

Fair Work Commission

s.156 – 4 yearly review of modern awards

Fast Food Industry Award 2010

AM 2014/49

Submissions



Shop Distributive and Allied Employees' Association

20 February 2018

1. The Shop Distributive and Allied Employees' Association (SDA) makes these submissions in response to the Amended Directions issued by the President on 15 February 2018.
2. In 2015 the Ai Group sought to resolve the ambiguity in the application of the evening penalty in the Fast Food Industry Award (FFIA) and proposed an end time of 5am.
3. This matter was referred to the Penalty Rates Full Bench.
4. The SDA submits that this matter was fully considered by the Penalty Rates Full Bench and the appropriate ceasing time for the evening penalty rate was determined to be 6am. The decision provided that:

[1134] *In our view the span of hours attracting the 15 per cent additional payment **should be amended to 'between midnight and 6.00am'**. In the context of this award the provision of an additional payment for work performed between 6.00am and 7.00am does not achieve the modern awards objective. (emphasis added)*

[1334] *It is convenient to deal here with another aspect of clause 25.5, in particular clause 25.5(a)(ii) which states:*

(ii) A loading of 15% will apply for ordinary hours of work after midnight, and for casual employees this loading will apply in addition to their 25% loading.

[1335] *Clause 25.5(a)(ii) provides for the payment of a 15 per cent loading for ordinary hours of work 'after midnight', but does not set the span of hours between which the loading is to be paid. The equivalent provision in the Restaurant Award (clause 34.2(a)(ii), above) provides that the 15 per cent loading is paid for ordinary hours worked between midnight and 7.00am. We note that RCI proposes to vary the span of hours to which this penalty applies, but the pertinent point for present purposes is that the Fast Food Award does not presently prescribe the span of hours during which the loading is to be paid. For the reasons set out above it would be logical to align the evening penalty rate provisions in the Fast Food and Restaurant Awards. We now turn to the RCI's claim.*

5. At a conference before President Ross on 11 September 2017 and before Commissioner Lee on 1 December 2017 Ai Group outlined its intention to pursue a claim to insert a facilitative provision in the FFIA to allow an employer and a majority of employees to agree to amend the ceasing time of the evening penalty rate from 6am to 5am. This application was made in the context that Individual Flexibility Arrangements were too burdensome in the fast food industry.
6. The SDA raised objections during the Conference on 1 December 2017 to the application made by the Ai Group proceeding on the basis that the matter had already been dealt with in the 4-yearly review as part of the Penalty Rates Full Bench.
7. The SDA wrote to Commissioner Lee on 13 December 2017 outlining its objection to the FWC hearing this matter again as part of the 4-yearly review of modern awards and emphasised that this matter was fully considered by the Penalty Rates Full Bench (2017) FWCFB 1001.
8. The Full Bench fully considered the matter and determined that the appropriate ceasing time for the evening penalty rate was 6am.
9. In its submission dated 9 February 2018 the Ai Group submits that the objections of the SDA should be dismissed.
10. The Ai Group submission refers to the decision in *Remington Products Australia Pty Ltd v Energiser Australia Pty Ltd [2008] FCAFC47*. The Ai Group refers to the decision to support its position that a facilitative provision is supplementary to the determination of the Full Bench in the penalty rates proceedings.
11. Paragraph 5 of the Ai Group's submissions read;

The decision in Remington emphasises that a supplementary order (or determination) does not vary or alter the initial order (or determination) (see Remington at [8]). The proposed facilitative clause (if the subject of a determination made by this Full Bench) does not alter or vary the initial

determination of the Full Bench in the Penalty Rates Proceedings on the end time of the late night penalty.

12. The determination of the Full Bench (2017) FWCFB 1001, was clear. The hours worked between midnight and 6am, attracted a loading of 15% (for casuals this will be in addition to the 25% loading). The inclusion of a facilitative provision clearly alters the determination of the Full Bench in this matter.

13. The draft determination in Ai Group's submissions of 16 January 2018 read:

In sub-clause 25.5(a)(ii), inserting after the words "25% casual (sic) loading." of clause 25.5(a)(ii):

The evening penalty end time (6.00 am) may be altered by up to one hour at the end of the spread (up to 5.00am), by agreement between an employer and the majority of employees concerned.

14. The effect of this facilitative provision is to remove the loading that would otherwise apply to hours worked between 5am and 6am. The SDA submits that this would alter the determination of the Full Bench. The SDA does not see this as in any way analogous to the situation described in Remington (where the overstickering of battery packs in the March 2008 orders are considered consistent with those orders made in December 2007).

15. Throughout its submission, Ai Group refers to the facilitative provisions standing "side by side" with the determination of the Full Bench. The SDA submits that it is not necessary or desirable that a facilitative provision stands "side by side" with clause 25.5(a)(ii). Clause 25.5(a)(ii) is clear and unambiguous and operates perfectly by standing alone.

16. The SDA does not agree with the statement at paragraph 9 of the submission that:

The failure of the Full Bench in the Penalty Rates Proceedings to make a determination including the facilitative provision does not preclude this Full Bench from making such a determination.

17. The SDA does not see the Full Bench as having “failed” in its determination on the ceasing time of the evening penalty rate. To the contrary, the decision demonstrates that the matter was strongly considered (see paragraph 4 above).
18. The Fast Food Industry Award 2010 does not contain any facilitative provisions. Some other awards, with their own specific history, do contain facilitative provisions. In an industry characterised by a handful of large operators, their franchisees, medium sized businesses as well as corner store operations, the inclusion of a facilitative provision to alter the ceasing time would require considerable evidence as to the effect, the operation and the consequences of such a provision. Ai Group had the opportunity to do this in the Full Bench Penalty Rates matter but did not do so.
19. Ai Group submissions at paragraph 10 state that the making of a supplementary order is not the notion of “essentiality” but “appropriateness or reasonableness”. The notion of “appropriateness or reasonableness” was considered by the Full Bench. The Full Bench at PN 1134 demonstrates it considered the span of hours and the appropriate ceasing time was 6am (and not 7am):

[1134] In our view the span of hours attracting the 15 per cent additional payment should be amended to ‘between midnight and 6.00 am’. In the context of this award the provision of an additional payment for work performed between 6.00 am and 7.00 am does not achieve the modern awards objective.

20. The Full Bench’s position at PN 1134 can be summarised as saying that a penalty loading (of 15%) is not appropriate for work between the hours of 6am and 7am as it is “not ‘fair’, to employers”. We can take from this position that the Full Bench has determined that a 15% loading is therefore appropriate for hours of work between 5am and 6am.

21. The Fast Food Industry Award already contains a method to alter the provisions of clause 25.5(a)(ii). That is, the Award Flexibility provision at clause 7. Clause 7 provides a mechanism for an employer and employee to agree to vary the application of arrangements for when work is performed and penalty rates. This clause offers protections and a clear process that there be no coercion or duress of the employee and that the employee be better off.
22. The SDA submits that it would be an unusual situation where a majority of employees would agree to forfeit a benefit such as a loading. The loading, at 15% is a modest but important benefit to a low paid employee working before 6am.
23. For the reasons above the SDA continues to press that this application is struck out.
24. While the SDA strongly submits that the application should be struck out, if the Full Bench is minded to allow the application to proceed, it should be referred to the Penalty Rates Full Bench which has already dealt with this matter.