



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

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

AM2014/305

s.156 - 4 yearly review of modern awards

**Four yearly review of modern awards
(AM2014/305)**

Melbourne

10.57 AM, THURSDAY, 23 FEBRUARY 2017

PN28607

JUSTICE ROSS: Please be seated. The Fair Work Act requires the Commission to conduct a four yearly review of all modern awards. As part of the review, various employer bodies have made application to vary the penalty rate provisions in a number of modern awards. These applications have been heard together. The decision we are handing down this morning deals with the review of weekend and public holiday penalty rates in a number of hospitality and retail awards.

PN28608

The conduct of these proceedings has been a substantial undertaking. We have heard evidence and submissions over 39 days of hearings. Evidence was given by 143 lay and expert witnesses of whom 128 were required for cross-examination. Over 5900 submissions have been received from the principal parties, state and territory governments, church-based organisations, political entities and individual employees and employers. Evidence from the final witness was heard on 28 September last year and the final written submission was received on 4 February this year.

PN28609

The Commission's website has been used extensively to facilitate broad participation in the proceedings. Interested persons were encouraged to subscribe to a dedicated notification service to keep them informed about the case. The Commission's task in the review is to decide whether a particular modern award achieves the modern awards objective. If it does not then it is to be varied, such that it only includes terms that are necessary to achieve that objective.

PN28610

We have decided that the existing Sunday penalty rates in the hospitality, fast food, retail and pharmacy awards do not achieve the modern awards objective, as they do not provide a fair and relevant minimum safety net. The effect of the decision in respect of Sunday penalty rates is as follows:

PN28611

In the Hospitality Award the penalty rate for full-time and part-time employees will be reduced from 175 to 150 per cent. There will be no change to the Sunday rate for casuals which will remain at 175 per cent.

PN28612

In the Fast Food Award the Sunday penalty rate will be reduced for level 1 employees from 150 to 125 per cent for full-time and part-time employees, and from 175 to 150 per cent for casuals. There will be no change to Sunday penalty rates for level 2 and 3 employees in that award. Our reasons for adopting this course are associated with the preferences of level 1 employees and the limited impact of Sunday work upon those employees.

PN28613

In the Retail Award the Sunday penalty rate for full-time and part-time employees will be reduced from 200 to 150 per cent. The Sunday rate for casuals will be reduced from 200 to 175 per cent.

PN28614

In the Pharmacy Award we have only decided, at this stage, the Sunday rates for work performed between 7 am and 9 pm. The rate for full-time and part-time employees for work performed between those times will be reduced from 200 to 150 per cent. The Sunday rate for casuals will be reduced from 200 to 175 per cent.

PN28615

Except in the fast food awards and for the reasons we have explained, we have not reduced the Sunday penalty rates to the same level as Saturday penalty rates. For many workers Sunday work has a higher level of disutility than Saturday work, though the extent of the disutility is much less than in times past. We also note that it is implicit in the claims advanced by most of the employer interests that they accept that proposition. If this were not the case then they would have proposed that the penalty rates for Sunday and Saturday work be the same, but they have not.

PN28616

As to the Pharmacy Award, at this stage we have not been persuaded to make the changes proposed to the loadings applying to work before 7 am and between 9 pm and midnight. The next steps in the review of that award are set out in Chapter 12 of our decision. Nor were we satisfied that the variations proposed to the Clubs Award and the Restaurant Award are necessary to ensure that these awards achieve the modern award objective. In short, the employer organisations concerned did not establish a merit case sufficient to warrant the granting of their claims. The deficiencies in the cases put and the next steps in relation to the review of these two awards are set out in Chapter 12 of the decision.

PN28617

We have also reviewed the Saturday penalty rates in the fast food, hospitality, restaurant and retail awards and are satisfied that the existing Saturday penalty rates achieve the modern awards objective. They provide a fair and relevant minimum safety net. The review of Saturday penalty rates in the clubs and pharmacy awards is to be the subject of further proceedings.

PN28618

We have also decided to reduce the public holiday penalty rates in the hospitality and retail awards, except for the Clubs Award and the reasons for that exception are set out in the decision. The effect of our decision is that the public holiday penalty rate for full-time and part-time employees, will be reduced from 250 to 225 per cent. The rate for casuals will be 250 per cent.

PN28619

The decision to reduce Sunday and public holiday penalty rates in these awards is based on our conclusions about the common evidence, and our assessment of the evidence in relation to each of the particular awards. In Chapter 6 of the decision we consider the common evidence in the proceedings which deals with the incidents and effects of weekend work, and the employment effects of reducing penalty rates. We conclude that two propositions emerge from the common evidence.

