



DECISION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Penalty Rates – Transitional Arrangements

(AM2014/305)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT ASBURY
COMMISSIONER HAMPTON
COMMISSIONER LEE

MELBOURNE, 21 JUNE 2017

4 yearly review of modern awards – penalty rates – hospitality and retail sectors – transitional arrangements – determinations

1. Background

[1] On 23 February 2017 we issued a decision dealing with the weekend and public holiday penalty rates, and some related matters, in a number of awards in the Hospitality and Retail sectors (the *Penalty Rates decision*).¹

[2] The *Penalty Rates decision* determined, amongst other things, that the existing Sunday penalty rates in the *Hospitality Industry (General) Award 2010 (Hospitality Award)*, *Fast Food Industry Award 2010 (Fast Food Award)*, *General Retail Industry Award 2010 (Retail Award)* and *Pharmacy Industry Award 2010 (Pharmacy Award)* did not achieve the modern awards objective, as they do not provide a fair and relevant minimum safety net. The effect of the *Penalty Rates decision* was to reduce Sunday penalty rates to 150 per cent for full-time and part-time employees in the *Hospitality, Retail and Pharmacy Awards* and to 175 per cent for casual employees in the *Retail and Pharmacy Awards*. The Sunday penalty rate for casual employees in the *Hospitality Award* remained unchanged at 175 per cent. The decision reduced the Sunday penalty rates in the *Fast Food Award* (for Level 1 employees only) to 125 per cent for full-time and part-time employees and 150 per cent for casual employees. The *Penalty Rates decision* also reduced the public holiday penalty rates in the above awards, as well as the *Restaurant Industry Award 2010 (Restaurant Award)*.

[3] On 5 June 2017, we issued the *Penalty Rates – Transitional Arrangements decision*² which dealt with the implementation of the *Penalty Rates decision*,³ including the determination of various transitional arrangements.

2. The draft determinations

[4] Draft variation determinations in respect of the Sunday penalty rate provisions in the *Fast Food, Hospitality, Restaurant, Retail and Pharmacy Awards*⁴ were published for comment on 7 June 2017. Draft variation determinations had previously been published (and commented upon) in relation to the variations to public holiday penalty rates.

[5] Submissions were received from the Australian Retailers Association, National Retail Association and Master Grocers Australia (the Retail Associations), Australian Industry Group (Ai Group), the Shop, Distributive and Allied Employees Association (SDA) and an organisation called WorkSight Pty Ltd.

[6] The Retail Associations identify two issues with the draft determination relating to the *Retail Award*. The first concerns the way the additional Sunday and public holiday rates are expressed, in that they are not consistent with the way other additional rates within the award are currently expressed. For instance, the evening and Saturday penalty rates are expressed as additional payments (a permanent employee working at those times is entitled to an additional payment of 25 per cent), whereas the draft determination expresses the penalties as a whole payment (a permanent employee working on a Sunday will be paid 195 per cent of the minimum hourly rate).

[7] The second issue raised by the Retail Associations is that the terminology used in the draft determination with respect to the reference point for the additional penalty (the ‘minimum hourly rate’) is inconsistent with the terminology used elsewhere in the *Retail Award*.

[8] The SDA advances a similar submission to that put by the Retail Associations, in relation to the *Fast Food, Retail and Pharmacy Awards*.

[9] Ai Group takes a different view and opposes the SDA’s objection to the use of the phrase ‘minimum hourly rate’ in the *Fast Food Award* draft determination. In the alternative, in the event we were to accept the SDA’s submission and adopt its proposed wording, then Ai Group submits that proposed clause 30.3 should be modified to make it plain that the amount of 250 per cent payable on a public holiday to a casual employee includes the casual loading. To the end, Ai Group proposes a modification to the SDA’s proposal as follows:

‘30.3 Work on a public holiday must be compensated by payment at the rate of 225% (250% for casual employees inclusive of the casual loading).’ (additional words underlined).

3. Consideration

[10] At the outset we note that the expressions used in the draft determinations are consistent with the approach adopted by the Commission in the course of reviewing modern awards as part of the 4 yearly review (the Review).

[11] As detailed in a statement issued on 6 February 2014,⁵ the Review consists of an initial stage (which dealt with a range of jurisdictional issues), a common issues stage and an Award stage. In the Award stage all modern awards are reviewed, in four stages. The review of each modern award involves the publication of an exposure draft which reformats the award to make it simpler and easier to understand and incorporates consistent expressions – such as

minimum hourly rate. The exposure drafts in respect of the awards which are presently before us have not yet been finalised. Further, the *Hospitality, Retail, Pharmacy and Restaurant Awards* are being re-drafted as part of the first tranche of awards in the Plain Language Project and the *Fast Food Award* has been proposed as one of the awards in the second tranche of that project.⁶

[12] Given the different stages of completion of the plain language re-drafting processes we have decided that the current form of the penalty rates provisions will be retained for the purpose of finalising these determinations. In finalising the variation determinations we will be guided by the proposals advanced by the parties. The adoption of this course will avoid any confusion that may arise for the use of different expressions within the one award. However, the drafting of these clauses will be revisited during the course of the Plain Language Project, as foreshadowed by the Retail Associations:

‘The Retail Associations understand ... that the Draft Determination may be structured so as to reflect the Plain Language Drafting process being undertaken in relation to a number of Modern Awards, and which the GRIA will be taken through in the future. While this will, once the process has been completed, resolve the issue with the Draft Determination as currently structured, it does not deal with the inconsistency that will exist between the date of a Final Determination taking effect and the completion of the Plain Language process for the GRIA.’⁷

[13] We will also adopt the modification suggested by Ai Group to proposed clause 30.3 of the *Fast Food Award*.

