

Shop Distributive and Allied Employees' Association

Matter No: 2014/305

FOUR YEARLY REVIEW OF MODERN AWARDS : PENALTY RATES

SUBMISSION OF THE SDA -

Terminology - Penalty Rates

Date 8 May, 2017

1. The FWC had issued directions on the 18th April ([2017] FWCFB 1933), in relation to a claim that had been made by the AHA, AAA and Pharmacy Guild in the Penalty Rate Case (AM2014/305).

2. This claim had not been pressed by the employer parties in the running of the Penalty Rate Case. The Guild had made no submission or reference to this issue in their written submissions or reply submissions.
3. The Guild has now advised late on Friday 5th May, that they are not pursuing this claim.
4. The AHA/AAA are in a similar position in that they are not pursuing the claim.
5. Given that the parties behind the change sought in terminology, are now not pressing the claims it does raise many questions including one of relevance of this matter in the scheme of the 4 yearly review, and the need for it remaining an issue for the Penalty Rate Full Bench to examine.
6. The SDA is also in a difficult position given that one of its awards was the vehicle for this issue, but the main employer in the Pharmacy Industry Award has now withdrawn the matter.
7. It is noted that the use of the term 'Penalty' or 'Penalty Rates' has not been an issue raised in the review of awards which have undergone the review process. It has not been an issue identified in exposure drafts of Awards that have been issued by FWC nor in the plain English draft awards also issued by FWC.
8. The term 'penalty' does not offend the FW Act, it is a term that plainly is a permitted term in a Modern Award, and it has been deemed a necessary term in many Modern Awards. Nothing in the Act prescribes that there needs to be conformity of terms or expressions used in Modern Awards. Each Modern Award is reflective of the industry/industries it covers, the history and its application.
9. It is therefore not an issue of such importance or public interest in the 4 yearly review that it should continue.
10. It is also noted that the SDA and United Voice have indicted their intention to seek judicial review of the Penalty Rate Decision.
11. The fact that Section 134 (1)(da)(ii) of the FW Act states 'the need to provide additional remuneration for...employees working on weekends', has little substance to seek a change given that the term 'penalty rates' is used extensively and widely throughout the FW Act.

12. Sections 16(1), 18(1)(d), 62, 139(1)(e) and 323 Note 2 of the FW Act all use the term 'Penalty Rates' and not 'additional remuneration'.
13. In particular , Section 139(1) of the Act lists terms that can be included in Modern Awards. Sn139(1)(e) in fact details penalty rates to be:
 - (e) penalty rates, including for any of the following:
 - (i) employees working unsocial, irregular or unpredictable hours;
 - (ii) employees working on weekends or public holidays;
 - (iii) shift workers;
14. Having such a clear definition in the FW Act would suggest that the term 'penalty rate' is the relevant expression for modern awards.
15. The SDA therefore believes in the first instance that this matter should not continue and if it does continue the SDA opposes any change to the term 'penalty rates'.