

**IN THE FAIR WORK COMMISSION**

**Matter No: AM2017/59**

**Section 156 - Four Yearly Review of Modern Awards –*Restaurant Industry Award 2010***

**SUBMISSION IN REPLY OF UNITED VOICE**

2 November 2018

1. This submission is made pursuant to the amended directions of the Fair Work Commission dated 19 September 2018 and in reply to the submission of Restaurant and Catering Industry Association ('RCI') filed on 12 September 2018.

**Item 9 –Meal breaks**

2. RCI seeks to amend clause 32 of the *Restaurant Industry Award 2010* ('**Restaurant Award**') to allow breaks to become the subject of individual flexibility agreements (IFAs).
3. United Voice opposes this claim.
4. RCI states that this provision is found in a '*like*' award, the *General Retail Industry Award 2010* ('Retail Award').
5. The retail sector and the restaurants sector are not like sectors. The RCI have not provided any probative material to base a finding that the Retail Award is a similar award to the Restaurant Award.
6. That IFAs can be utilised to vary meal breaks under the Retail Award is of little relevance to the Commission in determining whether employees covered under the Restaurant Award should be treated in the same manner.
7. Meal breaks are important in reducing fatigue in the workplace and provide an opportunity for employees to rest, recover and eat a meal.
8. A distinguishing feature of the sector covered by the Restaurant Award is that restaurants provide meals and beverages at defined service times: breakfast, lunch and dinner. Work under this award often concerns quite specific service periods which will be particularly busy for relatively short periods. It is not uncommon for there to be a few hours where employees are '*run off their feet.*' Split shift are common under this award and relate to the periodicity of the intensity of work and that there are well defined and knowable busy periods. This is not the case with retail work.
9. The periodicity of the intensity of work covered by the Restaurant Award is a compelling reason to maintain meal breaks as a fixed part of the award safety net.
10. Allowing meal breaks to become the subject of IFAs could result on employees missing out on meal breaks altogether, or with employees not receiving adequate meal breaks.
11. Whilst IFAs are intended to result in the employee "*being better off overall at the time the agreement is made than the employee would have been if no individual flexibility agreement had been agreed to*" in accordance with clause 7.3(b), the reality is IFAs are not monitored appropriately and there is no guarantee that the employee will be better off under an IFA.

12. This must be considered in light of the high levels of non-compliance in the hospitality industry (including restaurants).
13. A July 2018 Report by the Fair Work Ombudsman (FWO) found that 72% of businesses audited in the industry as part of FWO's food precinct activities were non-compliant.<sup>1</sup> This is an astonishing level of non-compliance with minimum award standards.
14. The FWO found that the non-provision of meal breaks was a common breach in the food precinct audit.<sup>2</sup>
15. Given the high level of non-compliance with the award already, there is a real risk that expanding the IFA provisions to include meal breaks will result in employees being worse off than under the Restaurant Award.
16. The variation sought should be rejected.

#### **Item 6 –Payment of wages**

17. RCI seeks to amend clause 27 to permit payment of wages to be made on any day of the week.
18. United Voice opposes this claim.
19. Clause 27.1 states in part that '*Except upon the termination of employment, all wages including overtime must be paid on any day other than Friday, Saturday or Sunday in each week.*'
20. The requirement under the Restaurant Award that wages are to be paid Monday to Thursday provides a benefit to employees by ensuring that they have timely access to their wages. Most banks are closed Saturday and Sunday. Electronic transfers made Friday to Sunday generally take longer to process than transfers made Monday to Thursday.
21. Amending the Restaurant Award in the manner proposed by RCI would result in delays in payment for employees covered by this award, many of whom are low paid and rely upon receiving wages in a timely manner. This may increase financial distress experienced by employees covered under the Restaurant Award.
22. The issue of the payment of wages under the Restaurant Award is already being addressed in the current 4 yearly review in the Payment of Wages Common Issue (AM2016/8) proceedings which are ongoing. There is a separate extant Full Bench dealing with this issue.
23. The Commission published a decision on 1 December 2016<sup>3</sup> which included a model term for the payment of wages. The provisional view of the Payment of Wages Full Bench, which includes the President, was that all modern awards should include a term providing for the method and frequency of payment and that there was some utility in establishing a model payment of wages and other amounts award term. The work of this Full Bench has recently concentrated on the payment of termination entitlements.
24. There has been an extensive process of consultation and many conferences. On 19 September 2017, the Commission issued a statement directed to further consultation concerning the

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<sup>1</sup> Fair Work Ombudsman, Food Precincts Activity Report, July 2018, page 3. Note: This figure includes employees covered by the *Restaurant Industry Award 2010*, *Hospitality Industry (General) Award 2010* and the *Fast Food Industry Award 2010*, accessed at <https://www.fairwork.gov.au/reports/food-precincts-activities-report/download-pdf>

<sup>2</sup> Fair Work Ombudsman, 'FWO's Food Precincts campaign returns \$471,904 in wages owed to hospitality workers', 11 July 2018, accessed at <https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/july-2018/20180711-food-precincts-mr>

<sup>3</sup> *4 Yearly Review –Payment of Wages* [2016] FWCCFB 8463.

model clause and the RCI did not respond.<sup>4</sup> In a statement made on 26 April 2017, a statement was issued summarising issues for a conference on 4 May 2017 which traversed the claim that the RCI now seeks to make in the award stage review of this modern award. The RCI has not in any meaningful way sought to participate in the Payment of Wages Common issue.

