

24 March 2017

**REVIEW OF THE PHARMACY INDUSTRY AWARD 2010
AM2016/28
SUBMISSION IN REPLY – SUBSTANTIVE CLAIMS**

Background:

- 1 We refer to the above matter in which we act for the Pharmacy Guild of Australia ("**the Guild**").
- 2 This submission is made following the Directions of the Full Bench issued 24 November 2016 ("**the Directions**").
- 3 These submissions are made in reply to those of the Shop Distributive and Allied Employees' Association ("**SDA**"), dated 17 February 2017 ("**SDA Submissions**") concerning their claim to vary the shift length and terms of engagement for full-time employees covered by the *Pharmacy Industry Award 2010* ("**PIA**").

SDA Claim:

- 4 The SDA seeks to vary the PIA to effect a number of variations being the introduction of:
 - (a) a minimum engagement of 4 hours for full-time employees; and
 - (b) an obligation to agree in writing to a regular roster and pattern of work of a full-time employee;
 - (c) an obligation to reduce to writing any variation to a full-time employees hours of work or roster; and
 - (d) numerous restrictions on the manner in which a full-time employee may be rostered or that roster varied.
- 5 The variations sought by the SDA are **not insignificant alterations** to the current obligations an employer has in respect of their full-time employees, and a claim which would result in more stringent obligations applying to full-time employees than are currently required with respect to part-time and casual employees. Notwithstanding the significance of the variation, the SDA has adduced no evidence in relation to the necessity or merit of the variations sought.

Context of the Review

- 6 In conducting the 4 yearly review of modern awards pursuant to s.138 of the *Fair Work Act 2009* (“**the Act**”), requires the Fair Work Commission (“**the Commission**”) to review each modern award to ensure it is achieving the modern awards objective. The Commission is charged with the obligation to ensure that modern awards, together with the National Employment Standards, “provide a fair and relevant minimum safety net of terms and conditions”, taking into account the considerations set out in s 134 of the Act.¹
- 7 The modern awards objective is set out in section 134 of the Act, which states:

134. The modern awards objective

What is the modern awards objective?

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

- (a) relative living standards and the needs of the low paid; and*
- (b) the need to encourage collective bargaining; and*
- (c) the need to promote social inclusion through increased workforce participation; and*
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and*
- (da) the need to provide additional remuneration for:*
 - (i) employees working overtime; or*
 - (ii) employees working unsocial, irregular or unpredictable hours; or*
 - (iii) employees working on weekends or public holidays; or*
 - (iv) employees working shifts; and*
- (e) the principle of equal remuneration for work of equal or comparable value; and*
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and*
- (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and*

¹ 4 Yearly Review of Modern Awards – Penalty Rates [2017] FWCFB 1001 at paragraph [115].

(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.

8 Section 138 of the Act provides that modern awards may include terms only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wage objective. If a modern award does not achieve the modern awards objective, it is to be varied such that it only included terms that are 'necessary' to achieve the modern awards objective.² That is, the Commission can only include terms in a modern award to the extent necessary to create a 'fair and relevant safety net'.

9 The framework of the 4 Yearly Review of Modern Awards was considered by the Commission in the 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues Decision.³ In this Decision at paragraph [60], the Full Bench held:

*The Review is broader in scope than the Transitional Review of modern awards completed in 2013. 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. 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. In conducting the Review the Commission will also have regard to the historical context applicable to each modern award and will take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so. The Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time that it was made.*

(emphasis added)

10 It is clear therefore that any significant change to the PIA sought by the SDA must be supported by a submission which addresses the relevant legislative framework and probative evidence properly directed to demonstrating the facts supporting the proposed variation.

The SDA Submissions – Four Hour Minimum Engagement

11 The SDA submits at paragraph [34] that the introduction of the four hour minimum shift for full time employees and the minimum terms of engagement achieve the modern

² 4 Yearly Review of Modern Awards – Penalty Rates [2017] FWCFB 1001 at paragraph [36].

³ 4 Yearly Review of Modern Awards - Preliminary Jurisdictional Issues Decision [2014] FWCFB 1788.

award objective of providing a fair and minimum safety net of terms and conditions, taking into account the:

- (a) relative living standards and the needs of the low paid; and
- (b) need to ensure a simple, easy to understand, stable and sustainable modern award system; and
- (c) need to promote social inclusion through increased workforce participation.

