



IN THE FAIR WORK COMMISSION

AM2016/15
Four Yearly Review of Modern Awards
Plain Language Re-drafting

SUBMISSIONS OF THE HEALTH SERVICES UNION

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Introduction

1. The Health Services Union (HSU) makes these submissions in accordance with the Directions issued by Vice President Hatcher on 27 April 2018 ('the Directions'), and in relation to the Statement issued by President Ross on 15 March 2018 ('the Statement') in relation to the plain language review of clauses allowing for the substitution of public holidays by majority agreement in modern awards.¹
2. The Directions invited parties to make submissions on:
 - the accuracy of the list of substitution clauses listed in the Statement; and
 - whether an award term which permits public holidays substitution by agreement between an employer and a majority of employees excludes the NES, or any provision of the NES, within the meaning of s 55(1).
3. The HSU has an interest in the following awards listed in the Statement:
 - *Aboriginal Community Controlled Health Services Award 2010*
 - *Ambulance and Patient Transport Industry Award 2010*
 - *Health Professional and Support Services Award 2010*
 - *Nurses Award 2010*
 - *Pharmacy Industry Award 2010*

Awards that allow substitution of public holidays by employer: Health Professional and Support Services Award and Pharmacy Industry Award

4. We submit that the Pharmacy Award was incorrectly included in the list in Attachment A to the Statement. The first sentence of clause 31.2 of the Pharmacy Industry Award provides for substitution by agreement between the employer and *employee*, not majority agreement. This has been clarified in the most recent exposure draft, which has been amended to provide, relevantly, that:

'The employer and an individual employee may, by agreement, substitute another day for a public holiday'.²
5. However, we submit that the *Pharmacy Industry Award 2010* should be included in the list in Attachment B to the Statement of 15 March 2018, as the

¹ [2018] FWCFB 1501

² Pharmacy Industry Award Exposure Draft, clause 25.3

second sentence of clause 31.2 in that award allows for the substitution of public holidays by the employer. The second sentence of clause 31.2 provides:

Where there is no agreement the employer may substitute another day but not so as to give an employee less time off work than the employee would have had if the employee had received the public holiday.

6. The HSU has previously made submissions as part of this four yearly review in the Health Professional and Support Services (HPSS) Award matter, for clause 32.1 (23.3(b) in the most recent Exposure Draft) of that award to be varied.

7. The second sentence of clause 32.1 in the HPSS Award provides:

Where there is no agreement, the employer may substitute another day but not so as to give the employee less time off work than the employee would have had if the employee had received the public holiday.

8. This is identical to the second sentence of clause 31.2 in the Pharmacy Industry Award.

9. This provision, in its current form, it is not consistent with sections 114 and 115(3) of the Fair Work Act 2009, and in accordance with s.56 of that Act, should have no effect.

10. Section 115(3) provides that a modern award may include terms providing for an employer and employee to agree on the substitution of a day or part-day for a day or part-day that would otherwise be a public holiday. The section provides no basis for such a term to be included without agreement.

11. It is clear in the Explanatory Memorandum to the Fair Work Act that s 115(3) was intended to ensure that an award term could not provide that a substitute day be determined unilaterally by the employer. It states:

Subclause 115(3) permits a modern award or enterprise agreement to include terms providing for an employer and employee to agree on the substitution of a day or part-day for a day or part-day that would otherwise be a public holiday under subclauses 115(1) or (2). This means that a modern award or agreement cannot provide that a substitute day can be determined unilaterally by the employer.³

12. Moreover, the capacity to compel an employee to work the public holiday in substitution for a day not of the employee's choice undermines the entitlement of an employee in s.114 of the FW Act to:

³ Explanatory Memorandum, paragraph 458

- Be absent from work on a public holiday (s.114(1)); and
 - Refuse a request from an employer to work on a public holiday if such request is not reasonable, or the refusal is reasonable (s.114(3)).
13. The positing of alternative bases to refuse to work suggests that a refusal may be reasonable notwithstanding that the request was also a reasonable one. It also invites particular consideration of the employee's reasons for refusing to work.
14. It may not be assumed that where the employer unilaterally determined a substitute day, that it would not be reasonable for an employee to refuse to work on a public holiday. One can readily imagine a situation where the critical factor inclining a worker to work on a public holiday would be the prospect of an alternative day off on a day convenient to the employee. To leave the employer with the capacity to compel an employee to work in those circumstances would abridge the rights in s.114 of the FW Act.
15. The removal of the second sentence in clause 32.1 of the HPSS Award, and 31.2 of the Pharmacy Industry Award goes not further than is required to bring these awards into conformity with the NES. The employer may still rely on their right to request, and the employee's obligation not to unreasonably refuse, as set out in s.114 of the FW Act.

Awards that allow substitution of public holidays by majority agreement

16. The following awards allow substitution of public holidays by majority agreement
- *Aboriginal Community Controlled Health Services Award 2010* (clause 29.2)
 - *Ambulance and Patient Transport Industry Award 2010* (clause 31.3)
 - *Health Professional and Support Services Award 2010* (clause 32.1)
 - *Nurses Award 2010* (clause 32.2)
17. It is our view that the public holiday clauses in these awards, as cited above, are not consistent with s 115(3) NES, which provides that a modern award may include terms providing for an employer and *employee* to agree on substitution of a public holiday.
18. These clauses are also not consistent with s 114, as discussed above, which provides that an employee has the right to be absent from work on a public holiday (s 114(1)), and to refuse a request from an employer to work on a

public holiday if such request is not reasonable, or the refusal is reasonable (s.114(3)).

19. The Aboriginal Community Controlled Health Services (ACCHS) Award may be an exception, as it allows for both majority and individual agreement. Clause 29.2 provides that:

(a) By agreement between the employer and the majority of employees in the enterprise or part of the enterprise concerned, an alternative day may be taken as the public holiday instead of any of the prescribed days.

(b) An employer and an individual employee may agree to the employee taking another day as the public holiday instead of the day which is being observed as the public holiday in the enterprise or part of the enterprise concerned.

20. In relation to the public holiday substitution provisions in the Ambulance and Patient Transport Industry Award, HPSS Award, and Nurses Award, we submit that these should be varied to allow for employers and individual employees to agree on a substitute day.