[14] There is one further matter in contention, namely the application of the *Penalty Rates decision* to trainees employed under the terms of the *Fast Food Award*.

[15] As we have mentioned, the *Penalty Rates decision* reduced the Sunday penalty rates in the *Fast Food Award* (for Level 1 employees only) to 125 per cent for full time and part time employees and 150 per cent for casual employees. No changes to Sunday penalty rates were made for Level 2 and Level 3 employees.

[16] The *Fast Food Award* contains three classifications – Levels 1, 2 and 3 – and also makes provision for the employment of trainees. The classification level definitions are set out in Schedule B to the award. In relation to the application of Sunday penalty rates to trainees, WorkSight submits:

‘The draft determination for the penalty rates applicable in the Fast Food Award appears to have the effect of excluding trainees from receiving any Sunday penalty at all as they are not level 1, 2 or 3 employees and there are not Sunday penalties applicable to any categories other than level 1, 2 or 3.’⁸

[17] The suggestion that the draft determination relating to the *Fast Food Award* excludes trainees (as they are not Level 1, 2 or 3 employees) is contested by Ai Group for the following reasons:

‘By the combined operation of clause 16 and clause 24 of the Fast Food Award, Schedule B to the Fast Food Award and Schedule D to the Fast Food Award, a trainee may be a level 1 employee, a level 2 employee or a level 3 employee.

Additionally, by the combined operation of clause D6.4 of the Fast Food Award and subclauses 25.5(c) and (d) of the Fast Food Award, a trainee is entitled to be paid a Sunday penalty rate if the trainee performs work on a Sunday.⁹

[18] Clause 16 requires, in effect, that all employees covered by the award be classified at one of the three levels set out in Schedule B to the award (i.e. levels 1, 2 or 3).

[19] Clause D6.4 states as follows:

‘Subject to clause D3.5 of this schedule, all other terms and conditions of this award apply to a trainee unless specifically varied by this schedule.’

[20] The wage rates for trainees are set out in Schedule D but there is nothing in that Schedule which varies the application of the award in respect of Sunday penalty rates. Accordingly, the terms of clause 25.5 – Penalty rates apply to trainees.

[21] It would seem to follow from the terms of clause 16 and Schedule B that employers are obliged to classify all employees covered by the award (including trainees) as either a level 1, level 2 or level 3 Fast Food Employee. On this construction of the award there is no need to amend the draft variation determination.

[22] However, we have not had the benefit of detailed submissions on this issue and we acknowledge that the interaction of the National Training Wage Schedule (Schedule D) and the other terms of the *Fast Food Award* are not free from doubt.

[23] In the circumstances we do not propose to vary the draft determination to make express reference to trainees. Any interested party wishing to pursue this issue should file an application to vary the *Fast Food Award* so that the matter may be fully considered.

[24] There is a final matter, in relation to the *Pharmacy Award*, which we propose to address.

[25] The Sunday penalty rates under the *Pharmacy Award* are to be reduced for ordinary hours worked between 7.00 am and 9.00 pm on a Sunday. The *Penalty Rates decision* stated that penalty rates for work *before* 7.00 am and *after* 9.00 pm on a Sunday will be the subject of further proceedings and accordingly the existing rates remain in force for hours worked during those hours.¹⁰ The draft determination published on 7 June 2017 did not make that distinction clear. The term will be amended as follows:

(d) Sunday work – 7.00 am to 9.00 pm

(i) From 1 July 2017 to 30 June 2018

A 95% (casuals 120%) loading will apply for all ordinary hours worked on a Sunday between 7.00 am and 9.00 pm.

...

(e) Sunday work – before 7.00 am and after 9.00 pm

A 50% (casuals 75%) loading will apply for all ordinary hours worked on a Sunday between 7.00 am and 9.00 pm.

[26] Final determinations will be issued today and come into operation on 1 July 2017.

PRESIDENT

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¹ [\[2017\] FWCFB 1001](#)

² Ibid

³ Reference should also be made to our decision of 17 March 2017 dealing with the operative date of certain variations in respect of late night penalties: [2017] FWCFB 1551

⁴ Draft determinations in relation to the public holiday rate provisions have already been issued for comment. Consolidated draft variation determinations arising from this decision will be issued shortly. In relation to the *Hospitality Award* and the *Restaurant Award* revised draft determination will be issued reflecting certain consequential changes to the time off in lieu provisions of the relevant public holiday clauses as considered during the conference conducted by Hampton C on 21 April 2017.

⁵ [2014] FWCFB 916

⁶ [\[2017\] FWCFB 1638](#) at [21]

⁷ Retail Associations Submission, 15 June 2017

⁸ WorkSight Pty Ltd [Submission](#), 7 June 2017

⁹ Ai Group Submission, 15 June 2017 at [9] – [10]

¹⁰ [\[2017\] FWCFB 1001](#) at [1892]