calculated.

While the parties put forward over 100 overlapping issues, the key disagreements in these cases came down to the following:

- Could the salary paid to an employee in one pay period, which exceeded award entitlements, be "set off" against amounts paid to them in another pay period which fell short of the award entitlements?
- What records must be kept by employers of different award entitlements, and does this change when the employee is on a salary?
- When has an employee "agreed" to vary entitlements under an industrial instrument?

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Because of the significant complexity of the findings, the decision focused on questions of legal interpretation. The impact on individual employees – including potential compensation and civil penalties – is yet to be finally determined, with the matter next before the court on 27 October 2025 for further case management.

SET OFF OR "OFFSET" CLAUSES

Many salaried employees in Australia are subject to a contractual "set off" clause which provides that the salary they receive is intended to meet all entitlements they may have under an award or enterprise agreement. *FWO v Woolworths* considered just how far these clauses can extend.

Woolworths and Coles each argued that the salaries could be considered over ***multiple pay*** periods. That is, if an employee's salary was AU$1,000 more than the award in one fortnight, then this AU$1,000 could be applied to a shortfall in a different fortnight. Woolworths' employment contracts specifically stated that this could be done over a 26-week period, while Coles' contracts were less specific.

While the decision considers many previous cases addressing these offsetting arrangements, it found that this specific issue had never been directly considered. In determining this issue for the first time, Perram J found the payment made for each pay period could only be set off against entitlements which arose during that ***same period***. While His Honour did not find the 26-weeks clause invalid, it was interpreted to only allow for this "pay period by pay period" approach.

The employers argued that, if this were the case, any compensation due to employees under the FW Act should be reduced by the amount of the "overpayment". His Honour rejected these "de facto offset" arguments on the basis that there was no overpayment – because even if there was an excess against the award, the employees were contractually entitled to that amount.

Other key findings included:

No Offset Clause

In the few cases where there was no offset clause in the contract, salaries could only satisfy the employees' ordinary wages – even if they exceeded the other entitlements, like overtime and penalty rates, an employee was entitled to under the award.

Drafting Offsets

The case stressed the importance of confirming that offsets are well drafted and clear in the entitlements that are satisfied by an employee's salary. In particular, the court found that in the absence of a clear indication of the order in which entitlements are to be allocated, they will be split equally (which could increase the quantum of an underpayment and the number of potential contraventions).

RECORD KEEPING

The other key findings in this decision clarified the obligations imposed on employers for record-keeping, relevant both to salaried and unsalaried employees, and indicated the severe consequences for departing from those obligations. These findings included:

Obligation Applies to all Entitlements

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The *Fair Work Regulations 2009* (FW Regulations) require that employers keep records of the hours which incur ***all*** penalties, loadings and allowances, not just overtime.

Obligations Apply Even if There is a Salary

Just because an employee is receiving a salary does not mean that they do not have an entitlement to these award entitlements – it simply means that the salary ***satisfies*** those entitlements. This means employers still need to keep track of the hours that will incur penalties, loadings, allowance and overtime, even if the salary covers it – so that employers can make sure that it does indeed satisfy these entitlements.

Clocking in and Out May Not be Enough

The employers were criticised even where they had timekeeping records of employees clocking in and out – because this just recorded the hours worked, and did ***not*** indicate which of those hours were overtime (or incurred other penalties).

The decision also clarifies that where records have not been kept, the employer must ***disprove*** the facts that are alleged by an employee, union or the FWO about such entitlements; however, in the case of incomplete records, employers only need to disprove claims made about those parts of the records that are missing.

AGREEMENTS TO VARY AWARD ENTITLEMENTS

The decision deals with a wide array of entitlements under the GRIA, many of which warrant a closer read for those in the retail industry. These include the nuanced interpretations of the many overtime triggers contained in that award.

However, the issue of varying award terms applies more broadly across all industrial instruments that allow such variations. For example, the GRIA provides that:

- An employee's roster can be changed by mutual agreement;
- An employee is entitled to a break of 12 hours between shifts, but this may be reduced to no less than 10 hours by agreement;
- Part-time employees are entitled to a regular pattern of work, and working in excess of this pattern can give rise to overtime, but this pattern may be altered by agreement.

The decision clarifies that for an employee to truly "agree" to a variation permitted by an industrial instrument, they must know what they are agreeing to. For example, it is not enough to accept a roster with only 10 hours between two shifts – the employee must know that they are giving up a break of 12 hours by entering such an agreement. Similarly, it may not be enough for an employee to agree to change their pattern of work if they do not know they are forgoing overtime if they make such an agreement.

KEY ACTIONS FOR EMPLOYERS

Although this decision is likely to be appealed once the proceeding is finally determined, these findings significantly increase the risks that salaried employees who are paid well above the amounts prescribed by their industrial instrument on an annual basis will be found to have been underpaid, and that the excess will be much

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less beneficial than before. It is of course possible to avoid the application of a modern award via a guarantee of annual earnings but this is limited to employees earing over the high income threshold which is currently AU$181,300 per annum.

Further, they call into question whether common timekeeping and record-keeping practices will be sufficient to meet the obligations in the FW Act and FW Regulations.

Following a year and a half in which penalties have risen dramatically, the bar for "serious contraventions" has lowered, and the criminal offence of wage theft has been introduced, the consequences for getting wage compliance wrong have never been more significant. Employers should immediately take the following steps:

Award Entitlements

Ensure they understand their underlying award or enterprise agreement entitlements (including making sure they know whether employees are covered by an industrial instrument or not).

Offset Clauses

Review the offset clauses in their template contracts ***and*** their rostering and payment practices to make sure employees are paid enough to satisfy award or enterprise agreement entitlements in ***every pay period***.

Check Records

Make sure they are keeping records and that they are recording *everything* they need to (even where an "all in" over award or enterprise agreement salary is paid).

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