20 April 2017

REVIEW OF THE PHARMACY INDUSTRY AWARD 2010

AM2014/301

SUBMISSION IN REPLY TO PUBLIC HOLIDAYS COMMON ISSUE

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Background:

1 We refer to the above matter in which we act for the Pharmacy Guild of Australia ("**the Guild**").

2 The submission in reply is made following the Directions issued by the Full Bench on 27 April 2016.

3 These submissions are made in reply to those of the Shop Distributive and Allied Employees' Association ('**SDA**') dated 10 October 2016 (the '**SDA's submissions**') but are confined to those variations sought by the SDA to the *Pharmacy Industry Award 2010* ("**PIA**").

The Legislative Framework

4 Section 156 of the *Fair Work Act 2009* (Cth) ('**the Act**') provides that the Fair Work Commission ('**the Commission**') must conduct a review of all modern awards every four years ('**the Review**').

5 The Commission's task in the Review is to determine whether a particular modern award achieves the modern awards objective. If the award is not meeting 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' in accordance with section 138 of the Act.[1]

6 The modern awards objective at section 134(1) of the Act is central to the Commission's conduct of the Review. The modern awards objective is to 'ensure that modern awards, together with the National Employment Standards ('**NES**') provide a '*fair and relevant* minimum safety net of terms and conditions', having regard to the particular considerations identified in sections 134(1)(a) to (h) of the Act. The Commission must assess the concept of fairness from the perspective of the employees and employers covered by the modern award in question, whilst the term 'relevant' is intended to convey that a modern award should be suited to contemporary circumstances and context.[2]

7 The scope of the Review was considered in the *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues Decision*[3] and from this Decision emerged the following propositions:

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[1] *4 yearly review of modern awards - Penalty Rates* [2017] FWCFB 1001 at paragraph [36].
[2] *4 yearly review of modern awards - Penalty Rates* [2017] FWCFB 1001 at paragraph [37].
[3] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at paragraphs [19] to [24].

(a) The Review is broader in scope than the Transitional Review of modern awards completed in 2013.

(b) In conducting the Review, the Commission will have regard to the historical context applicable to each modern award.

(c) The Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time it was made.

(d) Variations to modern awards should be founded on merit based arguments. The extent of the argument and material required will depend on the circumstances.[4]

8 In particular, *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues Decision*[5] 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 objective.

9 Having regard to the Commission's observations on the requirements for justifying a proposed variation to a modern award, the Guild submits that the SDA application to vary the PIA is not supported by probative evidence demonstrating the facts supporting the merits of the proposed variation and should therefore be dismissed.

10 In exercising its powers in conducting the 4 yearly review in relation to public holiday variations, the Commission must relevantly take into account the modern award objective in s134 of the Act.

SDA Submissions and Witness Statement

11 The SDA seeks to vary seven awards, including the PIA, to rectify an alleged anomaly relating to public holidays for workers with non-standard work arrangements.

12 The SDA proposes the following subclause be inserted into the relevant modern awards:

> *"This subclause applies to full-time employees, and to part-time employees who work an average of five days per week.*
>
> *If a public holiday or a part-day public holiday falls on a day an employee is not rostered to work they shall be entitled to receive by mutual agreement:*
>
> *(i) another day or part-day off in lieu; or*
>
> *(ii) an equivalent day or part-day's pay; or*
>
> *(iii) one extra day or part-day added to his or her annual leave."*

13 At paragraph [16] of the SDA Submissions, the SDA submits that workers with non-standard work arrangements are disadvantaged compared to Monday to Friday workers when a public holiday falls on their non-working day.

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[4] *4 yearly review of modern awards - Penalty Rates* [2017] FWCFB 1001 at paragraph [111].
[5] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at paragraphs [19] to [24].

14 The SDA has not defined the term "non-standard work arrangements", however given the SDA comparator is employees who are regularly rostered from Monday to Friday[6], the Guild has proceeded on the basis that 'non-standard work arrangements' are assumed to be any work arrangement that is not a regular Monday to Friday roster.

15 As the term non-standard worker appears to distinguish between employees regularly rostered to work weekends and employees who are not, the Guild submits that the SDA claim has failed to properly account for the fact that employees who are rostered to work weekends are compensated for these 'non-standard hours' through additional remuneration in the form of either Saturday, Sunday or Public Holiday penalty rates for that weekend work.

16 In our view, the SDA has failed to account for the additional remuneration for weekend work, and their claim would result in employees who regularly work weekends receiving higher wages in addition to additional paid days off work, though the employee ultimately perform the same type of work as an employee in the same position who is regularly rostered to perform work Monday to Friday. The Guild submits this is an inappropriate outcome and one that has not been justified by any probative evidence adduced by the SDA.

17 The SDA filed a single witness statement relating to an employee in the community pharmacy industry being an affidavit sworn 8 October 2016 of an employee based in South Australia. This affidavit is found at Attachment 8 of the SDA Submissions.

18 As the name of the SDA witness has been redacted from the statement, they will hereafter be referred to as "**the Deponent**". We note that a single employee witness statement from an industry of approximately 5,500 businesses is by no means an appropriate statistical sample size to justify the variation being sought by the SDA to the PIA.

19 Notwithstanding this, we note the following in relation to the SDA's evidence.

20 The Deponent states that during the period of 1 January 2015 to 8 October 2016, eight public holidays fell on days the Deponent was not rostered to work.[7] During this period there were 20 public holidays in South Australia, which means that the Deponent was entitled to a benefit on 12 public holidays (being either penalty rates for working on the day or absence from work without loss of pay).

