

IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

Restaurant Industry Award 2010

(AM2017/42)

RESTAURANT & CATERING INDUSTRIAL

OUTLINE OF SUBMISSIONS

1. The Commission has directed that RCI file submissions addressing [1157] of the Penalty Rates Decision. The relevant paragraph is reproduced below:

[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 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]);

2. The variation proposed is to reduce Sunday rates for casuals employed under the Restaurant Award in levels 3 to 6.
3. The material which would enable the Commission to assess the impact of the variation proposed by RCI include:
 - i. data about the numbers of full-time and part-time employees covered by the Restaurant Award based on expert evidence.
 - ii. the numbers of Level 3 to Level 6 casual employees based on expert evidence.
 - iii. the numbers of the employees who are Introductory, Level 1 and 2 casual employees based on expert evidence.
 - iv. evidence from lay witnesses that attest to future business and employment outcomes in their business from the proposed variation.

- v. expert evidence as to the impact of the proposed variation on employment.
- vi. evidence by survey of the industry and the proposed variation's effect.

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]);

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.

provide a cogent argument as to why we should depart from the Restaurants 2014 Penalty Rates decision in respect of Sunday penalty rates;

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.
 - ii. Although the Commission will not depart lightly from a previous decision the reasons for departing¹ from the 2014 decision include:

¹ Cetin v Ripon Pty Ltd (T/as Parkview Hotel) 2003 IR 205 at [48]

- a. The first issue is that the 2014 decision was based on a differentiation between career industry professionals and those more transient and lower skilled employees², and that differentiation was only considered as a rationale in the Penalty Rates decision in relation to the Fast Food Award³.
- b. That differentiation of the level of skill, it is submitted, has no bearing on the level of penalty rate an employee receives for work performed on a Sunday.
- c. The second issue in the 2014 decision was the acceptance that there was a difference between Saturday work and Sunday work. That acceptance has now changed in 2017 and provides a reason to depart from the 2014 Decision.
- d. The conclusion at [154](6) of the Restaurants 2014 decision that the level of disability for working Sundays is no higher than for Saturdays is rejected and is now no longer supportable. The position has changed since 2014 to 2017.
- e. By extension of [154](6), the conclusion at [154](8) is now out of date. It is now not fair or relevant to pay career industry employees the higher penalty rate.
- f. The reasoning of the Full Bench in the 2017 Penalty Rates decision (for example at [823]) that the penalty rates are to compensate for a disutility are equally applicable to the Restaurant Award.

address the Productivity Commission submissions in relation to the payment of casual loading in addition to weekend penalty rates.

7. The case to be advanced by RCI is:

- i. RCI will need to address the Productivity Commission Report, which was canvassed in detail by the Full Bench at [308] to [348], particularly in relation to the hospitality, entertainment, retail, restaurants and cafes (HERRC).
- ii. The Productivity Commission submissions, which were considered favourably by the Commission, submitted that there should be increasing consistency, but not uniformity, of penalty rates across HERRC. The Productivity Commission

² At [142] of the 2014 Restaurants Decision

³ At [1394]-[1395]

- submitted that what should be uniform is the method of calculation, that the casual rates should be exclusive of the casual loading.
- iii. The Restaurant Award contains penalty rates that differ in the method of calculation between the lower grades and the higher grades. The lower grades are paid a Sunday penalty that includes the casual loading. Grades 3 to 6 are paid the Sunday rate plus the casual loading.
 - iv. The approach of RCI would be to submit that introducing the Productivity Commission Report findings that rates should be the appropriate penalty plus the casual loading (rather than inclusive) would be an error as there is no reason to depart from the 2014 appeal decision which lowered those rates.
 - v. The same statutory regime was in place in 2014, and the decision arose from the modern award review process. There are no cogent reasons to depart from the previous decision on the lower grade penalties in the Restaurant Award.
 - vi. On the other hand, to increase the rates of pay would create instability in the industry and would not achieve the modern awards objective. To increase penalty rates for the lower grades may harm the employment prospects of those workers. To increase rates would not provide a fair or relevant minimum safety net for employers. Any increase could cause employers to hire less workers thus having a negative effect on employment.
 - vii. Evidence would be led by lay witnesses, expert evidence and survey evidence as to the impact of that proposal on the industry.

Anton Duc
State Chambers
29 September 2017