



FairWork
Commission

DECISION

Fair Work Act 2009

s.156—4 yearly review of modern awards

4 yearly review of modern awards – Award stage – General Retail Industry

Award 2020

(AM2017/60)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
COMMISSIONER LEE

MELBOURNE, 4 DECEMBER 2020

4 yearly review of modern awards – award stage – General Retail Industry Award 2020 – substantive issues.

1. Background.

[1] In a decision published on 24 November 2020¹ (the *November 2020 Decision*) we determined the remaining outstanding claim made in the 4 yearly review of the *General Retail Industry Award 2020* (the Retail Award).

[2] In the *November 2020 Decision* we rejected a claim by the Shop, Distributive and Allied Employees Association (SDA) to vary what is now clause 17.2 of the Retail Award to limit the application of junior rates. The proposed variation sought to confine the payment of junior rates to level 1 employees only; with the consequence that employees engaged at higher levels would be paid the full adult rate. However, while dismissing the SDA’s claim we went on to observe that the proceedings had raised an anomaly which required rectification:

‘It seems to us that the application of junior rates to level 4 classification employees gives rise to an anomaly. It is conceivable that, depending on their age and service with their employer, a 20 year old tradesperson may only receive 90 per cent of the level 4 minimum rate. Such an outcome is inconsistent with the general approach adopted by the Commission to the proper fixation of minimum rates. As mentioned earlier, the tradespersons rate (level 4 in the Retail Award) should align with the C10 rate in the *Manufacturing and Associated Industries and Occupations Award 2020*; but that is not presently the case for junior employees under the Retail Award. As mentioned earlier, the concepts of uniformity and consistency underpin the fixation of minimum wages in modern awards. In a practical sense this means that the minimum wage rate for a tradesperson should be set consistently across the modern award system; this is not the case in the Retail Award because of the application of junior rates to level 4 employees.

¹ [2020] FWCFB 6301

Further, the classification definitions associated with classification levels 5, 6, 7 and 8 all envisage the performance of work at a higher level than that performed by a level 4 employee. Accordingly, if junior rates are not applicable to level 4 employees it makes no sense to apply them to higher classification levels.²

[3] To rectify the identified issue we decided to vary clause 18.2 to provide that junior rates only apply to classification levels 1, 2 and 3.

[4] During the hearing on 18 November 2020 we invited the parties to make oral submissions in relation to the operative date of any variation we decided to make. The SDA submitted that any such variation should take effect ‘as soon as possible’. The various employer parties proposed a delayed operative date. The NRA submitted that from a ‘practical perspective’ alignment with increases resulting from the 2019-20 Annual Wage Review³ would reduce the administrative burden associated with the implementation of payroll changes.

[5] In the *November 2020 Decision* we observed that the proposal advanced by the NRA seemed sensible but acknowledged that the parties had only been afforded a limited opportunity to consider the issue of the operative date of the variation. We went on to express the *provisional* view that the variation operate from 1 February 2021.

[6] Any party opposed to our *provisional* view in respect of the operative date of the variation determination was directed to file a short written submission setting out their opposition by **4pm Tuesday, 1 December 2020**. Any submissions in reply are to be filed by **4pm Thursday, 3 December 2020**. In the event that there are no submissions opposing our *provisional* view we stated that we would issue the variation determination, operative 1 February 2021 and that if the matter is contested we would determine the operative date on the papers.

[7] The NRA filed a [submission](#) on 1 December and the SDA filed a [submission in reply](#) on 3 December. We turn first to the NRA submission.

[8] Much of the NRA’s submission is directed at the substance of the *November 2020 Decision*; that is the decision to vary clause 18.2 to provide that junior rates only apply to classifications levels 1, 2 and 3. As the NRA notes in its submission, the substance of our decision was not the subject of the directions we issued, which only concerned the operative date of the decision made. Despite this we propose to briefly respond to the NRA’s submissions directed at our substantive decision. The short point advanced by the NRA is that there was no evidence before us regarding the work value of junior employees employed at the various classification levels in the Retail Award and that we did not canvass any considerations of work value reasons justifying the variation we decided to make.

[9] We accept that no evidence was adduced in respect of the work value of junior employees employed at the various classification levels in the Retail Award. We also accept that the application (and the variation we decided to make) vary modern award minimum wages and consequently we must be satisfied that the variation is justified by work value reasons; a point we acknowledged at [26] of the *November 2020 Decision*.

² [2020] FWCFB 6301 at [84] – [85]

³ [2020] FWCFB 3500

[10] Section 156 relevantly provides:

(3) In a 4 yearly review of modern awards, FWA may make a determination varying modern award minimum wages only if FWA is satisfied that the variation of modern award minimum wages is justified by work value reasons.

