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Penalty goal

K&L Gates' **Michaela Moloney** and **Brianna Kenna** sort through the rate debate.

THE FULL BENCH of the Fair Work Commission's decision to reduce the penalty rates payable under awards covering employees in the Retail and Hospitality industries has sparked a furore of political and media attention. As part of the Fair Work Commission's four yearly review of modern awards, various employers made applications to review the penalty rates payable under a number of awards in the retail and hospitality industries. Relevantly for fashion brands and boutiques, this included changes to the penalty rates payable under the General Retail Award 2010 (Retail Award).

The Full Bench handed down its decision on 23 February 2017.

In considering whether changes were justified, the Full Bench noted that the traditional function of penalty rates was two-fold:

- firstly, they were intended to compensate employees for working outside of normal hours; and
- secondly, they were intended to deter employers from scheduling work outside of normal hours.

In the context of the Fair Work Act and the terms of the modern awards objectives, the Full Bench decided that the deterrence justification for the implementation of penalty rates was no longer relevant. Rather, the only consideration in setting penalty rates was to compensate employees for the inconvenience of working on weekends and public holidays.

In light of this conceptual shift, the Full Bench considered that Saturday penalty rates sufficiently met the modern awards objective, but that the Sunday and Public Holiday penalty rates did not.

The Full Bench decided to reduce the Sunday penalty rates, although not to the same level as Saturday penalty rates. It acknowledged that there was an additional inconvenience associated with working on a Sunday as opposed to a Saturday, but that this added inconvenience was not as high as it had been in the past.

The Full Bench also noted that the disutility of working on public holidays was greater than working on weekends, but considered that a proportionate reduction was necessary. It also noted that the inconvenience of working on public holidays had been somewhat reduced following

the introduction of the statutory right to refuse to work public holidays on reasonable grounds.

The changes to penalty rates under the Retail Award vary between employees. For full-time and part time employees, Sunday penalty rates will drop from 200% to 150%. For casual employees, this will be from 200% to 175%. Meanwhile, public holiday rates will drop down from 250% to 225% for full-time and part-time employees. While casual employees will see this drop 275% to 250%.

The Transition

The changes to public holiday rates will apply in full from the start of the first full pay period following 1 July 2017.

The transitional arrangements for Sunday penalty rates have not been finalised, however the Fair Work Commission has expressed a preliminary view that the rates will be incrementally decreased each year, which may begin on 1 July 2017.

Businesses whose employees are covered by the Retail Award will need to make adjustments to their employees' rates in accordance with the announced arrangements.

The Fair Work Commission's decision has been incredibly controversial, with all sides of politics weighing in heavily with their opinions. Bill Shorten has indicated that the Labor Party opposes the decision and will introduce a bill to nullify its impact.

Greens MP Adam Bandt introduced a private members bill entitled Fair Work Amendment (Protecting Weekend Pay and Penalty Rates) Bill 2017 on 20 March 2017. The bill proposes to prevent the Fair Work Commission's decision from coming into effect and will prevent any future decisions from making penalty rates lower than those in force at 1 January 2017.

Parliamentary support for either bill is yet to be gauged, however businesses affected by the decision should ensure that they stay abreast of any new developments. ■

For more information about issues relating to Labour, Employment and Workplace Safety please contact Michaela Moloney, Partner at K&L Gates (Michaela.Moloney@klgates.com). This article is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.