DECISION

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

Restaurant Industry Award 2010
(AM2017/42)

VICE PRESIDENT HATCHER
VICE PRESIDENT CATANZARITI
COMMISSIONER LEE SYDNEY, 24 NOVEMBER 2017

Application by Restaurant and Catering Industrial.

[1] The Fair Work Commission is currently conducting a four yearly review of modern awards in accordance with s 156 of the *Fair Work Act 2009* (FW Act). In the course of the review, a number of employer bodies have made applications to vary penalty rate provisions in a number of modern awards. These included an application made by Restaurant and Catering Industrial (RCI) to reduce penalty rates, including Sunday penalty rates, in the *Restaurant Industry Award 2010* (Restaurants Award). This and the other penalty rate applications were assigned to a specially-constituted five member Full Bench for hearing and determination.

[2] After a lengthy hearing involving the receipt of an extensive amount of evidence, the Full Bench issued its decision in the matter on 23 February 2017 (Penalty Rates Decision).[1] Regarding the Restaurant and Catering Industrial (RCI) Sunday penalty rate claim, the Full Bench concluded as follows:

> "**7.4.6 Conclusion**
>
> . . .
>
> [1155] As to the claims in respect of the Sunday penalty rate, on the material presently before us we are not satisfied that the variations proposed are necessary to ensure that the modern award sought to be varied achieves the modern awards objective. In short, RCI has not established a merit case sufficient to warrant the granting of the claim.
>
> [1156] If these were simply *inter partes* proceedings we would dismiss the RCI claim. But the claim has been made in the context of the Review and s.156 imposes an obligation on the Commission to review each modern award.
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> [1157] We propose to provide RCI (and any other interested party) with a further opportunity to seek to establish that the weekend penalty rates in the *Restaurant Award* do not provide a 'fair and relevant minimum safety net'. In the event that a

[1] [2017] FWFCB 1001, 265 IR 1

party wishes to take up this opportunity, it will need to address the deficiencies in the case put to date, as set out above. In particular, any such case will need to:

- provide material which would enable us to assess the impact of the variations proposed (see [1151]);
- provide evidence as to the effects (in terms of employment and service levels of the reductions in Sunday penalty rates consequent on the *Restaurants 2014 Penalty Rates decision* (see [1152]-[1153]);
- provide a cogent argument as to why we should depart from the *Restaurants 2014 Penalty Rates decision* in respect of Sunday penalty rates; and
- address the Productivity Commission submissions in relation to the payment of casual loading in addition to weekend penalty rates.

[1158] In relation to the provision of additional evidence as to the effects of the 2014 reduction in Sunday penalty rates, we are not suggesting that quantitative evidence (or 'natural experiment' evidence) as to the impact of these changes is required. However we do expect significantly more extensive lay evidence as to this issue than was presented in these proceedings.

[1159] In relation to the last point, in the event that we were persuaded to depart from the Transitional Review Full Bench decision we put any applicants on notice that the outcome of any further proceedings may result in the acceptance of the Productivity Commission submission such that Sunday penalty rates are varied so that all casuals receive both the Sunday penalty rate applicable to full-time and part-time employees *and* the casual loading."

[3] The Full Bench reiterated the above conclusions in paragraphs [2047]-[2049] and said:

"[2050] The RCI is to provide an indication as to whether it wishes to press its claim in light of the comments above at [2047]-[2049], by filing correspondence at amod@fwc.gov.au by **4.00 pm Friday, 24 March 2017**. We will list this matter for mention on **Tuesday, 28 March 2017**."

[4] The *Restaurants 2014 Penalty Rates decision* referred to in the above passages was a decision issued by a Full Bench of the Commission on 14 May 2014 in the conduct of the 2-yearly review of modern awards required to be conducted under item 6 of Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.[2] In that decision (2014 Decision) the Full Bench, by majority, determined to reduce the Sunday penalty rate for Level 1 and 2 casual employees only from 175% to 150% (inclusive of the casual loading) on the basis that such a variation was necessary for the modern awards objective in s 134(1) of the FW Act to be achieved.[3] However the Full Bench was not otherwise satisfied that the Sunday penalty rate of 150% in the Restaurants Award (or 175% for casuals in higher classifications inclusive of the casual loading) resulted in the award not meeting the modern awards objective.[4]

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[2] [2014] FWCFB 1996, 243 IR 132

[3] Ibid at [139]-[140]

[4] Ibid at [131]

[5] On 24 March 2017, RCI wrote to the Commission confirming its intention to press its claim concerning Sunday penalty rates in relation to the Restaurants Award and to address the matters referred to in paragraphs [1157] and [2048] of the Penalty Rates Decision. In a written submission filed by United Voice on the same day, it submitted, among other things, that the RCI should not be permitted to re-litigate its "*failed claim*" for the variation of penalty rates.

