
Fair Work Commission: 4 yearly Review of modern awards

SUBMISSION IN REPLY

**4 YEARLY REVIEW OF MODERN AWARDS: (AM2018/26)
SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES
INDUSTRY AWARD 2010 - SUBSTANTIVE ISSUES**

FILED ON BEHALF OF:

- **AUSTRALIAN BUSINESS INDUSTRIAL**
- **THE NSW BUSINESS CHAMBER LTD**
- **AGED & COMMUNITY SERVICES AUSTRALIA**
- **LEADING AGE SERVICES AUSTRALIA**

12 OCTOBER 2019

1. INTRODUCTION

- 1.1 This submission in reply is made on behalf of Australian Business Industrial (**ABI**), the New South Wales Business Chamber Ltd (**NSWBC**), Aged & Community Services Australia (**ACSA**); and Leading Age Services Australia Limited (**LASA**).
- 1.2 This reply submission is filed in accordance with the Amended Directions of the Fair Work Commission (**Commission**) issued on 13 September 2019, as amended by Deputy President Clancy on 20 September 2019, and again by Commissioner Lee on 11 October 2019. This reply submission addresses the unions' reply submissions to our claims in respect of our proposed variation to the client cancellation clause.

2. PROPOSED VARIATION TO THE CLIENT CANCELLATION CLAUSE

Response to the HSU submission

- 2.1 Our clients accept the HSU submission that the updated cancellation rules in the *NDIS Price Guide 2019-20* has improved the position of employers when it comes to clients cancelling scheduled services that are provided under the NDIS. That is clearly correct and is a very welcome development.
- 2.2 The fact that the NDIS rules have improved since previous years does not, however, nullify the merit of our clients' claim. As demonstrated by the cancellation rules in the *NDIS Price Guide 2019-20*, there is still a material disconnect between the Award requirements around changing rosters or cancelling shifts and an employer's ability to charge clients for cancelling scheduled services.
- 2.3 We do not accept the HSU submission that the revised cancellation rules provide "a generous mechanism for service providers to recoup the cost of service cancellations".
- 2.4 In the vast majority of cases, the rules do not allow employers to charge clients anything at all provided the client gives more than 2 clear business days' notice of the cancellation of a service.
- 2.5 This creates a situation where the employer receives no revenue, and yet has an employee who has been rostered to provide the now-cancelled service. Unless the employer is able to usefully deploy the employ to other productive work at that exact time slot, they face a potential situation of incurring labour costs without deriving any revenue.

- 2.6 Under the current terms of the Award, an employer can only vary an employee's roster on 7 days' notice, save for limited prescribed circumstances¹ and subject to compliance with other Award requirements around consultation and, in the case of part-time employees, obtaining their agreement.²
- 2.7 Where a disability services client cancels a scheduled service with less than 7 days' notice, the Award does not permit an employer to unilaterally change the employee's roster to accommodate the fact that their work is no longer required or available by reason of the client cancellation.
- 2.8 Under the NDIS rules, where the client cancels a shift more than 2 clear days before, but less than 7 days before the service is scheduled to be delivered, the employer is prohibited from charging the client.³
- 2.9 In those circumstances, the only ways the employer can avoid incurring a loss for the cancelled service are:
- (a) where they can redeploy the employee to other work at that precise time, which will be difficult in most cases given that other employees would most likely have already been rostered to perform that work; or
 - (b) where clauses 25.5(d)(ii) or (iii) apply, which will be rare; or
 - (c) where the employee agrees to vary their hours (e.g. under clause 10.3(e)).
- 2.10 Our clients' proposed make-up time scheme addresses this disconnect between the NDIS rules and the Award.
- 2.11 Notably, our client's proposal also involves materially improving the entitlements for employees in the home care stream.

Response to the United Voice submission

- 2.12 The position adopted by the United Voice to our clients' claim requires scrutiny.
- 2.13 On the one hand, the United Voice correctly acknowledge that our clients' proposed clause is "an improvement on the current client cancellation clause" for home care workers, and rightly acknowledge that it has "a beneficial effect in that it would provide employees with a more stable and secure income".

¹ See clauses 25.5(d)(ii) and (iii).

² See clauses 8A and 10.3(e).

³ In most cases.

