FAIR WORK COMMISSION

Summary of Decision

18 March 2013

Transitional Review Penalty Rates Decision

[2013] FWCFB 1635

AM2012/8 and others

SUMMARY

1. The *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Transitional Provisions Act) provides that the Fair Work Commission must conduct a review of all modern awards as soon as practicable after 1 January 2012 (the Transitional Review).

2. The Transitional Review is quite separate from, and narrower in scope than, the 4 yearly reviews of modern awards provided for in s.156 of the *Fair Work Act* 2009 (Cth) (the Act). The scope of the Transitional Review was dealt with in the June 2012 Transitional Review decision [2012] FWAFB 5600. In the Transitional Review Penalty Rates decision, the Commission adopted the June 2012 Full Bench decision and applied it to the applications before it.

3. In November 2011, the Commission called for applications to vary modern awards as part of the Transitional Review and some 292 applications were received. On 27 April 2012 the President issued a statement which identified the common issues in these applications (one of which was penalty rates) and directed that they be dealt with by a Full Bench.

4. This decision deals with 20 applications to vary penalty rates provisions in the following modern awards:

   - *Fast Food Industry Award 2010*
   - *Food, Beverage and Tobacco Manufacturing Award 2010*
   - *General Retail Industry Award 2010*
   - *Hair and Beauty Industry Award 2010*
   - *Hospitality Industry (General) Award 2010*

5. The modern awards were established by the award modernisation process in the period from April 2008 to December 2009 and was conducted in accordance with a written request (the award modernisation request) made by the Minister for Employment and Workplace Relations to the President of the Australian Industrial Relations Commission (AIRC). The award modernisation process was extensive and involved the provision of submissions, hearings and the release of draft awards prior to the final determination of the modern awards. By the end of 2009 the AIRC had reviewed

more than 1500 state and federal awards and created 122 industry and occupation based modern awards.

6. Many of the applications made as part of this Transitional Review involve matters that were expressly dealt with by the AIRC in the award modernisation process. In these circumstances the need to advance probative evidence in support of an application to vary a modern award is particularly important. The Transitional Review does not involve a fresh assessment of modern awards unencumbered by previous Tribunal decisions. As the June 2012 Full Bench stated, in the context of the Transitional Review:

> "...the Tribunal is unlikely to revisit issues considered as part of the Part 10A award modernisation process unless there are cogent reasons for doing so, such as a significant change in circumstances which warrants a different outcome."

7. It is also important to recognise that we are dealing with a system in transition. The transitional arrangements in modern awards continue to operate until 1 July 2014. The fact that the transition to modern awards is still occurring militates against the adoption of broad changes to modern awards as part of the Transitional Review. Such changes are more appropriately dealt with in the 4 yearly review, after the transition process has completed given that the Transitional Review is narrower in scope than the 4 yearly reviews provided in s.156 of the Act.

8. The Full Bench had before it applications from employer organisations, employers and from the SDA.

9. The substantive penalty rate claims by the employers sought to vary the *General Retail Industry Award 2010* and the *Fast Food Industry Award 2010.*

10. The employers generally sought to provide a penalty of 50% for Sunday work in lieu of the current 100% in the *General Retail Industry Award 2010* and the NRA's claim also sought to vary that award by removing the 25% penalty payments for evening work that presently applies to all non-casual hours.

11. In relation to the *Fast Food Industry Award 2010,* the substantive employer claims were as follows:

    - Varying clause 26.5(a)(i) to alter the span of hours for penalty rates applying to evening work from Monday to Sunday such that a loading of 10% applies between 10.00pm and midnight and 15% between midnight and 5.00am (currently 10% between 9.00pm and midnight and 15% after midnight applies Monday to Friday).
    - Deletion of clauses 26.5(b) and (c) which provide for penalty rates on the weekend (currently Saturdays - 25% and Sundays - 50%).
    - Variation to clause 26.5(a)(ii) to specify the time at which penalty rate ceases (5.00am/6.00am).

12. Although there are a number of penalty rate provisions that are sought to be varied in these applications, the major focus of both the evidence and the submissions was on the Sunday penalty in the General Retail award and the weekend and other penalties more generally in the Fast Food award.

13. The evidence led by the parties in relation to these matters is set out in the following reports provided to the Full Bench:

- *Report to the Full Benches in relation to the Hospitality Industry (General) Award 2010* by Gooley C;
- *Report to the Full Benches in relation to the General Retail Industry Award 2010 and the Food, Beverage and Tobacco Manufacturing Award 2010* by Hampton C*;* and
- *Report to the Full Benches in relation to the Fast Food Industry Award 2010 and the Hairdressing and Beauty Industry Award 2010* by Jones C.

14. Other than the applications relating to the proposed reduction in some of the existing penalty rates in the General Retail and Fast Food awards, there was little or no probative evidence dealing with other aspects of the applications before the Commission.

15. In approaching all of these matters the Commission gave particular consideration to whether the modern awards before it achieve the modern awards objective. Further, the Commission also considered whether the awards are operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process.

16. In dealing with these applications the Commission was satisfied that a high proportion of employees in the accommodation and food services and retail industries are low paid. The evidence established that:

    - the incidence of award reliance amongst employees covered by the Awards before us is higher than for employees generally, particularly so in relation to the accommodation and food services industries; and
    - actual incomes for full-time adults within the relevant industries are at the level of around 70% of average earnings, with employees relatively low paid by comparison to employees generally. This is more pronounced in relation to employees reliant of minimum award wages and occurs notwithstanding the relatively high incidence of work of weekends on employees in the accommodation and food services and retail industries.