[6] On 5 June 2017, the Full Bench issued a further decision, the *Penalty Rates – Transitional Arrangements* decision[5] which dealt with the implement of the Penalty Rates Decision. In respect of the Restaurants Award, this decision stated:

> "[240] We are conscious that the view expressed in the *Penalty Rates decision* – that RCI be provided a further opportunity to seek to establish that the weekend penalty rates in the *Restaurant Award* do not provide a 'fair and relevant minimum safety net' – was made without the benefit of submissions from the interested parties. In the circumstances the appropriate way forward is for RCI to file an application to vary the *Restaurant Award* setting out the penalty rate variations it seeks. That application will be allocated to a Full Bench and it will be a matter for that Full Bench, after providing the interested parties with an opportunity to be heard, to determine whether RCI is to be provided with a further opportunity to litigate its claim."

[7] On 28 July 2017 Restaurant and Catering Industrial (RCI) made an application to amend clause 34.1 of the Restaurant Award to read as follows:

Type of employment	Monday to Friday	Saturday	Sunday	Public holidays
	%	%	%	%
Full-time and part-time	100	125	~~150~~ 125	225
Casual ~~Introductory Level,~~ Level 1, Level 2 ~~(inclusive of 25% casual loading)~~	125	150	150	250
Casual ~~Level 3 to Level 6 (inclusive of casual 25% loading)~~	~~125~~	~~150~~	~~175~~	250

[8] As foreshadowed in the 5 June 2017 decision, this application was referred to us for determination. At a directions hearing on 25 August 2017, directions were made for the filing of submissions concerning the preliminary question of whether RCI should be given the opportunity to re-litigate its claim, and the hearing of that preliminary question was listed for hearing on 16 November 2017.

[5] [2017] FWCFB 3001

[9] Pursuant to the directions, on 29 September 2017 RCI filed a written submission in which it outlined the case it would present if it was given the opportunity to do so. In relation to evidence concerning the business effect of the limited Sunday penalty rate reduction in the Restaurants Award determined in the 2014 Decision, RCI submitted:

> "4. The case to be advanced by RCI is:
>
> i. evidence that employment increased in the lower grades will be led by lay witnesses that employees hired on Sundays prior to the 2014 2 Yearly Review changed following the lowering of penalty rates.
>
> ii. evidence that hours increased for employees in the lower grades will be led by lay witnesses that employees hired on Sundays prior to the 2014 2 Yearly Review changed following the lowering of penalty rates.
>
> iii. evidence will be by lay witness evidence who can demonstrate by records that employment increased and hours for employees increased.
>
> iv. that service levels rose will be attested to by lay evidence from industry participants.
>
> 5. RCI will provide significant evidence that the lowering of penalty rates had a positive employment effect.
> . . .
> 6. The case to be advanced by RCI is:
>
> i. RCI would present cogent evidence to depart from the Restaurants 2014 Penalty Rates decision based on the arguments presented in this Award Review. The current level of penalty rates does not provide a fair and relevant minimum safety net of terms and conditions. The disutility argument applies to the Restaurant Award as it does to the General Retail Industry Award and other awards where the Sunday penalty rates were lowered...."

[10] In its written submissions filed on 3 November 2017, United Voice stated:

> "28. The '*evidence'* referred to by RCI in its submissions is unhelpfully vague. The RCI submissions as to the evidence it proposes to call present as a 'wish list' of what the case "would be" without providing any detail. Given the significant undertaking of any RCI re-hearing the submissions do not justify such a re-hearing.
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> 29. RCI does not identify the type or identity of the experts it proposes to call. RCI does not inform the Commission or United Voice of the questions or the particular matters any experts will be asked to address, and/or how it is proposed that any experts will engage with the findings in the *Penalty Rates Decision* about these matters. RCI does not identity any expert to be relied on or provide some description of his or her qualifications (the practise that was applied in the Penalty Rates Review).
>
> 30. RCI proposes to call survey evidence without identifying whether it will seek to rely on surveys already conducted, or intends to conduct a fresh survey or surveys for

> the purposes of this hearing. This is a critical matter given the findings of the Full Bench in the *Penalty Rates Decision*.
>
> 31. Whilst it may not be necessary for RCI to identify by name the lay witnesses it proposes to call, given the comments of the Full Bench about the paucity of the lay evidence called by RCI, and the need for '*significantly more extensive lay evidence'* in any further hearing,[17] it is remarkable that there is no material before the Commission about the number of lay witnesses proposed to be called, the size and locations of their businesses, the length of time that the businesses have been in operation, the approximate number of employees, or even if such businesses are covered by the *Restaurant Award*.
>
> 32. The vague and general assertions of RCI do not allow the Commission to assess, with any confidence, that if a re-hearing is permitted, the re-hearing will be a proper exercise of its statutory powers."

[11] In its submissions in reply filed on 10 November 2017, RCI stated that "the Full Bench can be assured that the decision *[sic]* will address the matters raised in the Full Bench decision. RCI has communicated with members to advise them that the case may continue and that witnesses will be sought, has communicated with experts to obtain their consent to participate and spoken to survey firms to also seek their ability to carry out a survey."

