

IN THE FAIR WORK COMMISSION

Matter No: AM2016/36

Fair Work Act 2009

s. 156 – 4 yearly review of modern awards

4 yearly review of modern awards – Blood Donor Leave

Claim to vary the Pharmacy Industry Award 2010 (MA000012)

Submission in Reply

INTRODUCTION

- 1 This submission is filed by the Pharmacy Guild of Australia (the **Guild**) in reply to the Shop, Distributive and Allied Employees' Association (the **SDA**) submission filed on 2 May 2017 (the **SDA submission**).
- 2 The SDA asks the Fair Work Commission (the Commission) to vary the *Pharmacy Industry Award 2010* (the **Pharmacy Award**) in the terms set out in the draft determination filed on 5 April 2017 to include a term providing for paid blood donor leave.

THE LEGISLATIVE FRAMEWORK

- 3 Section 156 of the *Fair Work Act 2009* (Cth) (the **Act**) provides the Fair Work Commission (the **Commission**) must conduct a review of all modern awards, including the Pharmacy Award, every four years.
- 4 The modern award review must be such that each modern award is reviewed in its own right. This does not prevent the Commission reviewing two or more modern awards at the same time (s156(5)).
- 5 The Commission must therefore review the *Pharmacy Industry Award 2010* in its own right (section 156(5)). Notwithstanding, that for convenience, the inclusion of the paid blood donor leave term in five modern awards is being heard at the same time.
- 6 The Commission's task in conducting the review of the Pharmacy Award is to ensure permitted and required terms are included in the Pharmacy Award only to the extent necessary to give effect to the modern awards objective (s138).
- 7 The Commission must determine that that Pharmacy Award together with the National Employment Standards (the **NES**) provides a '*fair and relevant* minimum safety net of terms and conditions (s134(1)) taking into account the matters listed in s134(a) to (h) of the Act.

- 8 Not all matters listed in s134(a) to (h) will be relevant to a proposal to vary a modern award and no particular weight should be attached to one consideration over another¹.
- 9 In *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 the Commission held that whilst some proposed changes to a modern award may be self-evident and can be determined with little formality, where a significant change to a modern award 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 and how the changes meet the modern award objective².
- 10 The Guild submits that the SDA has not adduced any evidence related to community pharmacy, let alone probative evidence demonstrating the facts supporting the merits of inclusion of blood donor leave term in the Pharmacy Award and its claim should therefore be dismissed.

PREDECESSOR AWARDS AND ENTERPRISE AGREEMENT TERMS

- 11 The SDA submits from paragraph [24] onwards, that blood donor leave was a common entitlement contained in pre-modern awards and is a common term in Enterprise Agreements.
- 12 With respect to community pharmacy, this claim is inaccurate.
- 13 Of the 14 awards that were considered during the modernisation process that resulted in the making of the Pharmacy Award, only one Award from South Australia (being the Retail Pharmaceutical Chemists Award) contained reference and entitlement for blood donor leave (see Schedule A).
- 14 The SDA has not identified a single enterprise agreement that would apply to employees covered by the Pharmacy Award that contains a blood donor leave provision. In any case, enterprise agreement terms are the result of bargaining, which may mean that the employer agreed to the inclusion of a paid blood donor leave provision as a trade-off for other productivity gains.
- 15 The SDA submission that paid blood donor leave is sustainable for any business, including pharmacy, and achieves the modern award objectives is not made out by a review of award conditions and agreement terms in community pharmacy.

WITNESS EVIDENCE

- 16 The SDA says that there are hundreds of thousands of employees in the industries covered by the five awards subject to the blood donor leave claim, yet it relies on the evidence of just 14 employees to support its claim.
- 17 Of those 14 employees:
- a. none are covered by the Pharmacy Award;

¹ *Four Yearly Review of Modern Awards – Annual Leave* [2015] FWFC 3406 at paragraphs [19] and [20].

² At paragraph [23].

- b. only one employee donates blood four times per year and three employees donate three to four times per year. Four donate twice per year. The others are not regular donors; and
- c. ten have enterprise agreements, though all are covered by the *General Retail Industry Award 2010*.

