



STATEMENT

Fair Work Act 2009

s.157—Variation of a modern award to achieve the modern awards objective

Health sector awards – Pandemic Leave

(AM2020/12)

Various industries

JUSTICE ROSS, PRESIDENT

MELBOURNE, 9 APRIL 2020

[1] On 8 April 2020 a Full Bench of the Commission issued a Decision¹ (the April 2020 Decision) varying 99 modern awards to insert a new Schedule – ‘Schedule X: additional measures during the COVID-19 pandemic’.

[2] During the course of the proceedings relating to the April 2020 Decision the ACTU, AMNF, the HSU and APESMA made submissions regarding the particular circumstances of health care workers. The awards which were the subject of these submissions are as follows:

- *Aboriginal Community Controlled Health Services Award 2010*
- *Aged Care Aware 2010*
- *Ambulance and Patience Transport Industry Award 2010*
- *Health Professionals and Support Services Award 2010*
- *Medical Practitioners Award 2010*
- *Nurses Award 2010*
- *Pharmacy Industry Award 2010*
- *Social, Community, Home Care and Disability Services Industry Award 2010*
- *Supported Employment Services Award 2010*

[3] The ACTU submitted that:

We consider it critical that the Commission allow a further matter to be ventilated urgently and as soon as practicable after the determinations to vary modern awards are issued in the current proceeding. That further matter relates to what additional measures might be fair, relevant and necessary to meet the modern awards objective in industry and occupational awards covering employees who, as part of their employment, are required to personally attend to the needs of persons who have COVID-19, or are at a recognised high risk of suffering from COVID-19 virus, or work in health and community sector related environments where the risk of exposure to COVID-19 is clearly elevated (such as in disability services and aged care). We anticipate that such employees would have a much greater likelihood of being required to self-isolate on

¹ [2020] FWC 1837

more than one occasion. Such employees may be covered by a number of the awards identified as “phase 1” awards in paragraph [108] of the Statement, including the Aboriginal Community Controlled Health Services Award, Aged Care Award, Ambulance and Patient Transport Industry Award, Health Professionals and Support Services Award, Medical Practitioners Award, Nurses Award, Pharmacy Industry Award, and Social, Community, Home care and Disability Services Industry Award. It is our strong view that workers in those industries should be entitled to paid leave on multiple occasions. To be clear, we do not suggest that the “quick response” proposed by the Commission should be delayed pending the initiation of this further matter.’²

[4] The ANMF contended that:

‘it is critical that the Commission allows representatives of health care workers to be heard as a matter of urgency on making further amendments to the relevant awards to provide for paid pandemic leave on a per occasion basis.’

[5] The ANMF advanced the following submission in support of its contention:

‘As is evident in countries throughout the world, front-line health care workers, of whom nurses make up a large proportion of the workforce, are contracting the COVID-19 virus due to high levels of exposure.

There is evidence to indicate that health care workers are being infected at higher rates than the general public – even acknowledging that testing rates are also higher. In addition, there is evidence that health care workers are experiencing more serious symptoms as a result of contracting COVID-19 than the general public.

As the pandemic progresses in the coming months, it will be essential that health care workers are available to work treat patients infected with COVID-19. Periods of self- isolation to minimise the spread of infection for front-line health care workers will be an ongoing necessity to ensure the workforce remains healthy. Prevention of spread of the virus must be a forefront consideration.

Other health services, such as emergency departments, cancer wards, aged care and disability services are essential services that must continue to operate. Recipients of care in these environments are highly vulnerable to the impact of contracting COVID-19. Staff who care for these vulnerable people who have been exposed to COVID-19 are and will continue to be required to self-isolate to minimise the risk of infection in vulnerable groups of people.

It is highly likely that health care workers may be required to self-isolate on more than one occasion to minimise the spread of infection.’³

[6] On this basis the ANMF contended that it is ‘a matter of public health importance’ that health workers be provided with paid pandemic leave on a per occasion basis.

[7] Similarly, the HSU urged the Commission to convene an urgent separate process so they can be provided with an opportunity to be heard on additional proposed variations to these awards. In support of that proposition the HSU submitted:

² ACTU submission 6 April 2020 at para [9](a).

