



18 October 2018

The Hon. Justice Iain Ross
President
Fair Work Commission
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Melbourne VIC 3000

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Dear President Ross,

RE: 4 Yearly Review of Modern Awards – General Retail Industry Award 2010
RE: Award Specific Penalty Rates Claims – AM2017/43

We refer to the above matter and, in particular, the correspondence filed on behalf of the Shop, Distributive and Allied Employees' Association (SDA) on 5 October 2018.

NRA wishes to make comment on the matters raised by the SDA and also to make additional remarks with respect to areas of clarification arising from the Full Bench's reasons for decision on 27 September 2018 and subsequently corrected on 1 October 2018.

1. Background – the decision and the correction

- 1.1. The original decision on 27 September 2018 specified the transitional arrangements for the reduction in the Sunday shiftwork penalty rate in the *General Retail Industry Award 2010 (the Award)* at paragraph [275] as follows:

Full time and part time shiftworkers

1 November 2018	195 per cent
1 July 2019	190 per cent
1 July 2020	180 per cent

Casual shiftworkers

1 November 2018	220 per cent
1 July 2019	215 per cent
1 July 2020	205 per cent

- 1.2. Further to the correction issued on 1 October 2018, paragraph [275] now reads as follows:

Full time and part time shiftworkers

1 November 2018	195 per cent
1 July 2019	190 per cent
1 July 2020	175 per cent

Casual shiftworkers

1 November 2018	220 per cent
1 July 2019	215 per cent
1 July 2020	200 per cent

- 1.3. Per the correction, the Sunday penalty rate for shiftworkers has decreased by an additional five per cent from 1 July 2020 than in the original decision as published.
- 1.4. In addition, the SDA's claims to vary the Award with respect to Saturday penalty rates for casuals were granted, with the following transitional arrangements set out at paragraph [284]:

Saturday work – casuals

1 November 2018	A casual employee must be paid an additional 15 per cent for all work performed on a Saturday
1 October 2019	A casual employee must be paid an additional 20 per cent for all work performed on a Saturday
1 March 2020	A casual employee must be paid an additional 25 per cent for all work performed on a Saturday

2. Matters raised by NRA

- 2.1. NRA makes comment on both the matters raised by SDA and also wishes to seek clarification from the Full Bench with respect to the Saturday penalty rates for casuals.
- 2.2. At paragraph [263] of the decision, the Full Bench made the substantive determination to grant SDA's application to vary the Award.
- 2.3. The variation sought by the SDA was set out at paragraph [224] of the decision as follows:

[224] The SDA's claim seeks to amend sub-clauses 29.4(a) and (b), as follows:

29.4 Penalty payments

(a) ...

(b) **Saturday work**

A penalty payment of an additional 25% will apply for ordinary hours worked on a Saturday for full-time, and part-time and casual employees. A casual employee must be paid an additional 10% for work performed on a Saturday between 7:00am and 6:00pm.

- 2.4. The extent of SDA's claim was to increase the Saturday penalty rate for casual employees to parity with that paid to permanent employees, and to remove the limitation that this penalty rate applied only to hours worked between 7:00am and 6:00pm.

- 2.5. However, NRA is concerned that the transitional arrangements as they are currently expressed with respect to this variation go further than applying this increased penalty rate to ordinary hours and instead potentially results, inadvertently, in increased overtime payments as well.
- 2.6. This is because the expression 'all work' in the transitional arrangements is not limited, as the SDA's claim is, to ordinary hours.
- 2.7. NRA does not believe it was the intention of the Full Bench to vary the overtime loadings payable to casual employees on Saturdays as part of this decision, however we seek clarity from the Full Bench if this is indeed the case.
- 2.8. If it was the intention of the Full Bench to only increase the loading payable to casual employees with respect to ordinary hours worked on a Saturday, this may require the Full Bench to issue a further correction.

3. **Matters raised by the SDA**

3.1. The SDA raises issue with the correction issued by the Full Bench in this matter on 1 October 2018; specifically, the change to the final increment of the reduction in the transitional arrangements.

3.2. In particular, SDA has submitted that:

- (a) the reduction provided for in the corrected form of paragraph [275] imposes a greater reduction to the Sunday penalty rates for shiftworkers than was sought by the employer applicants; and
- (b) the reduction provided for in the corrected form of paragraph [275] imposes a greater reduction to Sunday penalty rates than was determined by the Full Bench in the *Penalty Rates Decision* to be necessary for the Award to meet the modern awards objective;

and that consequently the original form of paragraph [275] should be re-instated and that paragraphs [221] and [269] should be corrected to reflect the original form of paragraph [275].

3.3. NRA respectfully disagrees with both lines of submission advanced by the SDA and submits in response that:

- (a) the request by the SDA for further correction or re-correction of paragraph [275] or alternatively paragraph [221] and [269] fails to appreciate the distinction between the Full Bench's decision with respect to the substantive claim and the Full Bench's decision with respect to transitional arrangements;
- (b) the correction to paragraph [275] does nothing more than ensure that the transitional arrangements give effect to the substantive decision of the Full Bench with respect to the claim advanced by the employer parties; and
- (c) the request by the SDA for further correction or re-correction of paragraph [275] and a correction to paragraphs [221] and [269] is an impermissible attempt to re-contest the claims advanced by, and determined in favour of, the employer parties;
- (d) the SDA's submission with respect to the proportion of the Sunday component of the penalty rate being reduce to an extent greater than accepted in the *Penalty Rates Decision* is without merit; and

- (e) the SDA's implicit submission that the Full Bench is bound to follow the *Penalty Rates Decision* with respect to the proportion of the Sunday component of the penalty rate to be reduced is incorrect.

