

Summary of Decision

10 October 2013



Modern Awards Review 2012 - Restaurant Industry Award 2010

[2013] FWC 7840

AM2012/180 and others

1. This decision determines variations sought to the *Restaurant Industry Award 2010*, other than variations which were being dealt with by Full Benches constituted to deal with particular matters in the 2012 Review.
2. The major variation sought by the Restaurant and Caterers Association (RCA) was to change the penalty rate structure in the Award. RCA proposed that penalties be payable to an employee who works on the sixth consecutive day of work and the seventh consecutive day of work rather than the current clauses which provide penalty rates to be paid for work on Saturday and Sunday or for work performed between 10pm and 7am Monday to Friday.
3. Alternatively, RCA proposed that penalty rates be reduced to 125% for weekly employees on Saturday and Sunday and to 150% (inclusive of the casual loading) for casual employees and 225% for casual employees on Public Holidays.
4. Both variation proposals were dismissed as part of this review.
5. RCA submitted that the changing nature of labour market and the fact that the restaurant industry was a seven-day-a-week industry meant that penalties for working Saturday, Sunday and late nights were no longer relevant.
6. RCA also submitted that the industry predominately operated on weekends and that penalty rates deterred a number of employers from providing work to employees on weekends. It submitted that the increased Sunday loading was not promoting social inclusion and overvalued work performed on a Sunday, that the social disability specifically associated with Sunday work was no longer relevant in Australian society, and that for the majority of people work on Sunday was no different to work on Saturday
7. The Commission found that the effect of the application was to eliminate penalties for the vast majority of employees. It was not disputed that employees in the restaurant and catering industry were low paid and were disproportionately dependent on the minimum rates of pay set in the Award.
8. The Commission did not accept the RCA submissions that there were no longer any disabilities associated with working unsociable hours. More importantly it was not satisfied that there had been a significant change in the disabilities associated with working unsociable hours since the making of the Award.
9. The Commission acknowledged that except for small business, RCA was not proposing to reduce the minimum wage for employees; however if penalty rates were only payable on the sixth and seventh

day only it would have a significant impact on the take home pay of the employees in the industry. It concluded that it was not sufficient to assert that the employees may be offered additional hours to compensate for the reduction in their take home pay. There was insufficient evidence about the capacity of these employees to take up those additional hours of work. It also concluded that the need to work additional hours for the same income may also have detrimental effects.

10. While the Commission accepted that the variation proposed would reduce employment costs and reduce the regulatory burden on businesses, it did not accept that this would necessarily lead to an improvement in productivity.
11. The Commission found that the variations proposed would have a negative impact on the relative living standards and the needs of the low paid who would need to increase the hours worked simply to maintain their current income. The Commission was not satisfied that the proposed changes would encourage collective bargaining.
12. The Commission concluded that the RCA had not established cogent reasons for revisiting the penalty regime it proposed to the award modernisation Full Bench. The grounds on which it sought the variations did not identify a significant change in circumstance since the establishment of the Award, but were rather largely merits considerations which existed at the time the Award was made.
13. The question of whether the disabilities associated with working on Sunday are greater than working on Saturday required further consideration. The four yearly review, which commences next year, will provide an opportunity for these issues to be considered in circumstances where the transitional provisions relating to the relevant awards will have been fully implemented.
14. The Commission also rejected a RCA proposals that small business employers be exempted from the minimum wages prescribed in clause 20.1 of the Award or alternatively that the federal minimum wage apply to levels 1,2 and 3 and current rates apply to all other levels.
15. The Commission was not satisfied that the reduction in the minimum wages would increase employment but was satisfied that the variation proposed would have a negative impact on the incomes of the low paid. The variation proposed was therefore dismissed.
16. Further proposals from RCA regarding changes to the classification structure and junior employees were also dismissed.
17. The Commission granted a variation sought by Victorian Employers' Chamber of Commerce and Industry to clarify penalty rates payable on Christmas Day when it fell on a weekend and was not a prescribed public holiday.

[\[2013\] FWC 7840](#)

- ***This statement is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission's reasons.***

- ENDS -

For further information please contact:

Di Lloyd
Manager Media and Communications
Phone: (03) 8661 7680
Email: diana.lloyd@fwc.gov.au