

4 April 2018

4 yearly review of modern awards – Transitional Provisions

AM2014/303

Background and the SDA Application

- 1 These submissions are made on behalf of the Pharmacy Guild of Australia (“**the Guild**”) in accordance with the amended Directions of his Honour Deputy President Kovacic dated 22 February 2018.
- 2 The Guild’s interest in these proceedings is confined to the variation sought by the Shop, Distributive and Allied Employee’s Association (“**SDA**”) to the *Pharmacy Industry Award 2010* (“**PIA**”).
- 3 We note the Guild filed written submissions in relation to the SDA application on 17 April 2015 and 24 May 2016. Since this time, the SDA claim has changed substantially and as such the Guild no longer relies upon those submissions in relation to this matter.
- 4 On 17 December 2014, the SDA filed its application to vary the PIA to include a district allowance following the Full Bench decision to reject the ACTU claim to inter alia, delete the sunset provisions from all transitional District Allowance provisions of modern awards.¹
- 5 On 8 December 2017, the SDA filed a further revised Draft Determination which confined its application for the inclusion of a district allowance in the PIA to Western Australia and in particular to the Kimberly, Pilbara and Gascoyne regions (“**SDA Claim**”).
- 6 The SDA Claim is to insert the following clause into the PIA:

19.7 District allowances ~~Broken Hill~~

An employee in:

(a) the County of Yancowinna in New South Wales (Broken Hill); and

(b) the Shire of Ashburton, the Shire of Broome, the Shire of Carnarvon, the Shire of Derby-West Kimberley, the Shire of East Pilbara, the Shire of

¹ [2014] FWCFB 7767

Exmouth, the Shire of Halls Creek, the City of Karratha, the Town of Port Hedland, the Shire of Shark Bay, the Shire of Upper Gascoyne and the Shire of Wyndham-East Kimberley in Western Australia;

will in addition to all other payments be paid an hourly allowance for the exigencies of working in those locations of 4.28% of the standard rate.

The Legal Framework and the 4 yearly review of Modern Awards

- 7 The SDA Claim has been advanced during the 4 Yearly Review of Modern Awards (“**the Review**”) being conducted by the Fair Work Commission (“**Commission**”) pursuant to section 156 of the *Fair Work Act 2009* (Cth).
- 8 The Commission has discretion as to whether to vary a modern award and in order to do so and as prescribed by section 138 of the Act, the Commission must be satisfied that each award includes terms only to the extent that it is necessary in order to meet the modern awards objective.
- 9 At the commencement of the Review, the Commission confirmed that each modern award achieved the modern awards objective at the time that it was made.²
- 10 The modern awards objective is set out at section 134(1) of the Act and it requires that the Commission ensures that modern awards when considered together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions. In making this assessment, the Commission must take into account those factors listed at section 134(1)(a) to (h) of the Act.
- 11 Moreover, in accordance with section 136 of the Act, a modern award may only include a term that is permitted or required. Those permitted matters set out at section 139 of the Act include allowances for the disabilities associated with the performance of particular tasks or work performed in particular conditions or locations. Should such an allowance be included in an award, the allowance must be separately and clearly identified.
- 12 At the commencement of the Review, the Commission provided a framework as to the conduct of the review. It is pertinent with respect of the SDA Claim to consider the Preliminary Jurisdictional Issues Decision [2014] FWCFB 7767, in which the Full Bench held:

“[23] The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a ‘stable’ modern award system (s.134(1)(g)). The need for a ‘stable’ modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI’s submission that some proposed changes may be self-evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation” (our emphasis).

² 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788 at [24].

The Evidence

- 13 The SDA has filed 10 witness statements in support of its claim, that it says are employed in the industries covered by the awards which are the subject of its claim.
- 14 Of those 10 witnesses:
- (a) One is employed by K-Mart;
 - (b) Six are employed by Woolworths;
 - (c) One is employed by McDonald's; and
 - (d) Two are employees of the SDA.
- 15 We note that none of the witnesses relied upon by the SDA are employed in the community pharmacy industry and subsequently none of the witnesses relied upon by the SDA are covered by the PIA.

The Modern Awards Objective

- 16 The SDA has had regard to the modern awards objective at s.134 of the FW Act in support of a factual basis for the inclusion of a district allowance. The Guild responds as follows.

s.134(1)(a) Relative Living Standards and The Needs of the Low Paid

- 17 The SDA submits that the absence of a district allowance will have a significant impact on low paid employees. We note however that the proposed district allowance is not limited in its application to those that could be categorised as low paid.
- 18 The *Annual Wage Review 2014 – 2015* decision considered the meaning of relative living standards as follows:

"[310] The assessment of relative living standards requires a comparison of the living standards of workers reliant on the [national minimum wage] and minimum award rates determined by the annual wage review with those of other groups that are deemed to be relevant.

