



DECISION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—Nurses Award 2010 (AM2016/31)

Health and welfare services

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT BOOTH
COMMISSIONER CRIBB

SYDNEY, 9 JANUARY 2019

4 yearly review of modern awards – Nurses Award 2010 – substantive issues.

Introduction

[1] On 3 December 2018, we issued a decision (December Decision) dealing with the substantive claims in relation to the *Nurses Award 2010* (Nurses Award).¹ The December Decision determined, amongst other things, that variations to the recall to work when on call and not on call, free from duty, rest breaks between rostered work, meal breaks and rostering provisions of the Nurses Award would be made. Wording for the new provisions was suggested and interested parties were invited to comment.

[2] Submissions were received from the Australian Business Industrial and NSW Business Chamber (ABI and NSW BC),² the Australian Industry Group (Ai Group),³ Australian Nursing and Midwifery Federation (ANMF)⁴ and the Private Hospital Industry Employer Associations (PHIEA).⁵

Submissions

Recall to work when on call/not on call

[3] In the December Decision we proposed the following wording for clauses 28.5 and 28.6(a),(b) of the Nurses Award:

“28.5 Recall to work when on call

- (a) An employee who is required to be on call and who is recalled to work at the workplace will be paid a minimum of three hours work at the appropriate overtime rate.

- (b) An employee who is required to be on call and who is required to perform work via electronic communication away from the workplace will be paid a minimum of one hours work at the appropriate overtime rate. An employee who is required to perform work for longer than one hour will be paid for the time worked rounded to the nearest 15 minutes at the appropriate overtime rate.

...

28.6 Recall to work when not on call

- (a) An employee who is not required to be on call and who is recalled to work at the workplace after leaving the employer's premises will be paid a minimum of three hours work at the appropriate overtime rate.

- (b) An employee who is not required to be on call and who is required to perform work via electronic communication away from the workplace will be paid a minimum of one hours work at the appropriate overtime rate. An employee who is required to perform work for longer than one hour will be paid for the time worked rounded to the nearest 15 minutes at the appropriate overtime rate.”⁶

[4] The PHIEA submits that the proposed new clauses lack clarity in a number of respects. Firstly, in the absence of a definition of ‘*required to perform work*’, it is uncertain whether the intent of the proposed new clauses is to capture any contact with an employee who is not physically at the workplace, or whether the clauses are intended to have a narrower application and be directly related to the provision of advice or assistance relating to patient resident or client care.⁷

[5] Secondly, the PHIEA submits that in the private hospital sector, any recalls to work must be authorised by the person in charge or their nominee.⁸ They claim that the proposed new clauses contain no indication as to who is authorised to ‘*require an employee to perform work via electronic communication away from the workplace*’.⁹

[6] The PHIEA further submits that the reference to payments rounding to the nearest 15 minutes should be removed as actual time worked can be accurately captured via electronic payroll systems negating the need for a rounding mechanism.¹⁰ They also claim that clauses 28.5(b) and 28.6(b) lack clarity in specifying the precise calculation of the payment obligation and that the clauses could be interpreted as providing for overtime payments for each separate call or electronic request regardless of whether they are made within the same hour or not.¹¹

[7] The PHIEA proposes the following amendments to clauses 28.5(b) and 28.6(b) of the Nurses Award highlighted in red below:

“28.5 (b)An employee who is required to be on call and who is **requested by the person in charge of the work area or their delegate, to provide clinical advice relating to a specific patient, resident or client**, via electronic communication away from the workplace, will be paid a minimum of one hours work at the appropriate overtime rate. ~~An employee who is required to perform work for longer than one hour, will be paid for the time worked rounded to the nearest 15 minutes at the appropriate overtime rate.~~

Multiple electronic requests made and concluded within the same hour shall be compensated within the same one hour's overtime payment.

28.6 (b) An employee who is not required to be on call and who is requested by the person in charge of the work area or their delegate, to provide clinical advice relating to a specific patient, resident or client, via electronic communication away from the workplace, will be paid a minimum of one hours work at the appropriate overtime rate. ~~An employee who is required to perform work for longer than one hour, will be paid for the time worked rounded to the nearest 15 minutes at the appropriate overtime rate.~~ Multiple electronic requests made and concluded within the same hour shall be compensated within the same one hour's overtime payment.