21 If the Commission was to grant the variation sought by the SDA, an eligible employee does not receive a benefit for a public holiday falling on the employee's non-working day, where that day is a Saturday or Sunday. Therefore, as one of the eight public holidays on which the Deponent did not receive a benefit fell on a Saturday, the employee would not be entitled to a benefit for this day if the Commission made the variation to the PIA sought by the SDA.

22 In noting the SDA definition for a 'non-standard arrangement worker', the Guild undertook a comparison against the Deponent's public holidays for a full-time employee who is rostered to work their 38 ordinary hours from Tuesday to Friday each week. The SDA variation would not apply to this form of roster as this employee would not be treated as having a non-standard working arrangement.

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[6] At paragraph [7].
[7] At paragraph [8].

23 Based upon this comparison, the Tuesday to Friday employee would have only received a public holiday benefit (either in the form of a day off without loss of pay or public holiday penalty rates) on four occasions out of the 20 listed public holidays. By comparison the Deponent had received a public holiday benefit on 12 occasions.

24 Therefore though in both examples the employee is a full-time employee, the Deponent has received a public holiday benefit on more occasions then an employee working a standard week arrangement as defined in the SDA claim. The SDA has not explained, nor justified, why an employee engaged under a non-standard work arrangement should receive this more beneficial treatment.

Previous SDA Applications

25 The SDA sought to include a public holidays' non-working day provision into the *General Retail Industry Award 2010* in its application dated 5 November 2009, to the Australian Industrial Relations Commission. The terms of that proposed variation were largely in the same terms as the current SDA Application. As the matter was not determined by 31 December 2009, it was heard by the Commission (then Fair Work Australia) pursuant to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).

26 In rejecting the SDA's application, the Full Bench stated:

> *"In the context of opposition by employers, the NES and limited award supplementation, we do not believe that a case for these variations has been established".*[8]

27 A similar claim was then made by the Australian Council of Trade Unions in the 2012 Transitional Review ("**2012 Review**"), which was supported by the SDA. In its decision to reject the ACTU's claim, the Full Bench found that there was "little or no evidence" provided in support of the application, stating:

> *"On the material before us there is insufficient information to adequately assess the impact of the proposed change. The same may be said of the ACTU's proposed model clause as a concept. Further, we consider that the practical operation of the proposed model provision to different patterns of employment as provided in some of the modern awards is uncertain and may well create unintended consequences. We have concluded that this element should not be adopted as a model provision or included in the named awards as part of this Transitional Review."*[9]

28 In the 2012 Review, the ACTU (and the SDA) relied heavily on the Public Holidays Test. Although the PIA was not mentioned in the test case, the outcomes of this case were applied to the making of the Award. The Commission made the following observation in relation to this:

> *"During the second stage of the Part 10A process, the Full Bench responded to the ACTU's submissions that the AIRC "has so far taken a view of its power to supplement the terms of the NES which is too restrictive", and indicated that it would adhere to the views it previously articulated in its 19 December 2008 decision:*

[8] [2010] FWAFB 305
[9] [2013] FWCFB 2168 at [67]-[68]

"We think that we should give proper weight to the Parliament's decision to regulate minimum standards in relation to the matters covered by the NES. It cannot have been Parliament's intention that the Commission could make general provision for higher standards. We accept, however, that there may be room for argument about what constitutes supplementation in a particular case."

It is also relevant that the comparative schedules prepared by the AIRC for each stage of the Part 10A process included a range of public holiday clauses derived from a diversity of federal awards and NAPSA instruments.

For our part we agree with ACCI's submission that the fact that the Public Holiday Test Case decision was not inserted in all modern awards during the award modernisation process is not an anomaly within the meaning of Item 6(2)(b), as asserted by the ACTU, but rather a conscious decision on the part of the AIRC having regard to the various industrial instruments considered at that time.

Further, as submitted by Ai Group, there is no proper basis for the assertion that uniformity of award provisions dealing with public holidays was an intended outcome of the award modernisation process. Any lack of uniformity in the application of the Public Holidays test case decision was a feature of the federal award system well before the commencement of the Part 10A award modernisation process.

The Public Holiday Test Case remains a relevant consideration for present purposes, but there is considerable force in Ai Group's submission that it was determined in a different statutory context. In particular, the scheme of the present Act places reliance upon a relatively comprehensive set of minimum standards provided by the NES and the role of the modern awards is intended to operate in that context."[10]

29 In circumstances where the PIA is to be considered as prima facie meeting the modern awards objective at the time of its commencement and having regard to the prior decisions of the Commission in relation to a similar claim, the SDA has not adduced any evidence directed at showing why the PIA is no longer meeting the modern awards objective and why the variation sought is necessary to provide a fair and relevant safety net to employees in the community pharmacy industry.

30 It is the Guild's submission, the SDA is merely ventilating a claim which has previously been rejected by the Commission and the SDA has made no new arguments, nor adduced the required standard of evidence to support the proposed change. Further, the SDA submission that the failure to include a term in the PIA in the form sought is an anomaly simply cannot be accepted in consideration of the Full Bench's views in the context of the ACTU claim in the 2012 Review.

Conclusion

31 The Guild submits that, despite this being the SDA's third attempt to provide for public holiday benefits to non-standard employees on their non-working days, they have still failed to provide any probative evidence to support their application or adduce a cogent and merits based argument directed to supporting the variation sought. The variation sought by the SDA should be dismissed.

[10] [2013] FWCFB 2168 at [48] – [51], [62]