

IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s. 156 – 4 yearly review of modern awards

4 yearly review of modern awards – Penalty rates

(AM2014/305)

OUTLINE OF SUBMISSIONS AND FINDINGS

Shop, Distributive and Allied Employees' Association

Background

1. This outline of submissions and findings is filed in the Fair Work Commission (**Commission**) on behalf of the Shop, Distributive and Allied Employees' Association (**SDA**) in accordance with the Revised Directions issued by the Full Bench on 7 August 2015.
2. In that part of the four yearly review of modern awards dedicated to the Commission's consideration of various employer parties' proposals to alter penalty rates, the SDA is entitled to represent and does represent employees covered by the *General Retail Industry Award 2010* (the **GRIA**), the *Fast Food Industry Award 2010*, the *Hair and Beauty Industry Award 2010* and the *Pharmacy Industry Award 2010* (the **PIA**) (together the '**retail group awards**').
3. There are a number of employer parties that have filed draft determinations, evidence and submissions in support of their applications to vary the penalty rates in the retail group awards. The various applications apply, among other matters, to Sunday and public holiday penalty rates.
4. The SDA submits that the variations sought are not necessary to achieve the modern awards objectives as set out in s 134(1) of the *Fair Work Act 2009* (Cth) (**FW Act**) and that there is no basis to vary the penalty rates currently set out in the modern awards.
5. This outline of submissions and findings sets out the findings the SDA submits the Commission should make based on the lay evidence filed by the SDA.

Statutory Framework

6. In conducting a four yearly review of modern awards pursuant to s 156 of the FW Act, the Commission must review each modern award¹ against the modern awards objective so as to ensure that modern awards, together with the National Employment Standards (NES), “provide a fair and relevant minimum safety net of terms and conditions”, taking into account the considerations set out in s 134(1)(a)-(h) of the FW Act.
7. In respect of the considerations set out in s 134(1)(a)-(h) of the FW Act, no particular weight should be attached to any one consideration over another; and not all of the matters identified in s 134(1) will necessarily be relevant to a particular proposal to vary a modern award.² Equally, to the extent that there is any tension between the considerations in s 134(1), the Full Bench has determined that “*the Commission’s task is to balance the various considerations and ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions.*”³
8. The review of each modern award must be undertaken in the relevant historical and statutory context.⁴ In particular, the Commission has recognised that implicit in the award modernisation process is a legislative acceptance that, at the time they were made, the modern awards being reviewed were consistent with the modern awards objective:⁵

In the Review the Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time that it was made.

9. Further, where a significant change is proposed:⁶

..., it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.

¹ FW Act, s 156(5).

² *Four Yearly Review of Modern Awards – Annual Leave* [2015] FWCFC 3406, [19], [20].

³ *Ibid*, [20].

⁴ *Four Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* [2014] FWCFCB 1788, [24].

⁵ *Ibid*.

⁶ *Ibid*.

10. The SDA submits that the proposed reductions to penalty rates sought by the employer parties in each of the retail group awards constitute a proposed significant change in existing minima. As such, they must be underpinned by a cogent merit argument supported by probative evidence properly directed to demonstrating the facts supporting the proposed variation.
11. The Full Bench of the Commission should not reduce penalty rates in the retail group modern awards unless it is satisfied that the proposed reductions are necessary to achieve the modern awards objective.⁷ The Commission can only be satisfied of this necessity if the employer parties are successful in identifying either changed circumstances since the modern awards were made, or probative evidence to show that the modern awards objective is no longer being met.

Findings from the Lay Evidence of the SDA

12. The SDA submits that, in considering the variations proposed by the employer parties to each of the retail group awards, the Commission should make the following findings on the basis of the lay evidence it has filed in these proceedings.

Existing penalty rates are an essential part of the minimum safety net

13. On the basis of the lay evidence filed by the SDA, the Commission should find that existing penalty rates are an essential part of the minimum safety net. In particular:
 - Existing penalty rates are an essential part of the minimum safety net of terms and conditions of employment for employees employed under the retail group awards.
 - Employees employed under the retail group awards are low paid.
 - Penalty rates comprise a substantial proportion of the overall earnings of employees employed under the retail group awards.
 - Many of the households in which employees employed under the retail group awards reside have low living standards and find it difficult to secure the financial resources necessary to meet the cost of living.

