

Fair Work Commission

4 Yearly Review of Modern Awards

Alleged inconsistencies with the NES

(AM2014/1 and Others)

**Response to issues raised by the Fair Work Ombudsman regarding alleged
inconsistencies with the NES in modern awards**

**Further Submission in Response of the Shop Distributive and Allied
Employees' Association (SDA)**

16 January 2015

1. The Shop Distributive and Allied Employees' Association (SDA) makes this submission pursuant to the Statement issued by the President, Justice Ross, on 31 October 2014.
2. This submission is made in response to the alleged inconsistencies with the National Employment Standards (NES) identified by the Fair Work Ombudsman (FWO) in its correspondence and documentation, 'FWO Research for Modern Award Review on Inconsistencies between the National Employment Standards and Modern Awards' (FWO Research Document) issued on 4 April 2014 to the Fair Work Commission (FWC).
3. In Appendix A of the FWO Research Document, the FWO noted an issue relating to the 'Compassionate Leave entitlement' as prescribed in clause 34.2(b) of the *Hair and Beauty Industry Award 2010* (HBIA).
4. Clause 34.2(b) of the HBIA states: '*Such leave is unpaid. A minimum of 48 hours' absence is allowed by right with additional absence by agreement.*'
5. The FWO have identified clause 34.2(b) of the HBIA as being inconsistent with the NES and contend that:
'The clause is arguably more favourable than [sic] the NES entitlement as the employee is 'allowed by right' to an absence of a minimum of 48 hours. However the use of the word 'minimum' implies that an employer can require an employee to be absent for a minimum of 48 hours (rather than it being at the employee's election)'.
6. Before dealing with the issues identified in the FWO Research Document, firstly, the SDA would like to clarify that clause 34.2(b) of the HBIA refers only to unpaid carer's leave and not unpaid compassionate leave.
7. It appears the FWO have incorrectly identified inconsistencies in relation to unpaid compassionate leave, which is not actually prescribed in clause 34.2(b) of the HBIA, when the apparent inconsistencies relate to unpaid carer's leave. We note the reference in Appendix A of the FWO Research Document to s105(2) of the *Fair Work Act 2009* (the Act). S105(2) is a provision concerning unpaid compassionate leave, yet unpaid compassionate leave is not a feature of clause 34.2(b). Currently clause 34.2(b) of the HBIA only makes reference to unpaid carer's leave for casual employees which is inconsistent with the heading of clause 34 of the HBIA 'Personal/carer's leave and compassionate leave'.
8. The FWO Research Document should reference s103(2) of the Act for the purposes of analysis of inconsistencies between casual employees' entitlement to unpaid carer's leave under the NES and clause 34.2(b) of the HBIA.
9. The HBIA is silent in relation to the entitlement for casual employees to unpaid compassionate leave.
10. The HBIA should correctly prescribe casual employees entitlements to both unpaid personal/carer's leave and unpaid compassionate leave.
11. The entitlement to unpaid carer's leave is contained in s103(2) of the Act as follows:

(2) *An employee may take unpaid carer's leave for a particular permissible occasion as:*

- (a) *a single continuous period of up to 2 days; or*
- (b) *any separate periods to which the employee and his or her employer agree.*

12. The entitlement to unpaid compassionate leave for casuals is contained in s105(2) of the Act as follows:
- (2) *An employee may take compassionate leave for a particular permissible occasion as:*
- (a) *a single continuous 2 day period; or*
- (b) *2 separate periods of 1 day each; or*
- (c) *any separate periods to which the employee and his or her employer agree.*
13. S105(2) and s103(2) of the Act do not prescribe entitlements to unpaid personal/carer's and unpaid compassionate leave using the terms 'minimum' or 'maximum' period. The HBIA differs from the NES in that it quantifies the entitlement for casual employees to unpaid personal/carer's leave as '*A minimum of 48 hours*', whereas, the NES expresses the quantum of leave entitlements in days, as either;
- a '2 day period' for unpaid compassionate leave , or
 - 'up to 2 days' for unpaid carer's leave.
14. The SDA supports the FWO analysis to the extent that the current wording of clause 34.2(b) is inconsistent with the NES in that the HBIA uses the term '*hours*' and not days. However, the SDA does not support the FWO's contention that the clause is more favourable than the NES. The SDA accepts that the use of the word '*minimum*' may imply that an employee is to be absent for a minimum 48 hour period, rather than 'up to 48 hours' or '48 hours' which is more consistent with the NES provisions.
15. The FWO also expresses concern with the phrase '*allowed by right*'. It is the SDA's view that the use of the phrase '*allowed by right*' can not be interpreted as a mandatory prescription for employers to require an employee to be absent. *Allowed by right* simply indicates that the entitlement is not a discretionary one which an employer can choose to provide to an employee. It is a right of an employee to be absent when this particular permissible occasion presents.
16. The use of the phrase '*allowed by right*' in clause 34.2(b) of the HBIA reflects the intention and meaning of the NES and therefore no inconsistency exists in this regard.
17. It is noted by the SDA that clause 34.2(b) of the HBIA omits the phrase 'for a particular permissible occasion' which is in the NES. This omission is less favourable to employees as it could be interpreted as leave that may only be accessed on a single particular permissible occasion.
18. The SDA notes the submissions of Australian Business Industrial and NSW Business Chamber Ltd support the view that the wording of clause 34.2(b) in the HBIA 'should be revised' and that the clause should address casual employees' entitlements to both unpaid carer's leave and unpaid compassionate leave. However, we do not agree with their proposal of 'up to 2 days' for both leave types as this would be contrary to and inconsistent with s105(2) of the Act. It must also be noted that s105(2)(b) provides an additional option for how the leave may be taken which is not present in s103(2).

19. The SDA proposes the following changes to clause 34 of the HBIA, underlined below, to address the inconsistencies with the NES:

34. Personal/carer's leave and compassionate leave

34.1 Personal/carer's leave and compassionate leave are provided for in the NES.

34.2 Casual employees

- (a) Casual employees are entitled to unpaid personal/carer's leave. Casual employees are entitled to be unavailable for work or to leave work to care for a person who is sick and requires care and support or who requires care due to an emergency; and***
- (b) Casual employees are entitled to unpaid compassionate leave when a member of their immediate family or a member of their household suffers a serious personal illness or serious personal injury or dies; and***
- (c) Such leave is unpaid. Two days' absence is allowed by right on each particular permissible occasion, with additional absence by agreement.***

20. The SDA submits that changes proposed above to clause 34 of the HBIA address the matters raised by the FWO in relation to clause 34.2(b) of the HBIA and the inconsistencies we have identified in relation to unpaid compassionate leave. The SDA's proposed changes make it clear that casual employees under the HBIA are entitled to access unpaid personal/carer's leave and unpaid compassionate leave as per the NES, which is not presently the case.