*[311] The assessment of the needs of the low paid requires an examination of the extent to which low-paid workers are able to purchase the essentials for a "decent standard of living" and to engage in community life, assessed in the context of contemporary norms."*³

- 19 The term "low paid" also has a particular meaning, as considered by the Commission in its Annual Wage Review decisions:

[362] There is a level of support for the proposition that the low paid are those employees who earn less than two-thirds of median full-time wages. This group was the focus of many of the submissions. The Panel has addressed this issue previously in considering the needs of the low paid, and has paid particular regard to those receiving less than two-thirds of median adult ordinary-time earnings and

³ [2015] FWCFB 3500 at [310] to [311]

to those paid at or below the C10 rate in the Manufacturing Award. Nothing put in these proceedings has persuaded us to depart from this approach.⁴

- 20 The SDA has not undertaken the analysis required to demonstrate that the employees affected by the SDA Claim are in fact low paid, particularly with respect of the PIA which covers both community pharmacy assistants and pharmacists.
- 21 We note that the SDA relies upon paragraph [120] of *Re: SDA* [2014] FWC1846 in support of the proposition that “there is no doubt that the employees covered by the relevant awards are low paid workers”. In making this submission the SDA has seriously overstated the Commission’s statement that it “agrees with the SDA submission that a high proportion of employees in the retail industry are low paid”. This finding was made in the context of an application to vary the junior rates in the *General Retail Industry Award 2010* and is not an indicative assessment of whether workers are low paid in relation to any of the awards subject to the SDA Claim and specifically to employees covered by the PIA.
- 22 We submit this finding of the Commission is not sufficient in the context of this claim in any event, particularly in circumstances where the SDA has not adequately assessed either the needs of those low paid employees by considering the extent to which those employees are able to purchase the essentials for a “decent standard of living” and to engage in community life nor by comparing the living standards of employees who are reliant on minimum award rates with other relevant groups.
- 23 The paucity of evidence before the Commission going to these factors does not enable the Commission to find that the SDA Claim is justified by virtue of section 134(1)(a).

s.134(1)(b) The Need to Encourage Collective Bargaining

- 24 Section 134(1)(b) of the Act requires the Commission to take into account the need to encourage collective bargaining. This objective does not require the Commission to consider the likely outcomes of such bargaining, but rather whether parties will be encouraged to engage in a process of collective bargaining. The Commission should not, in assessing the need to encourage collective bargaining, have any consideration for the extent to which collective bargaining has led to an increased incidence of district allowances in affected areas in enterprise agreements.
- 25 The SDA evidence demonstrates that there is presently no impediment to collective bargaining occurring in the regions affected by the SDA claim and that a district allowance is a matter commonly negotiated between an employer, its employees and the union. Mr O’Keeffe’s evidence, indicates that of the 549 SDA members who are employed in those regions affected by the SDA claim there are only 6 employees who are not covered by enterprise agreements.⁵
- 26 We submit that the absence of an award provision provided for district allowance in the affected regions will continue to incentivise employers and employees to bargain for terms and conditions which are specific to their location and conditions of employment.

s.134(1)(c) The Need to Promote Social Inclusion Through Increased Workforce Participation

⁴ *Annual Wage Review 2012 – 2013* [2013] FWCFB 4000 and *Annual Wage Review 2013 - 2014* [2014] FWCFB 3500 at [310].

⁵ Paragraphs [11] and [12] of the witness statement of Peter O’Keeffe dated 16 February 2018.

- 27 The SDA has not advanced sufficient evidence as to how their claims “promote” social inclusion through workforce participation.
- 28 The SDA asserts that the inclusion of the proposed district allowance in the PIA will encourage employees to seek and remain in employment in regional and remote areas. There is no probative evidence in support of this contention before the Commission in these proceedings. Rather, the SDA seeks to rely upon a study regarding Queensland school teachers employed by the State Government. The SDA has not identified the correlation between the regions or occupations affected by the SDA Claim and the study. As a result, the Guild submits that the study is of little relevance to the present application.
- 29 Moreover, there is no evidence before the Commission that the payment of a district allowance provides an incentive for recruitment and retention of employees in the effected locations. Similarly, the SDA has not adduced any evidence that in the absence of a district allowance, workforce participation in the proposed locations will decrease.

s.134(1)(d) The Need to Promote Flexible Modern Work Practices and the Efficient and Productive Performance of Work

- 30 The SDA has not adduced any evidence nor made any submissions in relation this consideration.

s.134(1)(da) The Need to Provide Additional Remuneration (in certain circumstances)

- 31 The SDA has not adduced any evidence nor made any submissions in relation this consideration.

s.134(1)(e) The Principal of Equal Remuneration for Work of Equal or Comparable Value

- 32 The SDA has not adduced any evidence nor made any submissions in relation this consideration.

s.134(1)(f) The Likely Impact of Exercising Modern Award Powers on Business Including on Productivity, Employment Costs and the Regulatory Burden

- 33 Should the SDA Claim be granted, this will impose additional employment costs on employers, this is accepted by the SDA.
- 34 We note that if the Unions’ evidence and submissions that there is a higher cost of living in the locations subject to the SDA Claim, then those higher costs of living similarly affect employers operating in those locations too. The effect of being subject to higher operational and living costs makes any addition to their employment expenses more difficult to absorb.

s.134(1)(g) The Need to Ensure a Simple, Easy to Understand, Stable and Sustainable Modern Award System for Australia.

- 35 The ASU and SDA have advanced no evidence as to their claims ensuring a simple, easy to understand stable and sustainable modern award system.

s.134(1)(h) The Likely Impact of Any Exercise of Modern Award Powers on Employment Growth, Inflation and the Sustainability, Performance and Competitiveness of the National Economy.

36 The SDA Claim is also likely to adversely impact employment growth, inflation and the sustainability, performance and competitiveness of the national economy in particular those effected locations.

Conclusion

37 The Guild submits that the SDA Claim is inconsistent with sections 134(1)(a), (b), (c), (d), (f) and (g) of the Act and therefore should be dismissed.



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