25. It is not appropriate for the Commission to deal with this claim within the award specific review of the Restaurant Award in the 5<sup>th</sup> year of the current 4 yearly review when there has been a common issue which is ongoing dealing with the issue and seised with specialist expertise. The proceedings AM2016/8 have been in the usual manner public and the entire file is available on the Commission's webpage.
26. The variation sought should be rejected or alternatively not dealt with in these proceedings.

#### **Item 4 –Junior employees**

27. RCI seeks to amend clause 2 of the Restaurant Award PLED to exclude junior employees who provide table service of liquor to customers from the definition of *'liquor service employee'*.
28. United Voice opposes the proposed variation.
29. Clause 15.1 of the Restaurant Award states in part that *'Where the law permits, junior employees may be employed in the bar or other places where liquor is sold. Junior employees working as liquor service employees must be paid at the adult rate of pay in clause 20.1 for the classification for the work being performed.'*
30. This is reflected in similar terms in clauses 13.4 and 13.5 of the Restaurant Award PLED:

*13.4 Where the law permits, junior employees may work in a bar or other place where liquor is sold or dispensed.*

*13.5 Junior employees working as liquor service employees must be paid as an adult in accordance with Table 2—Minimum rates at the classification rate for the work being performed.*

31. As part of the plain language proceedings a definition of *'liquor service employee'* has been inserted into clause 2 of the Exposure Draft.
32. The definition states:  
*'Liquor service employee means a person employed to sell or dispense liquor in bars, bottle departments or shops and includes a cellar employee.'*
33. The addition of a definition of *'liquor service employee'* does not alter the obligation on an employer.
34. The requirement to pay junior employees working as liquor service employees the adult rate is in recognition that the service of alcohol carries with it specific obligations and responsibilities, no different to those placed on adult employees.
35. There are 5 categories of junior employee under clause 20.3 of the Restaurant Award. Junior employees 16 years and under receive 50% of the adult wage, employees 17 years and under receive 60% of the adult wage, employees 18 years of age receive 70%, employees 19 years of age receive 85% and employees 20 years of age receive 100% of the adult wage.
36. The age at which an employee may serve alcohol varies by state. In NSW, Victoria, South Australia, the Northern Territory and Western Australia the general rule is that an employee

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<sup>4</sup> *Statement and Directions* [2017] FWCFB 4817.

must be 18 years old to serve alcohol<sup>5</sup>. In Tasmania employees must be at least 16 years of age to serve liquor and must be 18 years old in some circumstances.<sup>6</sup> In the ACT, an employee under the age of 18 cannot supply alcohol in adults-only areas of licensed premises.<sup>7</sup> In Queensland, there is no minimum age requirement in the *Liquor Act 1992*.<sup>8</sup>

37. All states and territories require that employees serving, selling or supplying alcohol acquire and maintain specific qualifications and skills. For example, Responsible Service of Alcohol training is mandatory for everyone in NSW who sells serves and supplies alcohol. Similarly, completing a Responsible Service of Alcohol program is mandatory for staff selling, offering or serving liquor in Victoria.
38. There are significant penalties for breaching responsible service of alcohol requirements.
39. For example, in NSW, an employee can face up a fine to \$11,000 for supplying alcohol to an intoxicated person.<sup>9</sup>
40. There is no difference in the qualifications and skills required for the service or supply of liquor between junior employees and adult employees (where junior employees are permitted by law to serve alcohol), and both junior employees and adult employees are subject to significant penalties if they breach their responsibilities under state legislation for the responsible service of alcohol. The current Restaurant Award recognises this by ensuring that junior employees working as liquor service employees must be paid at the adult rate.
41. RCI contend that an employee who serves alcohol by waiting on a table should be paid a lower wage, on the basis that employees who deliver alcohol to tables are somehow performing a lesser duty than employees who pour and serve alcohol at a bar.
42. This is incorrect.
43. An employee serving alcohol to tables is still required to hold any relevant Responsible Service of Alcohol requirements, and would still be subject to penalties if they were to breach the requirements.
44. There is no justifiable reason as to why junior employees who serve alcohol to tables should not be paid the full adult rate, as any other liquor service employee would receive.
45. The variation sought should be rejected.

**United Voice**  
**2 November 2018**

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<sup>5</sup> See s 119 of the *Liquor Act 2007 No 90* (NSW), s 122 of the *Liquor Control Reform Act 1998* (Victoria), s 107 of the *Liquor Licensing Act 1997* (South Australia), s 117 of the *Liquor Act* (Northern Territory), s 121 (10) of the *Liquor Control Act 1988* (Western Australia).

<sup>6</sup> s 9 and s 10 of the *Liquor Licensing Regulations 2016* (Tasmania).

<sup>7</sup> s 118 of the *Liquor Act 2010* (ACT).

<sup>8</sup> s 155 of the *Liquor Act 1992* (QLD).

<sup>9</sup> s 73(2) of the *Liquor Act 2007 No 90* (NSW).