

IN THE FAIR WORK COMMISSION

AM2017/43

FOUR YEARLY REVIEW OF MODERN AWARDS

PENALTY RATES

GENERAL RETAIL INDUSTRY AWARD 2010

SUBMISSIONS OF AUSTRALIAN RETAILERS ASSOCIATION AND MASTER GROCERS AUSTRALIA

1. The following submissions are made on behalf of the Australian Retailers Association (**ARA**) and Master Grocers Australia (**MGA**) in accordance with the Directions of the Fair Work Commission (**Commission**) made on 6 April 2018.

A. BACKGROUND

2. On 31 July 2017 the ARA filed an application to vary the *General Retail Industry Award 2010* (**GRIA**) and a Draft Determination giving effect to the proposed variations.
3. The Draft Determination provided for the reduction in the shift loading for shiftworkers performing work on Sundays. The effect of the Draft Determination is that Sunday shiftwork would be paid at the rate of 175% of the ordinary time rate of pay for permanent employees, and 200% of the ordinary time rate of pay for casual employees.
4. The matter of the penalty rates applicable to shiftworkers working on Sundays was the subject of proceedings before the Commission in the Penalty Rates case (AM2014/35).
5. On 13 February 2015 the ARA filed submissions and a Draft Determination which provided, in part, for the reduction in Sunday shiftwork penalties as set out in paragraph 3 of these submissions.
6. On 12 February 2016 the Retail Associations (ARA, MGA, the Retail Council and the National Retail Association) filed closing submissions which addressed the reduction in Sunday shiftwork penalties.
7. The SDA filed numerous submissions during the Penalty Rates Case in which they resisted applications by the Retail Associations to reduce Sunday penalty rates. The SDA failed to address the issue of Sunday shiftworkers in those submissions, despite being on notice as to the proposed changes.
8. Despite the Sunday Shiftworker matter clearly being live before the Commission, in the Penalty Rates Decision¹ (**Decision**) the Commission failed to make a finding in relation to this matter, despite acknowledging the existence of the variation sought at paragraphs [1468] and [1710] where the Commission said:

¹ [2017] FWCFB 1001

[1468] *The Retail Employers also seek to amend the Retail Award to reduce the rates payable for shiftwork performed on Sundays. If granted, the variation would reduce the shiftwork rate payable on Sunday from 200 per cent to 175 per cent for full-time and part-time employees and from 225 per cent to 200 per cent for casual employees.*

.....

[1710] *The position in respect of Sunday work is even more curious. Casuals who work shiftwork on a Sunday are paid the Sunday loading (i.e. 225 per cent in total). In these proceedings the Retail Employers are seeking to reduce the premiums for shiftwork on Sunday, yet the proposal advanced retains the differential between full-time/part-time employees (at 150 per cent) and casual employees (at 175 per cent). If casual shiftworkers who work on Sunday are entitled to the Sunday loading plus their casual loading why is it that casual non-shiftworkers are treated differently?*

9. Following the issuing of the Decision, the Commission invited submissions from the parties in relation to transitional provisions, which the Commission determined were necessary to minimise the impact of Sunday penalty rate reductions on employees. The Retail Associations, in their written submissions dated 24 March 2017 at paragraphs 53 to 55, highlighted the Commission's failure to deal with its shiftworker application in the Decision, and advised the Commission that it had assumed the reduction in Sunday penalty rates applied to shiftworkers.
10. On 5 April 2017 the Commission released a Statement² which included an attachment (Attachment B) containing questions on notice to a number of parties who had filed submissions on transitional provisions. At paragraph [28] of Attachment B, and question 5.1, the Statement provided:

“The Retail Associations submit that the decision to reduce the Sunday penalty rate applies equally to shiftworkers (see [53]–[55] of the Retail Associations submission).

5.1 Question for the SDA:

Does the SDA oppose the submission advanced by the Retail Associations? If so, on what basis?”

11. At paragraphs 53 to 55 of its submissions filed on 21 April 2017, the SDA responded to the question from the Commission in the following terms:

53. After appropriately acknowledging that shift workers are not specifically addressed in the decision, the Retail Associations submit that the decision to reduce Sunday penalty rates should apply equally to those workers.²³ This is opposed by the SDA. It is an impermissible attempt to invite the Commission to introduce a further reduction to penalty rates which is not the subject of the decision. The Commission has invited the parties to make submissions on transitional matters, not to request further cuts after the substantive case has been conducted. This submission should be rejected.

54. This is particularly so given that it has long been recognised that shift work is distinct and separate to day work and that shift workers experience unique and

² [2017] FWCFB 1934

peculiar disamenities and losses associated with such work. The Retail Associations' submission that "there is nothing before the FWC to suggest that shiftworkers should be treated any differently to permanent employees under the Retail Award" flies in the face of the long-established recognition by the Commission of the unique and particular challenges faced by shift workers and the evolution of award conditions directed at those special features.

55. In the conduct of the proceeding, the employer associations did not advance any evidence or argument in support of proposed changes to penalty rates for shift workers. Unsurprisingly then, the SDA likewise did not advance any such argument or evidence. In those circumstances, it would be a denial of procedural fairness if the Commission was to accede to the Retail Association's claim that the decision to reduce Sunday penalty rates be applied equally to shiftworkers.