Distinction between substantive and transitional decisions and effect of correction

- 3.4. NRA respectfully submits that the matters raised by the SDA fail to appreciate the distinction between the Full Bench's decision with respect to the substantive claims advanced by the employer parties, and the Full Bench's decision with respect to transitional arrangements.
- 3.5. As a matter of logic, the transitional arrangements determined to be appropriate by the Full Bench to give effect to its substantive decision must give effect to the substantive decision.
- 3.6. Transitional arrangements should not, by virtue of this purpose, vary the substantive decision of the Full Bench. This distinction between a decision on the substantive claim and a decision with respect to transitional arrangements was recognised by SDA in its submissions in the *Penalty Rates – Transitional Arrangements Decision* [2017] FWCFB 3001 (at [212]).
- 3.7. The substantive decision with respect to the claims advanced by the employer parties was made at paragraph [221] of the decision, and in so doing specified the net reduction to the relevant penalty rates at the end of the transitional period would be 175 percent for permanent employees and 200 per cent for casuals.
- 3.8. The substantive decision at paragraph [221] of the decision was in accordance with the claim advanced by the employer parties, provided in detail at paragraph [79] and summarized again at paragraph [189].
- 3.9. The transitional arrangements set out at paragraph [275] could not, by their nature, alter this substantive decision, and the correction issued by the Full Bench on 1 October 2018 was right and proper in the circumstances.

Impermissible attempt to re-contest claims

- 3.10. In asking the Full Bench to re-instate the original version of paragraph [275] and to amend the substantive decision at paragraphs [221] and [269], the SDA has sought to re-contest the substantive claim.
- 3.11. Having regard for the hierarchy that must naturally exist between the substantive decision and the transitional arrangements made to give effect to that decision, requesting the Full Bench to amend its substantive decision to accord with transitional arrangements recorded in error on the face of the decision is an impermissible attempt to re-contest the substantive claim.
- 3.12. If the SDA is aggrieved by the Full Bench's decision in this case, the appropriate avenue is to either seek a review of the decision before the Federal Court, or to make an application to vary the Award reversing the effect of the decision.



Submission re Penalty Rates Decision without merit

- 3.13. The thrust of the SDA's submission appears to be that the Full Bench, erroneously, granted a greater proportionate reduction to the Sunday component of the penalty rate payable to shiftworkers than was determined to be appropriate in the *Penalty Rates Decision*.
- 3.14. In the *Penalty Rates Decision*, the Full Bench determined that a reduction in the Sunday penalty rate of one-half (in the case of permanent employees, reducing the penalty rate from 100 per cent to 50 per cent) was appropriate for the awards reviewed to meet the modern awards objective.
- 3.15. In the present case, the employer parties identified that the component of the penalty rate attributable to Sunday work was 70 per cent, in addition to a 30 per cent penalty rate for shiftwork (see paragraph [191]). There is nothing on the face of the decision rejecting this analysis.
- 3.16. By reducing the total penalty rate by 25 per cent, the Full Bench in this decision reduced the Sunday component of the shiftworker penalty rate for work on Sundays by a lesser proportion than in the *Penalty Rates Decision* (specifically, by slightly more than one-third), not a greater proportion as the SDA claims.
- 3.17. For the SDA's claim to be correct, the Full Bench will have needed to reduce the total penalty rate by more than 35 per cent, to 165 per cent for permanent employees and 190 per cent for casuals.
- 3.18. Consequently, the submission of SDA with respect to this point is without merit. If anything, it is an argument for a greater reduction to the Sunday shiftworker penalty rate than was sought by the employer parties or granted by the Full Bench.

Full Bench not bound to follow Penalty Rates Decision

- 3.19. Notwithstanding this, it must be remembered that the Full Bench's function in this matter is to review the relevant modern awards having regard for the modern awards objective.
- 3.20. This means that the overriding consideration for the Full Bench is the modern awards objective as set out in section 134 of the *Fair Work Act 2009* (Cth). It is not the role of the Full Bench to mechanically apply past decisions without regard for this overriding consideration.
- 3.21. In this matter, the Full Bench clearly considered the matters traversed in the *Penalty Rates Decision*, but nevertheless considered the claims of the parties against the modern awards objective independent of that decision.
- 3.22. Whilst the determination in the *Penalty Rates Decision* may be a relevant consideration, the Full Court of the Federal Court observed that:

"It is not legitimate to take one element of the overall suite of potentially relevant considerations to the discharge of the FWC's functions ... and discern from that one matter a Parliamentary intention that the scheme as a whole is to be construed with that end alone in mind." (*SDA v Australian Industry Group* [2017] FCAFC 161 at paragraph 33)

3.23. In NRA's respectful submission there is no error on the part of the Full Bench in assessing the claims of the parties as against the modern awards objective rather than mechanically applying the same proportionate reduction to the Sunday component of the penalty rate as was granted in the *Penalty Rates Decision*.

Yours sincerely,



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