- 12 At paragraphs [25] and [26] of the SDA Submissions, the SDA argues that the PIA currently contains a three hour minimum shift provision for part-time and casual employees. The SDA says that it is incongruous that the PIA would afford minimum shift protections for two categories of employees but not provide those same protections to full-time employees.
- 13 It is important to note that whilst there is currently no minimum shift engagement for a full-time employee under the PIA, the PIA does prescribe a minimum engagement for part-time and casual employees at clauses 12.5 and 13.4 of the PIA respectively. The minimum engagement prescribed in both instance is three hours, a lesser minimum engagement than that sought for full-time employees.
- 14 We acknowledge that Attachment B of the SDA's submission reflects a table of the full-time minimum shift provisions that were contained in the pre-modern awards and that of the eleven pre-modern awards, only six contained minimum shift provisions and all six were for three hour shift minimums (or less by agreement).
- 15 The SDA has not however explained why a more onerous minimum engagement is necessary for a full-time employee than a part-time or casual employee or why that minimum engagement should be more than existed in the pre-modern awards. Whilst the Guild opposes the variation sought by the SDA, if the Commission is minded to introduce a minimum engagement for full-time employees, this minimum should be no more than that prescribed for a part-time or casual employee engaged under the PIA.
- 16 Furthermore, the SDA relies, at paragraph [31], on the ACTU submission to the part-time and casual Full Bench regarding their claim for a minimum 4 hour shift for part-time and casual employees that 'the appropriate minimum safety net entitlement is that an employee should, after accounting for travel, childcare and other costs, earn at least one-fifth of the Newstart weekly amount being \$56.33 per day'.
- 17 The SDA has gone on to submit that a full-time Pharmacy Assistant Level 1 under the Pharmacy Industry Award needs to work at least 3 hours to earn this amount and that in order to provide a fair and relevant safety net for full-time employees a shift should be for a duration which represents greater compensation than if they did not work that shift.
- 18 We note that no finding has been made with respect to the ACTU submission referred to above and that there was no evidence before the Full Bench in the Part-time and Casual common matter relating to the community pharmacy industry in respect of this submission (or in fact the ACTU claim generally). On that basis, even if the Bench was to accept the submission of the ACTU there is no evidence presently before the Commission that these circumstances have application to community pharmacy.

- 19 In any event, the introduction of a minimum engagement for a full-time employee would not affect the weekly remuneration payable or hours worked for a full-time employee and this submission is therefore an irrelevant consideration in whether the introduction of a minimum engagement for a full-time employee is required to provide a 'fair and relevant safety net'.
- 20 The SDA goes on to say at paragraph [26] of the SDA submissions that the absence of a minimum shift provision could allow a full-time employee to be rostered for an inappropriately short shift, 30 minutes or 1.5 hours and that rostering a full-time employee in this manner does not provide a fair and relevant safety net and further at paragraph [30] that "to comply with the principles of a fair and relevant safety net there must be a prescribed minimum number of hours an employee can be rostered to work".
- 21 In our respectful submission, the SDA submission is unconvincing and the SDA has failed to account for the already significant protections afforded to full-time employees with respect to rostering arrangements.
- 22 The PIA provides at clause 11 that a full-time employee is an employee who is engaged to work an average of 38 hours per week. The manner in which these hours must be rostered is dealt with extensively at clause 25 of the PIA. In accordance with this provision, an employee may only be rostered to perform ordinary hours in one continuous period (except for rest pauses) between the hours of 7:00am and midnight. There are further restrictions on the method of rostering being that:
- (a) Ordinary hours will be rostered so as to provide an employee with two consecutive days off each week or three consecutive days off in a two week period;
 - (b) Ordinary hours and any reasonable additional hours may not be rostered over more than six consecutive days;
 - (c) Ordinary hours may not be rostered over more than five days in a week, provided that ordinary hours may be rostered on six days in one week where ordinary hours are rostered on no more than four days in the following week; and
 - (d) An employee who regularly works Sundays will be rostered so as to have three consecutive days off each four weeks and the consecutive days off will include Saturday and Sunday.
- 23 The SDA submission at paragraph [27] states that the variations sought with respect to the inclusion of a full-time minimum engagement are "uncontroversial and self-evident" and has such have not provided any probative evidence for the inclusion of these terms.
- 24 The Guild submits that the inclusion of a four hour minimum shift for full time employees and the minimum terms of engagement is not self-evident and that the PIA is already achieving the modern awards objective by providing a fair and relevant minimum safety net of terms and conditions as there are many other protections in place for full time employees.
- 25 Further, the Guild submits that the requested variations are significant and that in the absence of probative evidence supporting the variation sought, the Commission cannot be satisfied that the change is necessary to achieve the modern awards objective.

SDA Submissions – Terms of Engagement

- 26 The Guild acknowledge the SDA submission at paragraph [37] that there is history in the pre-modern awards of provisions prescribing the arrangement of hours/rosters for a full-time employee but does not agree that they are required to go to the extent of those provided for part-time employees.
- 27 The SDA submission states that without a regular pattern of work, a full-time employee under that Award can, in effect, be treated like a casual employee with a minimum of 38 hours per week or 76 hours averaged over two weeks.
- 28 The Guild submit that this is not the case; the nature of full-time employment is that employees are guaranteed employment for an average of 38 hours per week and as such have greater protections relating to the when their rostered hours will be worked compared to other employment categories as described at paragraph [21] above.
- 29 We note also the proposition of the Full Bench in the Penalty rates case at paragraph [111]⁴ that the Commission would proceed on the basis that prima facie the modern award being reviewed, in this case the PIA, achieved the modern awards objective at the time it was made and that variations to modern awards should be founded on merit based arguments. In our view, the SDA has failed to demonstrate that there is any merit to the inclusion of terms which may have existed in pre-modern instruments, in circumstances where the Commission was satisfied at the making of the PIA that these terms were not necessary to be included in order for the PIA to meet the modern awards objective.

Conclusions:

- 30 The variations sought by the SDA should be dismissed in their entirety.



Solicitor: Jessica Light
Direct line: (02) 9018 9940
Email: jlight@meridianlawyers.com.au



Principal: Sharlene Wellard
Direct line: (02) 9018 9939
Email: swellard@meridianlawyers.com.au

⁴ 4 Yearly Review of Modern Awards – Penalty Rates [2017] FWCFB 1001 at paragraph [111].