³ ANMF submission 6 April 2020 at paras [10] – [14]

‘However, for employees working in the health, aged care and social and community services, including disability support (SACS) sectors, and covered by the nine awards listed above, we submit that further temporary award variations are required in order to provide these employees access to paid leave per occasion they are required to isolate. We outline the reasons for this below:

- (a) There is an significant public health interest to ensure that health, aged care and SACS workers do not attend work while carrying the SARS-CoV-2 virus as these workers are in contact with the most vulnerable members of the community, including people with disabilities, elderly people, and patients who are sick or immunocompromised.
- (b) Due to the nature of their work and workplaces, health, aged care and SACS workers are more likely to be exposed to the virus, and exposed multiple times, compared to employees in the general population.
- (c) The need for additional personal leave for health, aged care and SACS workers has been reflected historically in awards. There are numerous examples of premodern awards in the health, aged care and SACS sectors which provided employees with increased personal leave,⁴ leave for dangerous medical conditions,⁵ infectious disease leave,⁶ or responded to specific health crises with additional leave provisions, such as tuberculosis leave.⁷
- (d) There is emerging evidence that healthcare workers are at risk of contracting more severe forms of COVID-19.⁸
- (e) It is in the public interest to promote adequate leave for health, aged care and SACS workers to ensure retention of staff in the health care workforce as the number of confirmed COVID-19 cases continue to rise and the workforce demand surges.⁹

[8] APESMA submitted that pharmacists are in the ‘front line’ and run the higher than usual risk of being exposed to COVID-19 in delivering ‘a vital service to customers’ and believes that workers employed under the Pharmacy Award and other health awards should be entitled to paid leave on multiple occasions and seek to be part of a separate process that considers this.

[9] In the April 2020 Decision the Full Bench responded to those submissions as follows:

‘We will shortly convene a conference of interested parties with a view to establishing a separate process to address the issues raised by the ACTU, ANMF, APESMA and HSU.’¹⁰

⁴ See, eg, *Nurses (Victorian Health Services) Award 2000*, clause 19.23 which provided up to 159 hours and 36 minutes paid personal leave; clause 30.1.2(c) of the *Ambulance Services and Patient Transport Employees Award, Victoria 2002* provided up to 168 hours paid personal leave.

⁵ See, eg, *Victorian Health and Community Services (Psychiatric, Disability and Alcohol and Drug Services) Award 2003*, clause 26.4.

⁶ See, eg, *Nursing Homes Award (Tasmania) 2009*, clause 33(f) – Personal leave and infectious diseases; *Hospitals Award (Tasmania) 2009*, clause 39(f) – Personal leave and infectious diseases.

⁷ See, eg, *Victorian Health and Community Services (Psychiatric, Disability and Alcohol & Drug Services) Award (1995)*, clause 25.5; *Nurses (Tasmanian Private Sector) Award (2007)* clause 25.3.3.

⁸ The Centre for Evidence-Based Medicine, Oxford University, *SARS-CoV-2 viral load and the severity of COVID-19* (April 2020) <<https://www.cebm.net/covid-19/sars-cov-2-viral-load-and-the-severity-of-covid-19/>>.

⁹ HSU submission 6 April 2020 at para [5]

¹⁰ [2020] FWCFB 1837 at [59]

[10] A telephone Conference will be held at **2pm** on **Tuesday 14 April 2020** to discuss the following matters:

- the coverage and application of each of the awards mentioned in [2] above. In particular, whether the practical application extends to each award extends to each State and Territory and the extent of enterprise agreement coverage;
- the nature of the claim advanced by the relevant unions; and
- the process for dealing with the claims advanced.

[11] I have attached the following materials which may assist in the discussion at the Conference:

- (i) Article '[SARS-CoV-2 viral load and the severity of COVID-19](#)' – published by the Centre for Evidence-Based Medicine at the University of Oxford and referenced in the HSU submission to AM2020/12.
- (ii) [Information note](#) on employees mapped to the Health industry awards.

[12] Any party wishing to attend the telephone Conference is to provide the name of the person attending, their direct contact number and the organisation name to chambers.ross.j@fwc.gov.au by no later than **12noon on Monday 13 April 2020**.

[13] A Notice of Listing will be published with this Statement.

PRESIDENT

Printed by authority of the Commonwealth Government Printer

<PR718211>