



Restaurant
& Catering

SAVOUR
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RESTAURANT & CATERING INDUSTRIAL SUBMISSIONS IN RESPONSE TO FAIR WORK COMMISSION DECISION (AM2017/57; AM2017/59) ISSUED 12 DECEMBER 2018.

Background

In its decision dated 12 December 2018, the Fair Work Commission outlined its intention to further alter the Restaurant Award by deleting clause 39 ('No deduction for breakages or cashiering underings').

Outline of RCI Position

The reasoning to support the deletion of clause 39, as understood by RCI, is based upon the potential for conflict with subsection 326(1), (3) or (4) and therefore contradiction of section 151.

The relevant elements of these provisions can be summarised as follows:

- A term of a modern award will have no effect if it permits an employer to make a deduction which is for the benefit of the employer **and** is unreasonable in the circumstances.
- A term of a modern award will have no effect if it permits an employer to make a deduction from an employee who is under 18 years of age without the consent of a parent or guardian.

It is also worth noting that subsection (2) of the provision specifically provides that regulations may prescribe circumstances in which a deduction referred to in subsection (1) is or is not reasonable.

RCI opposes the deletion of this clause for the following reasons:

- 1) This clause is first and foremost a protection of employees against deductions for unintentional breakage and cash underings in error.

This issue was previously considered by the Australian Industrial Relations Commission in December 1997 as part of the Award Simplification Decision (H0008 Dec 1533/97 M Print P7500) where their honours concluded, at 14.3, that the clause should remain because

“the clause contains necessary protections for employees”.

All versions of the clause have included a caveat for wilful misconduct and this clause is now enshrined in both the Restaurant Industry Award and the Hospitality Industry General Award.

RCI supports the position that employees should be protected from accidental breakage and cash underings, however, it maintains that the employer should be protected from acts of wilful misconduct.

2) *The provision is necessary to protect the employer from deliberate actions of employees*

In keeping with section 326(2) the award has prescribed a circumstance in which it is reasonable for an employer to make a deduction. This circumstance is wilful misconduct. There is no conceivable reason that an employer should not be protected against the deliberate actions of their employees with regards to breakage and cash underings. The tone of the clause is initially set by providing a protection in favour of the employee against the cost of breakages or cashiering underings and only provides wilful misconduct as an exception.

3) Consent of Parent or Guardian is not a relevant factor

Subsection (4) requires consent of a parent or guardian in order to make a deduction from an employee under 18 years of age. This provision provides a protection to minors that is already enshrined in common law and any deduction made under clause 39 of the award must satisfy this requirement. If it is asserted that this renders the clause ineffectual then this assertion must pertain only to employees under the age of 18, which does not render the clause ineffectual against the majority of employees across the industry who are over 18.

The parameters set out by the award and the legislation provide protection for employees under 18, however, that does not render the effects of the exception contained in clause 39 as ineffectual. One way of achieving protection under this provision, for example, would be to include this requirement as one of the terms and conditions of employment and having the parent or guardian co-sign upon induction of the employee.

The requirement to have a parent or guardian sign on behalf of a minor is a necessary protection that allows young adults to participate in society before reaching their age of majority. This protection has never been intended to absolve them of responsibility for wilful misconduct.

4) A legitimate protection should not be removed based on a hypothetical scenario that contravenes the legislation

At paragraph 255 of the decision, it is submitted that

“More generally, such a deduction will be of no effect if it is ‘unreasonable in the circumstances’ this may be the case if the deduction was disproportionate to the ‘breakages or cashiering underings’.

The intention of this clause is to provide a remedy for employers who are victims of wilful misconduct. The legislation, by way of s 325(1)(b) provides a safe guard to ensure that when guilty of wilful misconduct in the circumstances, an employee is not over penalised, and the employer is not unjustly enriched by imposing a requirement of reasonableness on the deduction. This can be interpreted to mean that the deduction should be proportionate to the damage suffered.

RCI Proposed Amendment

If the Commission accepts our submissions on the necessity of the clause, but is of the mind to amend the clause in order to ensure it is properly construed in conjunction with the provisions of the act, RCI proposes the following wording be used for clause 39:

39. No deduction for breakages or cashiering underings

An employer must not deduct any sum from the wages or income of an employee in respect of breakages or cashiering underings except in the case of wilful misconduct.

- (a) In cases of wilful misconduct, the deduction must be reasonable in the circumstances and proportionate to the loss suffered by the employer;
- (b) Any deductions against the wages or income of an employee under 18 years old must be authorised in writing by a parent or guardian.

RCI does not oppose the Commission's proposal concerning the Competency Based Wage Progression for Apprentices.

RCI maintains its previously outlined position with respect to meal breaks.