[8] The ABI and NSW BC support the submissions of the PHIEA to the extent they have identified a lack of clarity as to the definition of '*required to perform work*'.¹²

[9] The ANMF do not oppose the PHIEA's suggested amendments regarding the compensation of multiple electronic requests made within the same hours work.¹³ However, the ANMF oppose the PHIEA's other amendments, claiming the PHIEA should not be afforded an opportunity to rely on untested assertions in circumstances where it had the opportunity to submit evidence or test the ANMF's evidence at an earlier stage.¹⁴

[10] In respect to the wording of clauses 28.5(b) and 28.6(b), the ANMF suggests the inclusion of the words '*telephone or other*' to clarify that 'electronic communication' includes telephone calls.¹⁵ The ABI and NSW BC support this amendment.¹⁶

[11] We do not intend to adopt the PHIEA's suggested amendments in their entirety. We are not convinced that the phrase "*required to perform work*" lacks clarity or is as ambiguous as the PHIEA have claimed. Clauses 28.5 and 28.6 appear under the overtime provisions of the Nurses Award. Clause 28.1 defines when overtime is payable and provides the applicable overtime penalties. Nowhere in clause 28 does it explicitly state that overtime work performed by the employee is required to be authorised by the employer save for clause 28.3(c) which deals with an employee resuming work on the instruction of the employer without having had 10 consecutive hours off duty. Nonetheless, it is a commonly accepted principle that overtime is concerned with an employee working reasonable additional hours as requested by the employer.¹⁷

[12] Additionally, the current clause 28.5 of the Nurses Award states "*An employee, who is required to be on call and who is recalled to work...*"¹⁸ while the current clause 28.6(a) states "*An employee who is not required to be on call and who is recalled to work*"¹⁹ No parties made submissions in respect to any lack of clarity as to who authorises the on call or recall work in relation to the current wording of the clause prior to our December Decision.

[13] Having said that, for the avoidance of doubt we have decided to amend sub-clauses 28.5(b) and 28.6(b) to include the words '*by the employer*' after the words '*required to perform work*'. We consider that the word "employer" should be given its natural and ordinary meaning. We will also adopt the PHIEA's suggested wording in respect to the compensation of multiple electronic requests made within the same hours work and the ANMF's suggestion to include the words '*by telephone or other*' in the clauses.

[14] Clauses 28.5 and 28.6 will read as follows:

28.5 Recall to work when on call

- (a) An employee who is required to be on call and who is recalled to work at the workplace will be paid a minimum of three hours work at the appropriate overtime rate.
- (b) An employee who is required to be on call and who is required to perform work **by the employer via telephone or other** electronic communication away from the workplace will be paid at the appropriate overtime rate for a minimum of one hours work. **Multiple electronic requests made and concluded within the same hour shall be compensated within the same one hour's overtime payment. Time worked beyond one hour will be rounded to the nearest 15 minutes.**

28.6 Recall to work when not on call

- (a) An employee who is not required to be on call and who is recalled to work at the workplace after leaving the employer's premises will be paid a minimum of three hours work at the appropriate overtime rate.
- (b) An employee who is not required to be on call and who is required to perform work **by the employer via telephone and other** electronic communication away from the workplace will be paid at the appropriate overtime rate for a minimum of one hours work. **Multiple electronic requests made and concluded within the same hour shall be compensated within the same one hour's overtime payment. Time worked beyond one hour will be rounded to the nearest 15 minutes.**
- (c) An employee who is recalled to work will not be obliged to work for three hours if the work for which the employee was recalled is completed within a shorter period.
- (d) If an employee is recalled to work, the employee will be provided with transport to and from their home or will be refunded the cost of such transport.

Free from duty and on call

[15] In the December Decision we decided to amend clause 21.4 of the Nurses Award to determine that 'duty' included time an employee is on call.²⁰ The PHIEA submit that the effect of this amendment introduces a rostering restriction as nurses and midwives working in the private hospital sector can only be placed on the on-call roster when they are not rostered to work.²¹ The PHIEA propose the inclusion of the words "unless otherwise agreed between the employer and the employee" in clause 21.4 to permit employees to agree to be rostered on call on their allocated days off.²²

[16] The ABI and NSW BC support the PHIEA's proposed amendment to clause 21.4²³

[17] The ANMF opposes the PHIEA's proposed amendment.²⁴

[18] We do not accept the PHEIA's proposed amendment to clause 21.4. We consider that the proposal undermines the Full Bench's reasoning in the December Decision that being on call does not provide the opportunity for employees to rest and to pursue personal and family activities. Our reasoning in declining the ANMF's claim concerning additional annual leave as compensation for 'excessive on call' is also apt.²⁵ The requirement that an employee must be free from duty in accordance with our proposed clause 21.4 places a natural constraint on the incidence of on-call work. The PHIEA's proposal will in effect, negate the purpose of the amendment which was to allow employees to have adequate periods of rest between periods of work. Giving the employer the ability to request employees to work on their allocated days off will place a limitation on this safeguard.

