

IN THE FAIR WORK COMMISSION
S160 – Variation of modern awards
AM2020/21 - Application to vary the
Social, Community, Home Care and Disability Services Industry Award 2010
National Disability Services
Submission

Introduction

1. National Disability Services (NDS) makes this submission pursuant to the Statement ([2020] FWC 3064) published on 11 June 2020.
2. NDS is the peak industry body for the full spectrum non-government disability service providers which provide services for Australians with all types of disability.
3. The applicant is seeking a variation to the *Social, Community, Home Care and Disability Services Industry Award 2010* (SCHADS) at clause 25.3 “Rostered Days Off”.
4. A draft determination was filed by the applicant on 15 June 2020. The draft determination changes the reference to employees being free from duty for various periods of “full days” to being free from duty for periods of “24 hours”.
5. The proposed variation appears to be intended to facilitate more flexibility in relation to the rostering of sleepover and night shift work.
6. NDS supports the proposed variation in principle, although we have reservations regarding the detail of the draft determination.

The operation of clause 25.3 in relation to sleepover and night shift work

7. NDS submits that the current clause 25.3 has the important function of ensuring adequate rest for workers over the course of a 1, 2, or 4 week work cycle.
8. NDS is very aware of the risks to workers if adequate rest is not provided, and of the risk to employee health and safety and to quality of care of clients, where workers are fatigued.
9. NDS is also aware, through our own work in relation to disability workforce strategy, and evidence presented in the modern award review in relation to the SCHADS award (AM2016/26), that appropriately regulated hours of work is an important factor in the recruitment and retention of skilled workers, and in the provision of quality care for clients.
10. For these reasons, NDS approaches proposals to vary hours of work arrangements in the award with some caution.
11. Increasing flexibility and allowing a greater capacity to roster hours across as much of the calendar week as possible has an apparent economic benefit for employers, but this needs to be balanced against other factors including ensuring a fair safety net for workers, health and safety, and quality of care.

The application

12. The applicant has asserted that clause 25.3 requires time off to be measured in “days”, but that this is problematic in the case of workers who perform sleepover or night shift because

that work crosses calendar days. The applicant contends that time off should be expressed as hours rather than days to address that issue.

13. NDS submits that the meaning of the current award is clear and that the reference to a full day means a reference to a calendar day.
14. Nevertheless, we think that the application has highlighted a genuine problem with the operation of the current clause 25.3 of the SCHADS award in relation to workers who perform regular sleepover or night shifts.
15. By their nature sleepover and night shifts span more than one calendar day with the result that, for example, a fulltime sleepover or night shift worker who works five shifts does so over six calendar days.
 - a) This makes the requirement of clause 25.3 for two “full days” in a week free from duty impossible to comply with for any worker who is rostered for five sleepover or night shifts per week.
 - b) Similarly, if 10 sleepover or night shifts are worked in a fortnight, the shifts are across 12 calendar days and so the requirement for 4 “full days” free from duty cannot be met.
16. There is no such problem in relation to day shifts worked as 5 shifts per week or 10 shifts per fortnight because those shifts span just 5 or 10 calendar days respectively.

The scope of application of the proposed variation

17. We do not consider that there is a need for a variation to clause 25.3 in relation to workers who are rostered to work during the day where the shift is contained in a calendar day.
18. The draft determination would apply to day workers. A consequence could be that a day worker who finishes a shift at 3pm on a Friday and who currently has an entitlement to a “weekend” of two full days on Saturday and Sunday, might lose that entitlement and instead be able to be rostered to return to work ordinary hours at 3pm on the following Sunday, having had 2 consecutive periods of 24 hours free from duty rather than two full days.
19. It is our understanding that the intention of the application is to address a problem in relation to sleepover and night shifts and is not intended to extend beyond that.
20. NDS submits that if a variation is to be made it should be limited in scope to employees engaged to work sleepover or night shifts.

Amending the draft determination

21. There are at least two ways in which the determination could be amended to address the reservations we have expressed.
22. The first is simply to retain the existing clause 25.3 but add an exception that adopts the wording of the draft determination, confined to periods free from duty following the performance of a sleepover or night shift.
23. The second approach to drafting could be to take the approach used in some pre-reform awards that applied in the community and disability services sector¹, where the time off for

¹ See for example, [AP815319 - Social and Community Services - Western Australia Award 2002](#) at clause 20.3; [AN150046 Disabilities Service Award](#) (SA) at clause 6.4; AN150140 [Social and Community Services Award](#) (SA) at clause 6.8

night shift workers was expressed as “nights off” rather than days off. This would achieve the same outcome that Ms Abdullah seeks in the original application.

24. If clause 25.3 were to be varied, consideration could also be given to clarifying the treatment of hours worked where such time off is not provided. Our view is that such hours do not meet the definition of ordinary hours and so should be treated as overtime, however the award does not specify any particular treatment of such hours.

The modern awards objective

25. NDS submits that a variation along the lines sought for sleepover and night shift workers would remove an obstacle to the employment of sleepover and night shift workers on a fulltime basis and so is consistent with the modern award objective at s134(1) (c) – the need to promote social inclusion through increased workforce participation.
26. The proposed variation would also allow greater flexibility in rostering of disability services and assist in meeting the needs of people with disability, and so is a positive consideration in relation to the modern award objective at s134(1) (d) – the need to promote flexible modern work practices and the efficient and productive performance of work.
27. We submit that the proposed variation is mostly neutral in relation to other matters set out in s134(1) of the Act that need to be taken into account.

Michael Pegg

On behalf of National Disability Services

9 July 2020