⁷ FW Act, s 138.

- Reducing penalty rates will have a deleterious effect on the income and living standards of employees employed under the retail group awards.

14. These findings are directly relevant to the Commission's assessment of whether the existing penalty rate provisions of the retail group awards provide a fair and relevant minimum safety net of terms and conditions and to s 134(1)(a) of the FW Act which requires the Commission to take into account the relative living standards and the needs of the low paid.

There needs to be proper compensation for the negative impacts of working unsociable hours

15. On the basis of the lay evidence filed by the SDA, the Commission should find that proper compensation for the negative impacts of working unsociable hours is required for employees employed under the retail group awards. In particular:

- Current penalty rates appropriately recognise the value that employees employed under the retail group awards and the community, including employers, place on weekends and public holidays.
- Current penalty rates are a necessary compensation for the negative impacts on employees employed under the retail group awards of working unsociable hours.
- The negative impacts of working unsociable hours include the detriment employees experience in their personal, social, familial and spiritual lives.
- The detriment to employees' personal, social, familial and spiritual lives is most acutely felt as a result of working on Sundays.
- The negative impacts of working unsociable hours are also felt by the families and friends of employees employed under the retail group awards.

16. These findings are directly relevant to the Commission's assessment of: whether the existing provisions of the retail group awards provide a fair and relevant minimum safety net of terms and conditions; the needs of the low paid (s 134(1)(a)); and to s 134(1)(da) of the FW Act which requires the Commission to take into account, relevantly, the need to provide additional remuneration for employees working unsocial, irregular or unpredictable hours or employees working on weekends or public holidays.⁸

⁸ FW Act, s 134(1)(da)(ii) and (iii).

There is an inability to offset the negative impacts of working unsociable hours

17. On the basis of the lay evidence filed by the SDA, the Commission should find that there is an inability of employees employed under the retail group awards to offset the negative impacts of working unsociable hours. In particular, those employees:
- are not able to offset the negative impacts of working unsociable hours on their personal, social, spiritual and familial lives by shifting ordinary weekend activities to alternative days during the week;
 - often have other commitments such as unpaid caring responsibilities or study during the week, which limit their capacity to shift ordinary weekend activities to alternative days during the week;
 - recognise weekends, particularly Sundays, and public holidays as different from weekdays and important to their personal, social, spiritual and familial lives.
18. These findings are directly relevant to the Commission's assessment of whether the existing provisions of the retail group awards provide a fair and relevant minimum safety net of terms and conditions and the needs of the low paid (s 134(1)(a)). Whether employees employed under the retail group awards are able to offset the negative impacts of working unsociable hours is also relevant to the Commission's consideration of the need for additional remuneration in the circumstances identified in s 134(1)(da)(ii) and (iii) of the FW Act.

There is limited or no choice regarding working unsociable hours

19. On the basis of the lay evidence filed by the SDA, the Commission should find employees employed under the retail group awards have limited or no choice regarding working unsociable hours. In particular:
- They often work unsociable hours out of necessity rather than choice (whether due to financial necessity or the necessity of maintaining employment by accepting the hours available for work);
 - They are often allocated rosters, which require them to work unsociable hours;

- Their availability to work weekends does not negate the negative impacts of working these unsociable hours.
20. These findings are directly relevant to the Commission's assessment of whether the existing provisions of the retail group awards provide a fair and relevant minimum safety net of terms and conditions and the needs of the low paid (s 134(1)(a)). Whether employees employed under the retail group awards choose to work these unsociable hours is also relevant to the Commission's consideration of the need for additional remuneration in the circumstances identified in s 134(1)(da)(ii) and (iii) of the FW Act.

Conclusion

21. The proposed variations to the retail group awards are not necessary to meet the modern awards objective. The penalty rates set out therein provide a fair and relevant minimum safety net of terms and conditions.

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5 October 2015