12. On 5 June 2017 the Commission issued its decision in relation to the transitional provisions³. The Commission, at paragraphs [209] to [214] determined that the matter of Sunday shiftwork penalties should be dealt with at a further Hearing, saying:

[214] In the circumstances the appropriate course is for the Retail Employers (or any other interested party) to file an application to vary the Retail Award in respect of the Sunday rate applicable to shiftworkers. Such an application would then be determined in conjunction with the SDA's claim in respect of Saturday and late night rates for casuals.

B. Relevant Penalty Rates Decision Findings

13. The Commission, in the Penalty Rates Decision, made the following relevant findings:

- a. in order to maintain profitability it is common for retail businesses to fix labour budgets to a proportion of retail sales, hence changes in labour costs (or sales) may impact on the amount of labour rostered⁴;
- b. the Sunday penalty rate under the GRIA, as it was at the time of the Decision, was neither fair nor relevant⁵; and
- c. the extent of the disutility associated with Sunday work is much less than in times past⁶.

C. Relevant Penalty Rates Decision Comments

14. In the Penalty Rates Decision the Commission commented on the penalty rate provisions within the GRIA as they relate to casual employees, and said:

[1704] We now turn to the application of weekend penalty rates in the Retail Award to casual employees. The Retail Award provides that casual employees are paid a casual loading of 25 per cent.

³ [2017] FWCFB 3001

⁴ [2017] FWCFB 1001 at [1619] (ii)

⁵ *ibid* at [1701]

⁶ *ibid* at [54], [68], [689]

[1705] Casuals are currently paid an additional 10 per cent for work performed on a Saturday between 7.00 am and 6.00 pm, that is in addition to the 25 per cent casual loading. It is not clear whether the 10 per cent premium is compounded upon the casual rate of 125 per cent of the applicable minimum hourly rate or whether it is simply added to the 125 per cent such that casuals are paid 135 per cent of the applicable hourly rate. But for present purposes, and for the sake of convenience, we will refer to the Saturday rate for casuals as 135 per cent, for work performed during 7.00 am and 6.00 pm.

[1706] It is also relevant to observe that clause 30.3(c) of the Retail Award provides that: 'Any shiftwork performed on a Sunday will be paid at the rate of 200% (225% for casuals) of the ordinary time rate of pay.'

[1707] Yet, curiously, the Sunday rate for non-shift casuals is 200 per cent (inclusive of the 25 per cent casual loading), which is the same as the Sunday rate for full-time and part-time employees.

[1708] While these provisions no doubt have some history, they are plainly inconsistent and appear to lack logic and merit.

[1709] For instance, how is it that a casual employee working on a Saturday between 7.00 am and 6.00 pm is paid a premium of 135 per cent, but a casual working at, say, 6.00 am on a Saturday (or after 6.00 pm) is only paid the casual loading (i.e. 125 per cent)? Working early on a Saturday (at say 5.00 am or 6.00 am) or working late (say after 9.00 pm) may be said to attract a higher level of disutility than working between 7.00 am and 6.00 pm, yet casual employees receive less for working at these times.

[1710] The position in respect of Sunday work is even more curious. Casuals who work shiftwork on a Sunday are paid the Sunday loading (i.e. 225 per cent in total). In these proceedings the Retail Employers are seeking to reduce the premiums for shiftwork on Sunday, yet the proposal advanced retains the differential between full-time/part-time employees (at 150 per cent) and casual employees (at 175 per cent). If casual shiftworkers who work on Sunday are entitled to the Sunday loading plus their casual loading why is it that casual non-shiftworkers are treated differently?

[1711] Casual loadings and weekend penalty rates are separate and distinct forms of compensation for different disabilities. Penalty rates compensate for the disability (or disutility) associated with the time at which work is performed.

[1712] The casual loading is paid to compensate casual employees for the nature of their employment and the fact that they do not receive the range of entitlements provided to fulltime and part-time employees, such as annual leave, personal carer's leave, notice of termination and redundancy benefits.

[1713] Importantly, the casual loading is not intended to compensate employees for the disutility of working on Sundays.

[1714] As mentioned earlier we have a preference for what the Productivity Commission calls the 'default' approach to the interaction of casual loadings and weekend penalties. Under this approach, the casual loading is added to the applicable weekend penalty rate when calculating the Saturday and Sunday rates for casuals.

[1715] In our view, the casual loading should be added to the Sunday penalty rate when calculating the Sunday rate for casual employees. We propose to adopt the Productivity Commission's 'default' method. Accordingly, the new Sunday rate for casual employees in the Retail Award will be 25 plus 150, that is 175 per cent.