Meal breaks

[19] In the December Decision we proposed a new clause 27.1 which would allow an employee to work a shift of six hours or less without taking a meal break and cover the circumstances where a nurse is required to perform work or be available to perform work during a meal break.²⁶

[20] The PHIEA submit that the proposed new clause is silent as to how ordinary time payment is to count when overtime is being calculated for the purposes of clause 27.1(c). The PHIEA suggest an amendment to clause 27.1(c) to clarify this.

[21] The ANMF do not oppose the PHIEA's proposed change to the clause and further suggest that the words "is taken" are inserted to the end of clause 27.1(c).²⁷

[22] The ABI and NSW BC support the PHIEA's and the ANMF's proposed amendments to clause 27.1(c).²⁸

[23] We accept the proposed amendments suggested by the PHIEA and the ANMF. Clause 27.1 of the Nurses Award will read as follows:

27.1 Meal breaks

(a) An employee who works in excess of five hours will be entitled to an unpaid meal break of not less than 30 minutes and not more than 60 minutes. Such meal break will be taken between the fourth and the sixth hour after beginning work, where reasonably practicable. Provided that, by agreement of an individual employee, an employee who works shifts of six hours or less may forfeit the meal break.

(b) Where an employee is required to be on duty during a meal break, the employee will be paid overtime for all time worked until the meal break is taken.

(c) Where an employee is required by the employer to remain available during a meal break, but is free from duty, the employee will be paid at ordinary rates for a 30 minute meal break. **This period will not count as time worked when calculating ordinary hours for the purposes of overtime or penalties.** If the employee is recalled to perform duty during this period the employee will be paid overtime for all time worked until the balance of the meal break **is taken.**

Conclusion

[24] No changes to the proposed wording of the free from duty and on call provision, rest breaks between rostered work provision and the rostering provision as set out in the December Decision²⁹ will be made. Accordingly, we intend to give effect to our December Decision in respect to these provisions.

[25] A determination will be issued in conjunction with this decision and come into operation on and from 9 January 2019.



VICE PRESIDENT

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¹ [2018] FWCFB 7347.

² ABI and NSWBC [submissions in reply](#) – 19 December 2018.

³ Ai Group [submission](#) – 7 December 2018.

⁴ ANMF [submission](#) – 7 December 2018; [submission in reply](#) – 20 December 2018

⁵ PHIEA [submission](#) – 7 December 2018.

⁶ [2018] FWCFB 7347 at [72]-[73].

⁷ PHIEA [submission](#) – 7 December 2018 at [6].

⁸ Ibid at [7].

⁹ Ibid.

¹⁰ Ibid at [9].

¹¹ Ibid at [8].

¹² ABI and NSWBC [submissions in reply](#) – 19 December 2018 at [3.2]-[3.4].

¹³ ANMF [submission in reply](#) – 20 December 2018.

¹⁴ Ibid.

¹⁵ ANMF [submission](#) – 7 December 2018.

¹⁶ ABI and NSWBC [submissions in reply](#) – 19 December 2018 at [4.1].

¹⁷ See also *Fair Work Act 2009* s.62 which refers to requests by an employer to employees to work reasonable additional hours.

¹⁸ *Nurses Award 2010* clause 28.5.

¹⁹ Ibid clause 28.6(a).

²⁰ [2018] FWCFB 7347 at [99].

²¹ PHIEA [submission](#) – 7 December 2018 at [14].

²² Ibid.

²³ ABI and NSWBC [submissions in reply](#) – 19 December 2018 at [3.6].

²⁴ ANMF [submission in reply](#) – 20 December 2018.

²⁵ [2018] FWCFB 7347 at [88]-[89].

²⁶ [2018] FWCFB 7347 at [144].

²⁷ ANMF [submission in reply](#) – 20 December 2018.

²⁸ ABI and NSWBC [submissions in reply](#) – 19 December 2018 at [3.8], [4.2].

²⁹ [2018] FWCFB 7347 at [99], [115], [160].