



Restaurant
& Catering

FAIR WORK COMMISSION
4 YEARLY REVIEW OF MODERN AWARDS
– CASUAL AND PART-TIME EMPLOYMENT (AM2014/196 and AM2014/197)

RESTAURANT AND CATERING INDUSTRIAL
2 AUGUST 2017

1. Restaurant & Catering Industrial (RCI) make these submissions in pursuant to direction 7 of the Full Bench decision relating to the part-time and casual employment matters (AM2014/196 and AM2014/197), in response to the draft determination filed by United Voice.
2. We outline below RCI's objections to the variations proposed to the *Restaurant Industry Award 2010* by United Voice, contained in its proposed draft determination.
3. As a general observation, it is apparent that the variations sought in the proposed draft determination are new and different to the initial claims proposed by United Voice in the proceedings, and attempt to attribute additional rights to casual employees, contrary to decision of the Full Bench.
4. Annexed to this submission is a draft determination proposed by RCI.

Rostering Provision

5. RCI objects to the proposed variation by United Voice to include casual employees in the rostering provision contained in clause 31.6 of the Restaurant Award, to insert the wording "*Casual employees may be included in the roster.*" in subclause 31.6(a).
6. The proposed new addition in subclause 31.6(a), when read together with the existing subclause 31.6(b) of the Restaurant Award (which we understand has been inadvertently omitted in the draft determination), has the effect restricting employers' ability to freely engage casual employees by imposing a requirement for any changes to the roster to be made only by mutual consent. Subclause 31.6(b) reads:

"(b) The roster will be alterable by mutual consent at any time or by amendment of the roster on seven days' notice. Where practicable, two weeks' notice of rostered day or days off should be given provided that the days off may be changed by mutual consent or through sickness or other cause over which the employer has no control."
7. As observed by the Commission following consideration of the evidence by a number of employer parties in the common issues proceedings¹, the use of casual employees has been influenced by the inflexibility of the part-time provision in some of the hospitality

¹ [2017] FWCFB 39541 at [516], [517], [523]–[525].

awards. To meet the operational requirements of business, given the seasonal and transient nature of the industry, employers have utilised casual employment due to the flexibility that it affords. The restaurant, café and catering industry is particularly susceptible to the seasonal nature of the industry. The use of a large number of casual employees in the industry has also been influenced by the inflexibility of the part-time provision in the Restaurant Award.

8. The high number of casual staff in the food industry was also demonstrated by evidence provided by United Voice in these proceedings. There is a risk that inclusion of the proposed clause would have the opposite effect of resolving this issue.
9. The proposed variation to clause 31.6 would remove the flexibility afforded to employers to roster casual employees to suit the needs of the business, create significant administrative burden, and would ultimately be a disincentive for employers to offer hours to casuals over part-time employees, as the proposed clause would impose the same rigidity that is currently present in the part-time provision of the Restaurant Award,
10. It is noted that it was previously submitted by United Voice² that the rostering provision had no application to casual employees. As such, the variation now sought by United Voice amounts to a new claim. As this matter has now been determined by the Full Bench, United Voice should not be provided with an opportunity to raise issues, which have not previously been put to the Commission and given proper consideration.

Calculation of overtime penalty rates

11. RCI rejects the proposed calculation of overtime rates contained in the proposed clause 33.2 of the draft determination. It is firstly noted that United Voice previously submitted in its claim that payment of overtime relating to casual employees should be '*exclusive of the casual loading*'. This is noted in the decision:

"[433] Clause 33.3(a) would also be varied to include a reference as to how overtime rates shall be calculated for a casual employee, by inserting a new paragraph (iv):

(iv) In the case of a casual employee the normal rate of pay will be their rate of pay exclusive of the casual loading."

² United Voice Submission dated 29 February 2016 at [9].

12. United Voice has gone to great lengths³ to justify inclusion of casual loading in the calculation of overtime penalty rates for casual employees, contrary to the decision of the Full Bench, that *'The rate of the overtime penalty will in the case of each award be the same as for full-time employees. It shall not however compound upon the casual loading.'*⁴
13. In its submissions, United Voice referred to the preferred method of calculation of overtime payment by the Productivity Commission identified as 'default method'. RCI submits that this proposed calculation method in fact absorbs casual loading, and does not provide a means to justify the addition of further casual loading when calculating payment of overtime penalty rates.
14. The proposed variation would put casual employees in a more advantageous position to full-time and part-time employees and overcompensate casuals for any overtime hours worked in excess of 12 hours per day, or 38 hours per week, which RCI submits is not consistent with the modern awards objective.
15. RCI submits that the reference made by United Voice to a repealed award⁵, and caselaw that has no relevance to the matters at hand, has no application in determining a fair and proper calculation of overtime penalty rates for casual employees.
16. RCI therefore rejects any deviation from the decision of the Full Bench pertaining to this particular issue, and supports the calculation of overtime penalty rates for casual employees to be on the same rate as full-time and part-time employees, as is currently in clause 33.2 of the Restaurant Award.

