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28 August 2019

Vice President Hatcher
Fair Work Commission
80 William Street
East Sydney NSW 2011

Dear Vice President

Re. AM2016/8 – Annualised Wage Arrangements – Health Professionals and Support Services Award 2010

We refer to the 1 August 2019 submission of the Health Services Union (HSU) concerning the annualised wage arrangement clause that the Fair Work Commission has decided to insert into the *Health Professionals and Support Services Award 2010*.

In Ai Group's submission of 10 October 2016 and in the draft determination attached to that submission, Ai Group proposed that the annualised wage arrangements clause should apply to all health professional employees and to support services employees at level 8 and 9. In essence, our proposal was for the clause to apply to:

- All health professional employees; and
- Managerial and supervisory employees in the support services stream.

In the Commission's decision of 20 February 2018,¹ the Full Bench stated: (emphasis added)

Health Professionals and Supported Services Award 2010

[141] We are not satisfied that the *Health Professionals Award* should be varied to include the annualised wage arrangement provision proposed by the Ai Group. Having regard to our earlier general conclusions, we do not consider that the proposed provision complies with the requirement in s 139(1)(f)(iii) or meets the modern awards objective for the following reasons:

(1) The employees to be covered by the proposed provision work, as submitted by United Voice, complex rosters covering unsociable hours. As a result, shift loadings and penalty rate payments constitute a significant element of their overall remuneration. Because the interests of the employee would be so critically affected by the introduction of an annualised wage arrangement, we consider that fairness would require the agreement of the employee.

(2) The provision does not require the annualised wage to be transparently constructed on the basis of the award entitlements to shift allowances and penalty rates and reasonable assumptions about the number and pattern of working hours.

¹ [2018] FWCFB 154



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Nor does it provide for any safeguards if working hours diverge significantly from any such assumptions.

(3) The annual review mechanism is inadequate for reasons already stated.

[142] However we see no reason in principle why managerial or supervisory-level employees should not have access to an annualised salaries provision in appropriate form. We invite the Ai Group, United Voice and other interested parties to lodge submissions in accordance with the timetable at the end of this submission as to whether, in relation to the classes of employees encompassed by the Ai Group's claim, Model Clause 3 or Model Clause 4 should be introduced into the *Health Professionals Award*.

Given the underlined wording above, it appears that the reference to managerial and supervisory employees in paragraph [142] is a reference to such employees in the support service stream, as sought by Ai Group, and that the Full Bench had formed the provisional view that the annualised wage arrangements clause should apply to the "classes of employees encompassed by the Ai Group's claim".

This interpretation is confirmed by the following extracts from the Commission's decision of 4 July 2019:² (emphasis added)

[29] In relation to the matter the subject of the second direction, we confirm our conclusion that Model Clause 3 should be added to the *Health Professionals Award* on the basis that it is applicable only to supervisory and managerial staff. It may be, as the ACA submitted, that a provision of this nature may not be regarded as being of utility by some employers, particularly small medical practices. However no employer would be compelled to use it, and the Ai Group's submission in support of the inclusion of the provision is presumably indicative that at least some employers see some advantage in it.

[30] In paragraph [142] of the 2018 decision, our provisional conclusion was that we saw "no reason in principle why managerial or supervisory-level employees should not have access to an annualised salaries provision in appropriate form", and we invited submissions as to whether Model Clause 3 or 4 should be added to the award "in relation to the classes of employees encompassed by the Ai Group's claim" - that is, Support Services employee Levels 8 and 9, and all levels of Health Professional. In paragraph [59] of the 2019 decision we indicated our preparedness for Model Clause 3 to apply to "managerial or supervisory employees only", but we did not identify which specific classification levels that referred to. As earlier stated, the HSU submitted that the clause should apply only to managers classified at Health Professional Level 4, but no real basis for this submission was disclosed and we do not accept it. The classification definitions in Schedule C to the *Health Professionals Award* specify that the classifications of Support Services employee Levels 8 and 9 encompass the performance of supervisory duties, and we therefore consider that it is appropriate that Model Clause 3 apply to these classifications as well as all Health Professional classifications. It is worth emphasising that Model Clause 3 requires the agreement of the employee to any annualised wage arrangement and contains a range of protections intended to protect against any employee disadvantage.

² [2019] FWCFB 4368.



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Given the content of paragraph [30] above, the reference to “managerial and supervisory employees” in paragraph [29] appears to be a reference to such employees in the support services stream.

Accordingly, the annualised wage arrangements provision should apply to:

- All health professional employees; and
- Employees classified at levels 8 and 9 in the support services stream.

Yours sincerely

Stephen Smith
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