PN28620

The first is that there is a disutility associated with weekend work above that applicable to work performed Monday to Friday. Generally speaking, for many workers, Sunday work has a higher level of disutility than Saturday work, though the extent of the disutility is much less than in times past.

PN28621

The second proposition is that we agree with the assessment in the Productivity Commission's final report, that there are likely to be some positive employment effects from a reduction in penalty rates, though it is difficult to quantify the precise effect. Any potential positive employment effects from a reduction in penalty rates, are likely to be reduced due to substitution and other effects.

PN28622

The evidence of business owners and operators in these proceedings supports the proposition that the current level of Sunday penalty rates has led employers to restrict trading hours, reduce staff levels and restrict the services provided. The evidence also supports the proposition that a reduction in penalty rates is likely to lead to; increased trading hours, an increase in the level and range of services offered on Sundays and public holidays, and an increase in overall hours worked. The changes we propose to make to Sunday and public holiday penalty rates, will result in greater consistency in the penalty rate settings in the hospitality and retail awards.

PN28623

In each of the Sunday and public holiday penalty rates we have determined, we have adopted what the Productivity Commission describes as the default approach to setting the appropriate rate for casual employees. Under this approach the rate of pay for casuals is always 25 percentage points above the rate for non-casual employees. Hence, if the Sunday penalty rate for full-time employees is 150 per cent, the rate for casuals will be 175 per cent.

PN28624

This approach may have implications for the rate paid to casuals for Saturday work under the Retail Award, and it may also result in a shift from casual to part-time employment in respect of those employed in the modern awards which are to be varied. It is important to appreciate that the conclusions we have reached in relation to the weekend and public holiday penalty rates in the hospitality and retail awards, are largely based on the particular circumstances relating to these awards.

PN28625

The hospitality and retail sectors have a number of characteristics which distinguish them from other industries. Given these distinguishing characteristics, the decisions we have made provide no warrant for the variation of penalty rates in other modern awards. Each case must be determined on its merits. In this regard we note the views expressed in the Productivity Commission final report, and I quote:

PN28626

There is no case for common penalty rates across all industries. The Commission is not recommending a reduction in the Sunday penalty rates beyond hospitality, entertainment, retail, restaurants and cafes. Regulated penalty rates as currently constructed for essential services and many other industries are justified.

PN28627

That ends the quote from the Productivity Commission Report.

PN28628

We deal with implementation issues in Chapter 11 of the decision. A substantial proportion of award reliant employees covered by these modern awards are low paid, and the reductions in Sunday penalty rates we have determined are likely to reduce the earnings of those employees who currently work on Sundays.

PN28629

The evidence of the SDA and United Voice lay witnesses provides an eloquent individual perspective on the impact of the award variations. Many of these employees earn just enough to cover weekly living expenses. Saving money is difficult and unexpected expenses produce considerable financial distress. The immediate implementation of the variations to Sunday penalty rates would inevitably cause some hardship to the employees effected, particularly those who work on Sundays.

PN28630

We have concluded that appropriate transitional arrangements are necessary to mitigate the hardship caused to employees who work on Sundays. We have not reached a concluded view as to the form of those arrangements. We will seek submissions from interested parties about that issue. For the assistance of those parties who wish to make submissions, we have expressed a number of provisional views about proposed transitional arrangements in our decision. The changes to public holiday penalty rates will take effect from 1 July 2017, and the variation of the early/late night work loadings in the restaurant and fast food awards will take effect in late March this year.

PN28631

We deal with the next steps in these proceedings in Chapter 12 of our decision. The matters addressed include; the transitional arrangements in relation to the Sunday penalty rates reductions, the potential further review of the Clubs Award and the Restaurants Award and some other retail awards, the use of the terminology penalty rates and the potential for loaded rates in certain modern awards.

PN28632

As to the last matter, a loaded rate in this context refers to a rate which is higher than the applicable minimum hourly rate specified in the modern award, and is paid for all hours work instead of certain penalty rates, such as the penalty rates for Saturday and Sunday work. We envisage that the development of loaded rates will be undertaken in consultation with the interested parties. That process will commence after we have determined the transitional arrangements in respect of the reductions in Sunday penalty rates.

PN28633

Can I conclude by expressing our appreciation to the parties and their representatives who have participated in the review, and to the staff of the Commission for their assistance. We will now publish our decision and adjourn the proceedings.

ADJOURNED INDEFINITELY

[11.12 AM]