Payment on rostered days off

17. RCI rejects the proposed amendment by United Voice to include a new subclause 33.2(c) in the Restaurant Award, entitling casual employees to be paid a minimum of four hours if they are required to work on a rostered day off. As submitted in paragraphs 5 to 10 above, RCI objects to the proposal of formalising the rostering of casual employees. It is pertinent

³ United Voice Submissions dated 21 July 2017 at [26] – [39].

⁴ [2017] FWCFB 39541 at [550].

⁵ United Voice Submissions dated 21 July 2017 at [37], [38].

for employers in the industry to maintain the freedom to engage casual employees as and when required, depending on the operational needs of the business. Further, as this claim has not previously been raised by United Voice and should therefore not be given any consideration, for the same reason mentioned in paragraph 9 above.

18. The majority of RCI members employ a significant number of casual workers due to the flexibility it affords in terms of rostering, bearing in mind the seasonal nature of the industry and fluctuations in service demands. With the ever-increasing labour costs in the restaurant, café and catering industry, particularly relating to the employment of casual employees, together with the proposed changes by United Voice mentioned above, would create significant additional impediment to the viability of employers' businesses and their ability to engage new, or indeed maintain existing casual employees.

Restaurant and Catering Industrial



FAIR WORK
COMMISSION

DRAFT DETERMINATION

RESTAURANT INDUSTRY AWARD 2010

[MA000119]

Restaurant industry

VICE PRESIDENT HATCHER
SENIOR DEPUTY PRESIDENT HAMBERGER
DEPUTY PRESIDENT KOVACIC
DEPUTY PRESIDENT BULL

SYDNEY, XX YYY 2017

4 yearly review of modern awards – part-time and casual employment

A. Further to the Full Bench decision issued by the Fair Work Commission on 5 July 2017, the *Restaurant Industry Award 2010* is varied as follows:

1. By deleting clauses 13.2 and 13.3 and inserting the following:

13.2 A casual employee may be engaged to work:

- (i) for a maximum of 38 hours per week;
- (ii) where a roster applies, up to 38 hours per week averaged over the roster cycle provided the roster does not exceed 4 weeks; or
- (iii) for a maximum of 12 hours per day or within a continuous or broken shift.

13.3 On each occasion a casual employee is required to attend work they are entitled to a minimum payment for two hours' work.

13.4 All time worked in excess of the hours prescribed in clause 13.2 will be overtime and paid for at the rates prescribed in clause 33—Overtime.

13.5 A casual employee must be paid at the termination of each engagement, but may agree to be paid weekly or fortnightly.

2. By deleting clause 24.1(a) and inserting the following:

24.1 Meal allowance

- (a) An employee required to work overtime for more than two hours without being notified on the previous day or earlier that the employee will be so required to work will be supplied with a meal by the employer or paid a meal allowance of \$12.71.
3. By inserting a new clause 33.1(c) as follows:
- (c) A casual employee is paid at overtime rates in the circumstances specified in clause 13.4.
4. By deleting clause 33.2 and inserting the following:

33.2 Overtime rates

- (a) The overtime rate payable to a permanent full time or part time employee depends on the time at which the overtime is worked.
 - (i) **Monday to Friday:** 150% of the employee's ordinary base rate of pay for the first two hours of overtime then 200% of the employee's ordinary base rate of pay for the rest of the overtime.
 - (ii) **Between midnight Friday and midnight Saturday:** 175% of the employee's ordinary base rate of pay for the first two hours of overtime then 200% of the employee's ordinary base rate of pay for the rest of the overtime.
 - (iii) **Between midnight Saturday and midnight Sunday:** 200% of the employee's ordinary base rate of pay for all time worked.
 - (iv) **On a rostered day off:** 200% of the employee's ordinary base rate of pay for all time worked. The employee must be paid for at least four hours even if the employee works for less than four hours.
 - (b) The overtime rate payable to a casual employee depends on the time at which the overtime is worked.
 - (i) **Monday to Friday:** 150% of the employee's ordinary base rate of pay (inclusive of casual loading) for the first two hours of overtime then 200% of the employee's ordinary base rate (inclusive of casual loading) of pay for the rest of the overtime.
 - (ii) **Between midnight Friday and midnight Saturday:** 175% of the employee's ordinary base rate of pay (inclusive of casual loading) for the first two hours of overtime then 200% of the employee's ordinary base rate of pay (inclusive of casual loading) for the rest of the overtime.
 - (iii) **Between midnight Saturday and midnight Sunday:** 200% of the employee's ordinary base rate of pay (inclusive of casual loading) for all time worked.
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- B. This determination will come into operation from 1 December 2017. In accordance with s.165(3) of the *Fair Work Act 2009* (Cth) this determination does not take effect until the first full pay period that starts on or after 1 December 2017.

VICE PRESIDENT