- 2.14 The United Voice then indicate their *support* for the thrust of our clients' proposed variation *in respect of home care workers*, subject to a few additional elements. This is unsurprising given that our proposed clause represents a significant improvement to the current provision for home care workers.
- 2.15 However, on the other hand, the United Voice then *oppose* our clients' proposed variation in respect of disability services workers and assert that it will not result in the Award meeting the modern awards objective.
- 2.16 So you have the United Voice conditionally supporting the proposed client cancellation / make-up pay clause in respect of home care workers while at the same time opposing it for disability services workers.
- 2.17 Such a position is illogical.
- 2.18 The United Voice's conditional support for our proposed clause in respect of home care employees undermines their opposition to it applying to disability services employees.
- 2.19 While the United Voice refer to the different regulatory regimes for the different streams of work, the reality is that there is no less merit of a client cancellation / make-up time arrangement in the disability services stream as it is in the home care stream.
- 2.20 At paragraph [38] of their submission, the United Voice identify a drafting error in our Draft Determination. We confirm that the reference to clause 25.5(f)(iv)(B) in clause 25.5(f)(v) should instead be 25.5(f)(iv)(A).

Response to the ASU submission

- 2.21 At paragraph [34] of the ASU reply submission, they state that our clients' proposed clause would permit an employer to 'double-dip' where the employer is can charge a participant for a cancelled service.
- 2.22 That was not the intention of the proposal. The proposed clause is intended to cover the circumstances where an employer *cannot* charge a participant but would still be liable to pay the employee in respect of the cancelled shift. Our clients are not opposed to a variation to our proposal to explicitly state that the employer may only require an employee to work make-up time where the employer is permitted to charge the client a cancellation fee.
- 2.23 In response to paragraph [35] of the ASU submission, we dispute that the new NDIS rules allow provider sot charge a 90% cancellation fee "in most circumstances". Clearly, there is a significant window where a provider is *not* able to charge a cancellation fee and yet the employer is unable to vary the employee's roster or cancel the shift.

- 2.24 In response to paragraphs [36] - [43] of the ASU reply submission, we accept that we most likely erroneously construed the scope of the existing client cancellation clause. We do not press those parts of our submission of 2 July 2019 which asserted otherwise.
- 2.25 Notwithstanding that issue, however, we maintain that it is necessary to extend the existing client cancellation clause in the Award beyond the home care sector and to the disability services sector. It is necessary to address this disconnect between the NDIS rules and the Award.
- 2.26 Interestingly, while the ASU oppose the introduction of a client cancellation / make-up time scheme in the disability services sector, they fail to acknowledge that our clients' claim would be materially beneficial for home care workers as compared to the existing clause.
- 2.27 While the ASU make a general assertion at [29] that clause 25.5(f) in its current state "does not meet the modern awards objective", they do not proffer any changes to it or provide any suggestions for improving the existing regime. They simply oppose our clients' claim. Again, the credibility of that position deserves scrutiny.

Response to the Ai Group submission

- 2.28 In relation to the Ai Group submission, it is not our clients' intention for the proposed client cancellation to prevent an employer utilising clause 25.5(d)(i) of the Award to change an employee's roster in response to a cancellation that is notified more than 7 days in advance of the scheduled service.
- 2.29 Our proposed clause is intended to operate in conjunction with, and not to the exclusion of, clause 25.5(d)(ii). We accept that the proposed drafting does not make that clear and requires a minor amendment to clarify that issue.
- 2.30 Our proposed client cancellation clause is intended to deal with circumstances where services are cancelled by clients less than 7 days before the rostered shift is due to take place. It seeks to provide a fair and workable mechanism to deal with those situations without the employer or employee being unfairly disadvantaged.
- 2.31 We note that Ai Group have identified that our clients' claim is less flexible for employers than the existing clause in respect of client cancellations in the home care stream of the Award. Further, and ironically, they identify that our claim is less beneficial for employers than the HSU claim in respect of home care services. We accept both of those propositions to be correct. However, the primary aim of our clients' claim is to extend a client cancellation / make-up pay regime to the disability services stream, and in doing so, we have

proposed to materially improve the existing Award regime as it stands for home care employees.

2.32 We submit that the proposed variation strikes the right balance and meets the modern awards objective.

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