

Summary of Decision

14 May 2014



Restaurant and Catering Association of Victoria [2014] FWCFB 1996 C2013/6610

1. This decision concerns an appeal by the Restaurant and Catering Association of Victoria (RCAV) against a decision of Deputy President Gooley of 10 October 2013 concerning the two-yearly review of the *Restaurant Industry Award 2010* (Restaurant Award). In that decision, the Deputy President rejected a large range of proposals to vary the Restaurant Award, including proposals to reduce pay rates for small businesses, abolish weekend penalty rates and modify the classification structure.

2. The RCAV's appeal only challenged limited aspects of the Deputy President's decision, namely the refusal to grant an alternative application to reduce the Sunday penalty rate in the Restaurant Award from 50% to 25% and to make four specific changes to the classification structure.

3. The Full Bench has, by majority, decided the following:

- (1) Permission to appeal is granted because the subject matter of the appeal is of sufficient importance to attract the public interest, and because error has been identified in the Deputy President's decision in a number of respects.
- (2) The Deputy President's decision concerning Sunday penalty rates was attended by appellable error, in that the Deputy President apparently determined the matter by reference to the test of whether there had been a significant change of circumstances since the making of the Restaurant Award and, as a result, did not consider the matter in accordance with the relevant requirements of the applicable legislation.
- (3) It is necessary therefore for the Full Bench to re-determine the RCAV's alternative claim for a reduction in the Sunday penalty rate from 50% to 25%.
- (4) The RCAV's case that the reduction in the Sunday penalty rate from 50% to 25% would have significant benefits for employment and business turnover was not made out. Employment in the restaurant industry has consistently been growing strongly over the last two decades, and has continued to grow since the Restaurant Award was made. It is accepted however that Sunday penalty rates may have a limited effect on employment, particularly in relation to owner-operators working on Sundays in preference to engaging staff for additional hours.
- (5) The RCAV's case that, as a general proposition, the level of disability for working on Sundays is no higher than that for Saturdays is rejected. The position has not changed since a Full Bench of the Australian Industrial Relations Commission considered this issue in 2003. Working on Sundays involves a loss of a day of family time and personal interaction upon which special emphasis is placed by Australian society.
- (6) Although a 50% Sunday penalty rate is generally appropriate for employees under the Restaurant Award, for transient and lower-skilled casual employees working mainly

on weekends, who are primarily younger workers, the superimposition of the casual loading of 25% in addition to the 50% penalty tends to overcompensate them for working on Sundays and is more than is required to attract them for work on that day. In that respect, the Restaurant Award is not meeting the modern awards objective in s.134 of the *Fair Work Act 2009*.

- (7) It is necessary to vary the Restaurant Award to remedy the issue identified. It is not intended that the variation to be made have any effect upon career restaurant industry employees, recognising that the latter category of employees is likely to include persons employed on a casual basis working regular and/or full time hours.
- (8) It is considered that transient and lower-skilled casual employees will primarily be employed in the Introductory Level classification or in the Level 1 and Level 2 pay grades. Accordingly, effective from 1 July 2014, the Restaurant Award shall be varied to provide that for casual employees in these classifications, the Sunday penalty rate together with the casual loading should not exceed 50% in total (that is, the 25% casual loading and in addition a further 25%). To prevent as far as possible affecting the take-home pay of existing employees, there will be an additional requirement that no existing employee classified as Level 3 or above should be moved down to Levels 1 or 2 or be discriminated against in the allocation of work as a result of this variation.
- (9) In respect of the four proposed changes to the classification structure in the Restaurant Award, it is considered that the Deputy President erred in her consideration of two of the changes, which means that those claims must be re-determined by the Full Bench. The Restaurant Award currently does not permit employees classified as Food and Beverage Attendants Grade 1 to receive money from customers, and does not permit employees classified as Food and Beverage Attendants Grade 2 to take reservations and greet and seat guests. Because this restriction artificially limits the use of those classifications, the Restaurant Award is not meeting the modern awards objective in this respect. The Restaurant Award shall be varied, effective from 1 July 2014, to allow employees classified as Food and Beverage Attendants Grade 1 to receive money from customers, and employees classified as Food and Beverage Attendants Grade 2 to take reservations and greet and seat guests, subject to the requirement that no existing employee should have his or her classification reduced as a result of this variation.

4. The minority also determined that permission to appeal should be granted and that the Deputy President's decision was attended by appellable error, but preferred a different outcome on the re-hearing.

[\[2014\] FWCFB 1996](#)

- ***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.***

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