- 18 At paragraph [68] of the SDA Submissions, the SDA notes that the Australian Red Cross already works with community pharmacy employers to facilitate blood donation and there are 49 organisations in the community pharmacy industry registered to the Group Donation Program.
- 19 There is no evidence filed that would support the SDA claim that a variation of the Pharmacy Award to include blood donor leave is necessary at all.

THE PROPOSED TERM.

- 20 Community pharmacies, on average, employ eight to ten employees. The low staff numbers and the requirement that a pharmacist be on duty at all times and supported by a pharmacy assistant, means that if an employee was to take blood donor leave, another employee would have to be called in to cover the absence.
- 21 The minimum shift in the Pharmacy Award is three hours (noting that the ACTU / SDA has a current claim before the Commission to increase it to four hours). Which means that in order to cover the absence of an employee for a two hour duration to donate blood, another employee has to be rostered an additional three hours.
- 22 This is a significant cost and regulatory burden on business. The introduction of the proposed claim could increase the cost to community pharmacy employers to approximately \$18 million per year (see Schedule B).

MODERN AWARDS OBJECTIVE

- 23 In accordance with s134(1) of the Act, the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions have regard to the following criteria.

s134(1)(a) – relative living standards and the needs of the low paid

- 24 Donating blood is entirely voluntary. An entirely voluntary decision made by an employee for personal reasons should have no bearing when taking into account the relative living standards and needs of the low paid.
- 25 There is insufficient evidence to support the proposition that employees need paid time off in order to donate blood. In fact, there is no evidence in relation to the Pharmacy Award at all.

s134(1)(b) – the need to encourage collective bargaining

- 26 Many enterprise agreements include blood donor leave. The existing award conditions are not an impediment to enterprise agreements including such a provision. In fact, the absence of an award term dealing with blood donor leave is

arguably more likely to encourage collective bargaining (where such a term may be agreed) than if a blood donor leave clause is included in the awards.

s134(1)(d) the need to promote flexible modern work practices and the efficient and productive performance of work

- 27 There is no evidence that an award term is necessary in order to assist employees in pharmacy give blood.
- 28 As noted at paragraphs [25] to [27] above, it is not flexible, nor a modern work practice, nor efficient or productive performance of work to have to have to call in an employee to work a three hour shift (the minimum under the Pharmacy Award) to enable another employee to have one to two hours off work to participate in a voluntary social activity.

s134(1)(f) – Likely impact on business, including productivity, employment and regulatory burden

- 29 The impact on business for the inclusion will be potentially high as demonstrated in schedule B where the absence will need to be covered by an employee that needs to be rostered on for a longer shift than the actual absence.
- 30 The SDA make an assumption that an entitlement to paid blood donor leave would not be accessed by many employees, though provides no basis for this assumption. An equally valid assumption would be that employees who currently donate blood outside work hours would move to donating blood during work hours, significantly impacting on productivity and the regulatory (rostering, payroll etc) burden.

s134(1)(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

- 31 The Guild does not dispute that blood donation is an important social activity with societal and community benefits. So to does the Guild recognise the value of organ donation (a person can register online), bone marrow donation or volunteering at a soup kitchen by way of example. There are many more activities that a person could choose to participate in that are valuable and beneficial to society.
- 32 The SDA has not made any submission about why blood donation is more important than any other activity with similar societal benefits.
- 33 It does not create a stable and sustainable modern award system if there is uncertainty about whether awards will include further paid leave entitlements for other activities.

s134(1)(h) – the likely impact of any exercise of modern award powers on employment growth, inflation, sustainability, performance and competitiveness of the national economy

- 34 An increase in regulation and cost affects the sustainability of community pharmacy and, having regard to the role community pharmacy plays in health care, the performance and competitiveness of the national economy.

s134(1)(c), s134(1)(da) and s134(1)(e) - promote social inclusion through increased workforce participation, the need to provide additional remuneration and the principal of equal remuneration for work of equal or comparable value

35 The Guild submits these considerations are not relevant.

36 We note Blood donor leave is social activity, the fact that a person could access paid blood donor leave, would not increase workforce participation.