D. Proposition from the Decision

15. It follows from this that the Commission has concluded that, absent any compelling reason to the contrary, penalties and loadings compensate employees for different things, and one element of the compensation is not intended to compensate for a different, separate element.
16. Under the GRIA permanent employees performing shiftwork (a shift which commences on or after 6.00pm on one day and before 5.00am on the following day) are entitled to be paid 130% of the ordinary time rate of pay. Casual employees in the same circumstances are entitled to be paid 155% of the ordinary time rate of pay.
17. In the case of shiftworkers who work on weekends, they are compensated for the disutility associated with shiftwork and for the disutility associated with weekend work. Under the GRIA, permanent employees performing shiftwork on a Saturday are entitled to be paid at the rate of 150% of the ordinary time rate of pay. Casual employees performing shiftwork at the same time are entitled to be paid at the rate of 175% of the ordinary time rate of pay. Permanent employees performing shiftwork on a Sunday are entitled to be paid at the rate of 200% of the ordinary time rate of pay. Casual employees performing shiftwork at the same time are entitled to be paid at the rate of 175% of the ordinary time rate of pay.
18. It is clear from this that shiftworkers are compensated for the disutility associated with shiftwork through the payment of a shift loading, and are provided with additional compensation where they perform work on weekends. In the case of Saturday work the additional compensation for permanent employees equates to 20% of the ordinary time rate of pay. In the case of Sunday work the additional compensation equates to 70% of the ordinary time rate of pay.
19. As set out above, the Commission has concluded that the disutility associated with Sunday work is "much less" than in times past, that the Sunday penalty rate (as it was) did not represent a fair and relevant minimum safety net of conditions, and accordingly has reduced the Sunday penalty rate for day work under the GRIA to address this. In relation to the Sunday shiftwork penalty and loading it follows that it also does not represent a fair and relevant minimum safety net, as it has not been reduced to reflect the new assessment of the disutility associated with Sunday work. ARA and MGA are not asking the Commission to reduce the component of the Sunday shiftwork penalty and loading which relates to the disutility of performing shiftwork. What is being asked of the Commission is to reduce the compensation for working on Sundays to reflect the Commission's decision as to the disutility associated with Sunday work.

E. Modern Awards Objective

20. While it is submitted that the Commission can rely on the Decision in giving consideration to the requirements of section 134(1) of the *Fair Work Act 2009* (Cth) (**FW Act**), for ease of reference we consider those matters below.

21. As a starting point, the Commission should be mindful of the comments of the Full Bench in the Decision as to the meaning of “fair and relevant” in the context of a fair and relevant minimum safety net of terms and conditions. The Full Bench concluded:
- (a) fairness is to be assessed from the perspective of the employers and employees covered by the modern award in question (see *Decision* at [117]); and
 - (b) relevant is intended to convey that a modern award should be suited to contemporary circumstances (see *Decision* at [120]).
22. Given this, the Commission should have particular regard to the comments of the Full Bench in the Decision as they relate to the significant reduction in disutility associated with Sunday work. As set out above, the Commission concluded that this disutility is “much less than in times past”. If the Sunday shiftwork penalty is not reduced in a similar manner to that of the Sunday day work penalty then it is likely the GRIA, as it relates to Sunday shiftwork, will not represent a relevant minimum safety net.
23. Section 134(1)(a) of the FW Act requires the Commission to consider “relative living standards and the needs of the low paid”. The needs of the low paid is a consideration which weighs against a reduction in Sunday shiftworker rates, however the needs of the low paid are best addressed by the setting and adjustment of modern award minimum rates of pay (see *Decision* at [1660]).
24. Section 134(1)(b) (need to encourage collective bargaining) is a neutral factor.
25. Section 133(1)(c) (social inclusion through increased workforce participation) favour the granting of the proposed variation. As set out above, in the Decision, the Commission concluded that a reduction in labour costs may lead to increased labour hours being offered.
26. Section 134(1)(d) (efficient and productive performance of work) and (f) (impact on business, including on productivity and employment costs) favour the granting of the variation. Granting the variation will reduce employment costs for those businesses who engage shiftworkers on Sundays. which is likely to increase productivity.
27. Section 134(1)(da) is a neutral factor, however it should be noted that in the Decision the Commission said:

[1678] We now turn to matter (i), the extent of the disutility of, relevantly, Sunday work. In addition to the findings set out in Chapter 6, the lay witness evidence led by the SDA spoke to the adverse impact of weekend work on the ability of retail sector employees to engage in social and family activities.

[1679] While for some of those witnesses Sunday work had a particularly adverse impact, others simply referred to the impact of weekend work and one said that the intrusion into their social activities of Saturday and Sunday work was ‘about the same’.

[1680] We also note the following findings from the Sands Report online survey of retail employees:

- *The ‘vast majority’ of employees that do not work on Sundays state that nothing will motivate them to work on a Sunday;*

- *The main difficulty with Sunday work is the impact on the ability to spend time with family/friends;*
- *86 per cent of Sunday employees hardly ever or never are able to make up time to attend community, sporting or cultural events during the week; and*
- *29 per cent of Sunday employees with children believe that Sunday work has an adverse impact on the health and development of their children.*

[1681] We note that in the event Sunday penalty rates were reduced (but not removed entirely) employees working on Sundays would still receive 'additional remuneration'.

28. Sections 134(1)(g) and (h) are not relevant to the Commission's consideration and therefore should be treated as neutral factors.

21 May 2018