[12] On 15 November 2017, the day before the listed hearing of the preliminary question, RCI sent correspondence to the Commission stating the following (formal parts omitted):

> "We refer to the above matter, which we note is listed for a hearing tomorrow.
>
> RCI has made a decision not to proceed with its claim pursuant to paragraph [1157] of the penalty rates decision, and will instead seek to pursue its claim at a later date through alternative mechanisms.
>
> We thank the Commission and United Voice for their time.
>
> Please confirm that there will be no requirement for the parties to appear at the hearing tomorrow."

[13] In response, the Commission notified the parties the same day that their attendance at the hearing was required in order "to consider the final disposition of the review of penalty rates provisions" in the Restaurant Award. RCI and United Voice consequently attended the hearing the following day. During the hearing, the following exchange occurred between the bench and counsel for the RCI:

> "VICE PRESIDENT HATCHER: ...The Full Bench has noted the correspondence received from Restaurant & Catering Australia, but it raises a question as to on what basis we now conclude the review, that is, we had the penalty rates decision which indicated a provisional outcome but gave Restaurant and Catering Industrial a further opportunity. It's now made a decision not to pursue that opportunity. Are we now in a position to conclude that at least insofar as the penalty rate provisions of the award are concerned the provisions meet the modern awards objective and the review is concluded? Mr Duc?

MR DUC: That's so. The common issue of the penalty rates from RCI's point of view should be concluded.

VICE PRESIDENT HATCHER: We need to form a conclusion that the provisions are consistent with the modern awards objective. Is there anything else preventing us from forming that conclusion?

MR DUC: No, your Honour."

[14] The fact that RCI has decided to abandon, at least for the time being, its application to reduce Sunday penalty rates is not, by itself, conclusive of the Commission's task in undertaking the 4-yearly review of the Restaurants Award insofar as its penalty rates provisions are concerned. As the Full Bench in the Penalty Rates Decision[6] said:

> "[110] The Review is to be distinguished from *inter partes* proceedings. Section 156 imposes an obligation on the Commission to review *all* modern awards and each modern award must be reviewed in its own right. The Review is conducted on the Commission's own motion and is not dependent upon an application by an interested party. Nor is the Commission constrained by the terms of a particular application.[35] The Commission is not required to make a decision in the terms applied for (s.599) and, in a Review, may vary a modern award in whatever terms it considers appropriate, subject to its obligation to accord interested parties procedural fairness and the application of relevant statutory provisions, such as ss.134, 138 and 578."

[15] Accordingly it is necessary for us to form our own conclusion as to whether any variation to the Sunday penalty rates provisions of the Restaurants Award is necessary in order to ensure that the award meets the modern awards objective in s 134(1). In this respect the relevant considerations are as follows:

- The limited adjustment to Sunday penalty rates made in the 2014 Decision was considered by the Full Bench in that case to be sufficient to ensure that the Restaurants Award achieved the modern awards objective – that is, the Sunday penalty rates otherwise prescribed by the award were not inconsistent with the modern awards objective.

- No party has ultimately sought to advance a case that the 2014 Decision should be departed from because it was wrongly decided or because of changed circumstances or for any other reasons.

- The Full Bench in the Penalty Rates Decision, having heard the RCI's case for a change to the penalty rate provisions of the Restaurants Award, was not satisfied that the RCI had established a merits case sufficient to warrant varying the Sunday penalty rates in the award.

- Although the Commission is not, as a non-judicial body, bound by principles of *stare decisis*, as a matter of policy and sound administration it will generally follow

[6] [2017] FWCFB 1001, 265 IR 1

previous Full Bench decisions relating to the issue to be determined in the absence of cogent reasons for not doing so.[7]

- No further evidence has been placed before us to justify a departure from the conclusions expressed in the 2014 Decision and the Penalty Rates Decision.

- Although RCI's submission of 29 September 2017 might be read as suggesting that evidence of this nature was in existence, its later submission of 3 November 2017 confirmed that no such evidence had in fact been obtained, and therefore its earlier submission is to be read merely as a description of a case which it hoped to be able to advance rather than a case which it was actually in a position to advance.

- Although not determinative, RCI's concession through its counsel that the Commission was in a position to conclude that the Sunday penalty rates provisions of the Restaurants Award were consistent with the modern awards objective must be given significant weight.

- There is no other matter of which we are aware to support a departure from the relevant conclusions stated in the 2014 Decision and the Penalty Rates Decision.

[16] Accordingly we confirm and adopt the conclusions concerning the Sunday penalty rates provisions of the Restaurants Award reached in the 2014 Decision and the Penalty Rates Decision. We find that no further reduction in the Sunday penalty rates prescribed by the Restaurants Award is necessary in order to ensure that the award achieves the modern awards objective. On that basis, this proceeding is now terminated.

VICE PRESIDENT

Appearances:

A. Duc of counsel on behalf of Restaurant and Catering Industry Association for Australia.
C. Dowling of counsel and *K. Burke of counsel* on behalf of United Voice.

Hearing details:
2017.
Sydney:
16 November

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[7] *Cetin v Ripon Pty Ltd (T/as Parkview Hotel)* (2003) 127 IR 205 at [48]