17. The employers in the Fast Food award argued that in the award modernisation process the AIRC had inappropriately based the entire penalty rate structure in the award on the *National Fast Food Retail Award* and the award did not reflect the majority award conditions at the time.

18. Various employer submissions also contended that the award variations sought would have a positive impact on employment growth (and hence promote social inclusion through increased workforce participation); productivity; competitiveness and the efficient and productive performance of work. The Commission determined that these were all relevant considerations and were embraced within the factors the Commission is required to take into account as part of the modern awards objective.

19. The essence of the employers' contentions, particularly in the retail sector, was that the existing penalty rate provisions had the consequence that employers were engaging fewer employees than they would prefer to employ on a Sunday and that the mix of employees engaged on a Sunday, in terms of age and experience, was less than optimal. It was submitted that if the Sunday penalty rate was reduced then employers would be willing to offer more hours of work on Sundays and the mix of employees engaged would better promote the efficient and productive performance of work.

20. The Commission decided that while there was some evidence in support of elements of these contentions, it was far from compelling, and it rejected the substantive claims. It said in part:

> *"[234] There is a significant 'evidentiary gap' in the cases put. It is particularly telling that there is no reliable evidence regarding the impact of the differing Sunday (or other) penalties when applied upon actual employer behaviour and practice. This is a most unfortunate omission given that the transitional provisions, which rely upon the differing NAPSA entitlements, provide an opportunity for evidence to be led from employers operating in multiple States to provide these comparisons. There is also no reliable evidence about the impact of the existing differential Saturday and Sunday penalties upon employment patterns, operational decisions and business performance.*
>
> *[235] We are not persuaded that a sufficient case has been made out to warrant varying the relevant awards in the manner proposed by the employers. While aspects of the applications before us are not without merit - particularly the proposals to reassess the Sunday penalty rate in light of the level applying on Saturdays - the evidentiary case in support of the claims was, at best, limited.*
>
> *[236] The 4 yearly review of these awards is to commence in 2014. That review will be broader in scope than the Transitional review and will provide an opportunity for the issues raised in these proceedings to be considered in circumstances where the transitional provisions relating to the relevant awards will have been fully implemented. In the event that the claims before us are pressed in the 4 yearly review we would expect them to be supported by cogent evidence. We would be particularly assisted by evidence regarding the matters referred to above and the likely impact upon employment levels, the organisation of work and employee welfare of any change in the penalty rates regimes."*

21. In determining these matters, the Commission also considered evidence regarding the impact of "unsociable" hours upon employees.

22. The Commission has also rejected a number of variations sought by the SDA. The SDA seek to modify the overtime provisions of the *General Retail Industry Award 2010* in two respects. Firstly, to provide that the double time penalty operate after two hours, rather than three hours as currently operating and secondly, to provide overtime payments for casuals who work in excess of 38 hours. The *General Retail Industry Award 2010* does not presently provide overtime payments for casuals in those circumstances.

23. The employers opposed the claim and contended, among other things, that the SDA was in effect seeking to re-litigate an issue determined by the AIRC in the award modernisation process.

24. The Commission agreed with the submissions advanced by the employers and rejected the variation sought by the SDA

25. The Commission also dealt with various claims concerning the insertion of an annualised hours provision in each of the General Retail, Fast Food, and Hairdressing and Beauty Industry awards.

26. Although there is some minor variation in terms, each claim involved the insertion of a new provision permitting an employer to pay an employee an annual salary in lieu of wages, allowances, penalty payments, overtime, shiftwork payments and annual leave loading. This arrangement would be subject to a no disadvantage provisions and annual review.

27. Despite the opportunity afforded by the Transitional Review, the employers did not advance the argument in support of an annualised hours provision beyond what was put in previous proceedings. The Commission was not persuaded that it was appropriate to vary the relevant awards to introduce annualised salaries however it did state that it was conscious of the need to take into account regulatory burden and to ensure that modern awards are simple and easy to understand. (see s.134(1)(f) and (g)). In that context the Commission considered that the existing penalty rate regime in the relevant awards gave rise to some complexity in the application of the award provisions and that this may pose a particular challenge for small businesses.

28. As a means of addressing these issues the Commission decided that there was merit in the parties discussing the concept of incorporating loaded rates within the *General Retail Industry Award 2010* and the *Fast Food Industry Award 2010.*

29. Any such loaded rates would need to recognise the application of the existing penalty rates regime and apply fairly across the range of employees and working hours patterns that might be considered as applicable to the concept. Subject to those considerations, our preliminary view is that the establishment of loaded rates within these awards would have the capacity to reduce the complexity of their application, particularly for small businesses.

30. In order to explore this concept further, the Commission will facilitate some conciliation discussions between the major parties with a view to seeking a degree of consensus. Commissioner Hampton will convene a conference for this purpose in the near future.

31. The Commission has also determined that proposed variations should be made to clarify the intended operation of the General Retail[1] and Fast Food[2] awards. A claim concerning the *Hospitality Industry Award 2010*[3] has also been remitted to Deputy President Sams for determination.

[2013] FWCFB 1635

- ***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 -

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[1] Clause 13.2 of the award.
[2] Clause 26.1 of the award.
[3] Clause 12.7 of the award.