



4 April 2019

AM2017/51 - 4 YEARLY REVIEW OF MODERN AWARD – OVERTIME FOR CASUALS – PHARMACY INDUSTRY AWARD 2010 SUBMISSION IN RESPONSE

Background

- 1 This submission is made following the Fair Work Commission ('**Commission**') Full directions of 15 March 2019.
- 2 In accordance with the directions at [3], parties are invited to file a response to Health Services Union ('**HSU**') submissions dated 23 January 2018.
- 3 The Pharmacy Guild of Australia ("**Guild**") submission is made in reply concerning HSU claim in particular to the Pharmacy Industry Award 2010 ("**PIA**") where casual employees can access overtime.

HSU Claim

- 4 The HSU seeks to vary the PIA with the introduction of:

"Insert clause 26.3"

"26.3 An employer must pay casual employees at the overtime rate, as specified in clause 26.2(a) for any hours worked at the direction of the employer:

- (i) *in excess of 38 hours per week; or*
- (ii) *in excess of 10 hours per day; or*
- (iii) *that are not continuous, except for rest breaks and meal breaks as specified in clause 28 – Breaks; or*
- (iv) *between midnight and 7.00am; or*
- (v) *in excess of their rostered shift."*

- 5 The variation sought by the HSU is **not an insignificant alteration** to the current obligations an employer has in respect of their employees, and is a claim which would result in more stringent obligations applying to casual employees than are currently required with respect to all employees as noted at clause 26.1 of the PIA. Notwithstanding the significance of the variation, the HSU has adduced no evidence in relation to the necessity or merit of the variation sought to current award terms, including the maximum shift length permitted for ordinary hours.

Context of the Review

- 6 Conducting the 4 yearly review of modern awards pursuant to s.138 of the *Fair Work Act 2009* (“**the Act**”), requires the Commission to review each modern award to ensure it is achieving the modern awards objective. The Commission is charged with the obligation to ensure that modern awards, together with the National Employment Standards, “provide a fair and relevant minimum safety net of terms and conditions”, taking into account the considerations set out in s134 of the Act.¹
- 7 Section 138 of the Act provides that modern awards may include terms only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wage objective. If a modern award does not achieve the modern awards objective, it is to be varied such that it only includes terms that are ‘necessary’ to achieve the modern awards objective.² That is, the Commission can only include terms in a modern award to the extent necessary to create a ‘fair and relevant safety net’.
- 8 The framework of the 4 Yearly Review of Modern Awards was considered by the Commission in the 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues Decision.³ In this Decision at paragraph [60], the Full Bench held:

*The Review is broader in scope than the Transitional Review of modern awards completed in 2013. The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a ‘stable’ modern award system (s.134(1)(g)). The need for a ‘stable’ modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. Some proposed changes may be self evident and can be determined with little formality. However, where a **significant change** 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. In conducting the Review the Commission will also have regard to the historical context applicable to each modern award and will take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so. The Commission will proceed on*

¹ 4 Yearly Review of Modern Awards – Penalty Rates [2017] FWCFB 1001 at paragraph [115].

² 4 Yearly Review of Modern Awards – Penalty Rates [2017] FWCFB 1001 at paragraph [36].

³ 4 Yearly Review of Modern Awards - Preliminary Jurisdictional Issues Decision [2014] FWCFB 1788

the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.

(emphasis added)

- 9 It is clear therefore that any significant change to the PIA sought by the HSU must be supported by a submission which addresses the relevant legislative framework and probative evidence properly directed to demonstrating the facts supporting the proposed variation.

When Overtime Commences

- 10 The HSU submits at paragraph [52]⁴ that introduction of the proposed clause is necessary to clearly state when a casual employee is entitled to overtime.
- 11 It is important to note that the question raised by HSU in relation to overtime for a casual employee was discussed and answered by the Commission in [2017] FWCFB 3540 dated 5 July 2017 and [2017] FWCFB 4029 dated 1 August 2017. The HSU was a party to these decisions.
- 12 It is our respectful view that the HSU is attempting to re-argue a matter that has been decided previously without the provision of any probative evidence to support their claim that the current PIA wording is not sufficiently clear to articulate when a casual employee is entitled to overtime.
- 13 The PIA utilises the terminology ‘employee’ and thereby makes no distinction between who and when either a full time, part time and casual employee can be entitled to overtime as defined with clause 26.1 of the PIA. The point about the term ‘employee’ is noted within the HSU submission⁵ at [8].
- 14 In addition, at paragraphs [12], [15] and [52]⁶, the HSU has indicated that the maximum allowable ordinary hours shift before overtime is applicable needs to be 10 hours which is a significant decrease for the PIA provisions and being only applicable to casual employees in the PIA.
- 15 The Guild acknowledges that HSU may have a view that 10 hours is the maximum ordinary hours per shift for some Awards – however the PIA permits that the maximum ordinary hours shift for an employee is 12 hours.

⁴ HSU Submission, Common Issues – Overtime for Casuals dated 23 January 2018

⁵ *ibid*

⁶ *ibid*

- 16 The Guild submits that changing the maximum ordinary shift length for casual employees is not self-evident and that the PIA is already achieving the modern award objective by providing a fair and relevant minimum safety net and conditions.
- 17 The variation sought by the HSU is **not an insignificant alteration** to the PIA provisions and notwithstanding the significance of the variation, the HSU has adduced no probative evidence in relation to the necessity or merit of the variation sought to current award term relating to the maximum shift length permitted for ordinary hours to meet the modern award objective.
- 18 The guild submits that the requested variations are significant and that in the absence of probative evidence supporting the variation sought, the Commission cannot be satisfied that the change is necessary to achieve the modern award objective.

Conclusion

- 19 The variations sought by the HSU should be dismissed in their entirety.

Scott Harris

National Manager, Workplace Relations

Pharmacy Guild of Australia