

FAIR WORK COMMISSION RESHAPES PENALTY RATES REGIME.

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INTRODUCTION:

On the 23rd February the Full Bench of the Fair Work Commission (FWC), handed down its decision relating to six awards in the Hospitality & Retail sectors, as part of the 4 yearly review of modern awards.

In 2015, I wrote an article outlining the history of penalty rates noting that:

“Penalty rates protect/compensate employees for ‘isolation/alienation from their community and family’. This approach reflects the historical development of penalty rates during the period of the largely fulltime and male dominated workforce of the early twentieth century; a workplace relations environment that saw very different ‘norms’ to those applying currently, including:

- *An average working week of 44 hours over five and a half days of the week;*
- *No paid recreation leave and very little paid sick leave;*
- *Little or no retail activity on Sundays or Public Holidays.*

This was a period when the community was more ‘family focused’, with regular and routine religious observance by many on Sundays, and a hospitality sector significantly more restricted in trading hours and practices by licensing laws.....”

This particular item outlined the background to the case that was determined by the FWC in February 2017.

In addition, in 2015, I commented that:

“..... a full bench of the Fair Work Commission (in 2015) handed down a decision relating to a series of issues including penalties and casual loadings impacting upon the operation of the Restaurant Industry Award 210. The matter was brought by the Restaurant and Catering Association of Victoria (RCAV), who was seeking a reduction in Sunday penalty rates from 50 to 25%.”

“Therefore, for the very first time, a Full Bench has qualified the right to penalty payments in terms of both the status (casual/transient/younger) and seniority (lower skilled) of employees.”

“The impact of this decision has seen the door left ajar for a slew of applications from employers across a wide-range of Sectors seeking similar or greater concessions; likely to coincide with the Productivity Commission Hearings, thereby creating an environment which may embolden the Federal Government to make complementary amendments to the Fair Work Act.”

The following is a summary of the Commission’s findings (of 2017).

A MILESTONE DECISION:

The Commission characterised the arguments put by the various, (& numerous), parties to the proceedings as evaluating the “compensatory element” (compensating

employees for work outside 'normal hours'; and thereby forming a "deterrence" on employers), or in the alternative, compensating employees for the "disutility" associated with working on weekends or public holidays (being the sense of isolation from family and social networks, referred to in my earlier article).

The FWC was of a view that there is a varying degree of 'disutility' between Saturday, Sunday and Public Holidays, however that; **"the disutility is much less than in times past."**

The Bench determined:

"The notion of relative disutility supported a proportionate approach to the fixation of weekend and public holiday penalty rates."

Most significantly, they agreed with the findings of the Productivity Commissions' 2015 Final Report – 'Workplace Relations Framework' in as far as; **"there is no case for common penalty rates across all industries."**

They further concluded that the current (and anticipated) work opportunities afforded by a reduction in penalty rates would fall predominately to lower skilled staff (typically at Level 1, in the awards under review); they took this logic one step further, in drawing a distinction in as far as employees at Level 2, and above; *"are generally speaking, regarded as 'career' employees, whereas part-time crew members are usually regarded as 'non-career employees."*

SO WHAT HAS CHANGED:

The FWC Full Bench, in considering the awards before it, found that:

- Weekend work – particularly on Sunday in a number of "discretionary consumer services industries has become highly contested..... where consumer expectations of access to services has expanded over time....."
- "Such industries are also important sources of entry-level jobs for.....relatively unskilled casual employees and young people (particularly students) needing flexible working arrangements."
- The disutility in relation to Public Holidays; "has been ameliorated somewhat by the introduction of a limited right to refuse to work, on reasonable grounds." This was seen as a "significant contextual matter which was not taken into account when the existing 250 percent penalty was set."
- The existing Sunday penalty rates in the 'Hospitality, Fast Food, Retail and Pharmacy Awards' **"do not achieve the modern awards objective, as they do not provide a fair and relevant minimum safety net."**

WHERE TO FROM HERE:

The Commission has advised that it will give parties the opportunity to make further submissions on the timing and methodology of phasing-in changes to the various awards to create "appropriate transitional arrangements necessary to mitigate the hardship caused to employees who work on Sundays."

The President indicated that new Sunday & Public Holiday rates will take effect from 1.7.2017, with annual instalments (in a similar way, as Modern Award provisions where phased-in in 2010 to replace dissimilar NAPSA's - State-based Awards). Such instalments will probably be no fewer than two and not more than five, and will differ from award to award.

As a further step in the general 4 yearly review process, the Commission will consider the insertion of *'loaded rates'* schedules in the group of modern awards in this particular application, in order to overcome the concerns of the *Fair Work Ombudsman*, relating to significant levels of non-compliance in payment of penalty rate provisions. 'Loaded rates' may have a positive effect on award compliance.

IMPACT ON LEISURE & RECREATION AWARDS:

Given the specific issues addressed in this decision, this is by no means the end of the story in relation to 'penalty rates': despite what many conservative editorialists may have published.

The major awards operating in the Leisure & Recreation Industry (*'The Fitness Industry Award 2010'* and *'Amusement, Events and Recreation Award 2010'*), whilst regulating minimum wages and conditions "*discretionary consumer service industries*", have significantly different history and provisions, from the small group in this particular decision. For instance, in several of the former state awards that preceded the Modern Awards, some had no effective Saturday Penalties, some provided 'all-up casual rates', (and still do), for work on weekends and Public Holidays, and - most did not have shift or split shift loadings.

The Leisure & Recreation Industry (probably) has a higher level of reliance on casual , and unskilled employees than the Hospitality & Retail Sectors. Where there are weekly employees, they are more likely to be 'full-time', (possibly salaried), than part-time.

The Sector is not in competition with internet-based operators, unlike the Retail Sector.

Larger employers are likely to have been operating under enterprise agreements for many years, which are highly likely to have appropriately addressed weekend & public holiday work, which in turn will be embedded in their charges to consumers.

THE BIG PICTURE:

This decision, while significant, is but one small step down a very tortured path. As a community we need to resolve the questions "*Do we want & need all services delivered on a 24/7 basis?*"

AND

"What price do we want to pay or be paid for them?"