CONCLUSION

37 The claim for paid blood donor leave is not necessary. It is not fair, nor relevant.

38 The SDA has not provided any probative evidence; in fact it has not provided any evidence at all, to support the inclusion of a paid blood donor leave term in the Pharmacy Award and its claim should be rejected entirely.

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Schedule A – State Based Awards

The State based awards the were considered during the modernisation process are:

- a. **Chemists (Australian Capital Territory) Award 2000**, [AP772207](#), did not contain any reference to Blood Donor Leave. This award was terminated on 11 August 2011 at the Commission direction.
- b. **Community Pharmacy (State) Award 2001**, NSW, [AN120152](#), did not contain any reference to Blood Donor Leave. This award was terminated on 11 August 2011 at the Commission direction.
- c. **Community Pharmacy Award 1998**, VIC, [AP773671](#), did not contain any reference to Blood Donor Leave. This award was terminated on 11 August 2011 at the Commission direction.
- d. **Pharmaceutical Employees' Award - State (Exclusive of Public Hospitals) 2003**, QLD, [AN140206](#), did not contain any reference to Blood Donor Leave. This award was terminated on 11 August 2011 at the Commission direction.
- e. **Pharmacy Assistants (State) Award**, NSW, [AN120416](#), did not contain any reference to Blood Donor Leave. This award was terminated on 11 August 2011 at the Commission direction.
- f. **Pharmacy Assistants' Award - State 2003**, QLD, [AN140207](#), did not contain any reference to Blood Donor Leave. This award was terminated on 11 August 2011 at the Commission direction.
- g. **Retail Pharmaceutical Chemists Award**, SA, [AN150131](#), did contain reference to Blood Donor Leave at clause 7.8, however this award was terminated on 11 August 2011 at the Commission direction.
- h. **Retail Pharmacists' Award 2004**, WA, [AN160277](#), did not contain any reference to Blood Donor Leave. This award was terminated on 11 August 2011 at the Commission direction.
- i. **Retail Pharmacy Award**, TAS, [AN170087](#), did not contain any reference to Blood Donor Leave. This award was terminated on 11 August 2011 at the Commission direction.
- j. **Retail Trade Industry Sector - Minimum Wage Order - Victoria 1997**, [AP795238](#), did not contain any reference to Blood Donor Leave. This award was terminated on 11 August 2011 at the Commission direction.

- k. **Retail, Wholesale and Distributive Employees (NT) Award 2000**, [AP794741](#), did not contain any reference to Blood Donor Leave.
- l. **S.D.A Western Australian Community Pharmacy - Pharmacy Assistants Award 2000**, [AP806529](#), did not contain any reference to Blood Donor Leave. This award was terminated on 11 August 2011 at the Commission direction.
- m. **Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977, The, WA**, [AN160292](#), did not contain any reference to Blood Donor Leave. This award was terminated on 11 August 2011 at the Commission direction.
- n. **Shop, Distributive and Allied Employees Association - Victorian Pharmacy Assistants Award 2000**, [AP796289](#), – did not contain any reference to Blood Donor Leave. This award was terminated on 11 August 2011 at the Commission direction.

Schedule B – Average Cost

Employment Classification	Hourly Rate (as at 1 July 2017)	Absence	Per Annum per individual	Average employees per pharmacy	Total per annum
Pharmacist in Charge	\$29.46	8 hrs per annum (4 x 2 hrs)	\$235.68	2	\$471.36
Pharmacist in Charge – casual replacement	\$36.82	12 hrs per annum (4 x 3hrs min shift)	\$441.84	2	\$883.68
Pharmacist Assistant Level 3	\$21.30	8 hrs per annum (4 x 2 hrs)	\$170.40	4	\$681.60
Pharmacist Assistant Level 3 – casual replacement	\$26.62	12 hrs per annum (4 x 3hrs min shift)	\$319.44	4	\$1277.76
Total Cost per Annum					\$3314.40

Therefore the cost to community pharmacies for the introduction of the proposed would be anticipated at 5600 community pharmacies x \$3314.40 per pharmacy an amount of \$18,560,640 per annum (excludes labour administration costs – SG, insurance, training, rostering).