(4) Work value reasons are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:

- (a) The nature of the work;
- (b) The level of skill or responsibility involved in doing the work;
- (c) The conditions under which the work is done

[11] We reject the suggestion that the *November 2020 Decision* did not canvass any work value reasons justifying the variation we propose to make.⁴ At [83] of the *November 2020 Decision* we noted that:

‘A fundamental feature of the minimum wage objective is the requirement to establish and maintain ‘a safety net of fair minimum wages’, and a necessary element of this is that the level of those wages bears a proper relationship to the value of the work performed.’⁵

[12] At [73] and [74] we explained the principles to be applied in the fixation of award minimum rates of pay, which requires a three step process:

1. The key classification rate in the award is to be fixed by reference to the minimum rate for a fitter in the *Metal Industry Award 1998* (i.e. \$477.20);
2. Once the key classification rate has been properly fixed the other rates in the award are adjusted by applying the internal award relativities which have been established, agreed or maintained; or
3. Any residual component above the identified minimum rate is to be separately identified and not subject to future increases.⁶

[13] The C10 rate in the Manufacturing and Associated Industries and Occupations Award 2020 is central to the fixation of modern award minimum rates and the tradespersons rate (level 4 in the Retail Award) should align with that rate, but that is *not* presently the case for junior employees under the Retail Award. As we note at [84] – [86] of the *November 2020 Decision*:

⁴ See generally [27] – [28], [73] – [74], [83] – [86] of the *November 2020 Decision*

⁵ [2020] FWCFB 3500 at [99].

⁶ See generally *Clerks (Breweries) Consolidated Award case* Print R9120, 15 September 1999 per Ross VP at [28] – [61].

'In a practical sense this means that the minimum wage rate for a tradesperson should be set consistently across the modern award system; this is not the case in the Retail Award because of the application of junior rates to level 4 employees.'

Further, the classification definitions associated with classification levels 5, 6, 7 and 8 all envisage the performance of work at a higher level than that performed by a level 4 employee. Accordingly, if junior rates are not applicable to level 4 employees it makes no sense to apply them to higher classification levels.

To rectify the identified anomaly, we propose to vary clause 18.2 of the Retail Award to provide that junior rates only apply to classification levels 1, 2 and 3. A number of the hourly rates of pay schedules in Schedule B will also require amendment. We are satisfied that the variation we propose is justified by work value reasons, in particular the level of skill involved in doing the work when compared to equivalent classification levels in other modern awards.' (Emphasis added)

[14] As to the operative date of the variation we propose to make, the NRA submits that the submission it advanced during the course of the oral hearing on 18 November 2020 'was heavily caveated, noting the limited time that parties had been given to consider the particular question'.⁷ The NRA goes on to reiterate the submission it advanced at the hearing,:-

'any decision needs to not only consider the practical considerations of how businesses may most effectively administer such a change through their payroll systems, but also further considerations of the wider economic context on the best data available.'⁸

[15] The NRA goes on to note:

(a) While an implementation date of 1 February 2021 would align with increases to the minimum wage made by the Annual Wage Review 2019-20, this will be followed in comparatively short order by increases made by the Annual Wage Review 2020-21.

(b) The final increase to evening penalty rates for casual employees is due to take effect on and from 1 March 2021.

(c) The JobKeeper wage subsidy scheme is due to conclude on 28 March 2021

The net consequence of the above is that if the implementation of the proposed determination was to commence on 1 February 2021, it would do so at a time when wage costs under the Retail Award are already in a state of flux and businesses would be under the pressure to deal with these'⁹

[16] Finally, the NRA submits:

'There is a risk that additional changes to the Retail Award targeted specifically at junior employees would create a perception of such employees as posing an additional cost, even in

⁷ NRA submission 1 December 2020 at [2.1]

⁸ Ibid at [2.2]

⁹ Ibid at [2.3] and [2.4]

relation to those employees unaffected by the determination which may have adverse ramifications for the employment of juniors.¹⁰

[17] The NRA concludes by urging that we ‘take a cautious approach to safeguarding employee outcomes whilst allowing a modicum of stability for employers, rather than heaping several significant changes on employers in rapid succession.’

[18] It is convenient to deal first with the assertion that there is ‘a risk’ that the variation ‘may have adverse ramifications for the employment of juniors’. The proposition put seems to be that removing the application of junior rates to levels 4 – 8 will somehow have adverse ramifications for the employment of juniors in the Retail industry generally, even at levels 1 – 3 which are unaffected by the variation. We reject this proposition.

[19] As we noted in the *November 2020 Decision*, ‘it is likely that very few junior employees will be employed at classification levels 4 and above’.¹¹ The majority of junior employees covered by the Retail Award are employed at level 1 – which is *not* affected by the variation we propose – it is likely that only 10 – 15 per cent of junior employees are employed in classifications higher than level 1.¹² We fail to see any basis for the proposition that the variation we propose will adversely impact the employment of juniors at levels 1 to 3 of the Retail Award.

[20] As to the other arguments advanced by the NRA we accept that the fact that the final increase to evening penalty rates for casuals is due to take effect on 1 March 2021 and that the conclusion of the JobKeeper program is scheduled to conclude on 28 March 2021 are considerations which weigh in favour of a later operative date.

[21] Regrettably, the NRA chose not to advance any proposal in respect of what particular operative date it favoured.

[22] In reply the SDA continued to press for the implementation of the variation as soon as possible but notes that ‘the implementation date proposed by the Full Bench aligns with the minimum rates increase already programmed’.

[23] No further submissions were filed by either ABI or the Newsagents’ Associations, but we note that during the course of hearing on 18 November 2020 Mr Booth, on behalf of the Newsagents’ Associations submitted that an operative date of 1 July would be ‘a more appropriate date’.

[24] We acknowledge that the retail industry has been particularly adversely impacted by the various public health restrictions which have been instituted to contain the pandemic. We are also conscious that there are other wage cost increases that will impact on retail businesses in

¹⁰ Ibid at [2.5]

¹¹ [2020] FWCFB 6301 at [95]

¹² Ibid at [38]

February and March 2021. In all the circumstances, we have decided that the variation we propose to make will operate from 1 May 2021.

PRESIDENT

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