

IN THE FAIR WORK COMMISSION

AM2020/21

Application to vary the Social, Community, Home Care and Disability Services Industry Award 2010

SUBMISSION OF THE HEALTH SERVICES UNION

13 JULY 2020

1. The Health Services Union (HSU) make these submissions in accordance with the Statement of Deputy President Clancy of 11 June 2020,¹ in relation to application by Ms Zeenat Abdullah (**the Application**) to vary the Social, Community, Home Care and Disability Services Industry Award 2010 (**SCHCDS Award**).
2. The HSU supports the submissions of the ASU dated 13 July 2020. In addition we make the following submissions below.

3. The current clause 25.3 provides as follows:

Employees, other than a casual employee, will be free from duty for not less than two full days in each week or four full days in each fortnight or eight full days in each 28 day cycle. Where practicable, days off will be consecutive.

4. Ms Abdullah's most recent proposed draft variation, dated 15 June 2020, proposes the following clause:

(a) An employee, other than a casual employee, will be free from duty for at least:

- (i) Two periods of 24 hours in each week;*
- (ii) Four periods of 24 hours in each fortnight; or*
- (iii) Eight periods of 24 hours in each 28 days cycle.*

(b) Where practicable, hours off will be consecutive.

5. There are a number of issues with the Application which may be summarised as follows:
 - a. it is not necessary to meet the modern awards objective;
 - b. the Applicant has not provided any probative evidence to satisfy the Fair Work Commission that the variation is necessary;

¹ [2020] FWC 3064

- c. the Applicant's reasons for making the application are not adequate to justify the proposed changes, and;
 - d. the proposed clause goes against the intent of the provision and renders the provision meaningless.
6. An application to vary a modern award under s 157 of the *Fair Work Act 2009* should only be granted if the amendment is necessary to achieve the modern awards, and, as per s 138, only to the extent necessary to achieve that objective.
7. Where a significant, contestable change is proposed, it should be supported by sound analysis and probative evidence.
8. These principles were delineated by the Full Bench summarised in the *4 Yearly Review of Modern Awards - Penalty Rates (Hospitality and Retail Sectors) Decision (the Penalty Rates Case)*²:
 1. *The Commission's task in the Review is to determine whether a particular modern award achieves the modern awards objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are 'necessary to achieve the modern awards objective' (s.138). In such circumstances regard may be had to the terms of any proposed variation, but the focal point of the Commission's consideration is upon the terms of the modern award, as varied.*
 2. *Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.*³
9. The Applicant's Form F46 justifies the proposed variation on the basis that '*a shift worker or worker carrying out sleepover duties having 48 hours rest would be similarly rested also meeting the intent of the award*'. However, if the provision that the Applicant has drafted were to apply, employees in her position would not be entitled to '*48 hours rest*'. They would be entitled to a period of '*24 hours*' rest a week, which could be broken up into individual hours of rest if consecutive hours off are not '*practicable*'.
10. It is not clear, therefore, that the outcome of the proposed variation matches the Applicant's intention in making the Application.

² (2017) 256 IR 1

³ *Ibid*, [269].

11. The reasons given by Ms Abdullah for making the application appear to be based on a perceived unfairness in the way that rosters are arranged for employees working night shifts or sleepovers.⁴ However, the effect of the Application, which would radically alter the current Rostered days off clause, would have adverse consequences for all employees covered by the award, not simply those working night shifts and sleepovers.
12. The Applicant has also failed to address why the current provision is lacking. The clause currently allows for some flexibility where two full consecutive days' off is not possible, allowing that '*[w]here practicable, days off will be consecutive*'. On the face of the clause, it appears that if it is not practicable for a shift worker or employee working a sleepover to have two consecutive full days off, they can arrange to have two non-consecutive days off and still be compliant with the clause.
13. Even if the Applicant intended for the Award to be varied in such a drastic way, they bear the onus to set out, as was stated in the Penalty Rates Case quoted above, '*analysis of the relevant legislative provisions*' and '*probative evidence*'. Neither of these requirements for an award variation application have been met.
14. Finally, the Application clearly goes against the intent of the current clause 25.3. As the heading of the clause clearly states, the provision is for Rostered *days* off. It is not a provision intended to provide '*hours*' off. By measuring the period of time in '*hours*' rather than '*days*' and allowing these to be broken up non-consecutively, the proposed variation would remove the essence of the provision, clearly going against what was intended in the drafting of the award.
15. For these reasons, the HSU opposes the Application.

Health Services Union

⁴ [2020] FWC 3064, [5]