



4 October 2016

Our Ref: 20140518

Your Ref: AM2014/286

BY EMAIL

amod@fwc.gov.au

ABN 76 008 556 595

140 Arthur Street
North Sydney NSW 2060

Locked Bag 938
North Sydney NSW 2059
DX 10541 North Sydney

t: 1300 565 846

f: +61 2 9954 5029

ablawyers.com.au

Award Modernisation Team
Fair Work Commission

Dear Sir / Madam

**4 YEARLY REVIEW OF MODERN AWARDS - GROUP 4 AWARDS - AM2014/286 -
SUPPORTED EMPLOYMENT SERVICES AWARD 2010**

- 1.1 We refer to the abovementioned proceedings and to the Fair Work Commission's Statement and Directions [2016] FWC 6062 issued on 26 August 2016 (**Statement**).
- 1.2 We act for Australian Business Industrial (**ABI**) and the NSW Business Chamber Limited (**NSWBC**).
- 1.3 By letter filed 2 March 2015, our clients indicated that they wished to pursue a number of variations to the *Supported Employment Services Award 2010* (**Award**). In accordance with the Statement, we provide confirmation of those proposed variations as follows.

2. THE NATURE OF THE CHANGES SOUGHT

- 2.1 Our clients intend to pursue the following variations to the Award:

Variation 1: coverage - reference to school-aged employees engaged in casual supported employment (clause 4.1)

- 2.2 This variation is intended to make clear, for the avoidance of doubt, that the Award applies to school-aged workers engaged in supported employment on a casual basis.

Variations 2-4: wage assessment - reference to new versions of existing wage assessment tools and insertion of ABI wage assessment tool (clause 14.4)

- 2.3 This variation provides for new versions of existing wage assessment tools and inserts our clients' proposed wage assessment tool.

Variation 5: penalty rates - rates for employees working in retail and hospitality industries (clause 20.3)

- 2.4 In addition to the traditional focus on assembly and manufacturing, employers and employees in the supported employment services industry are increasingly operating in the retail and hospitality industries.
- 2.5 This variation is pursued on the basis that employers and employees subject to the Award should not be disadvantaged (in terms of competitiveness) as compared to other employers operating in these particular industries.

Variation 6: ordinary hours of work and rostering - night shift only rosters (clause 20.5)

- 2.6 This variation is to clarify that employers and employee(s) can agree that an employee's roster will include only night shift work, that is, without the need for there to be a rotating roster in order to attract the relevant loading.

3. DRAFT VARIATION DETERMINATION

- 3.1 A draft determination giving effect to the above proposed variations is annexed to this submission.
- 3.2 The draft determination is likely to be refined further following further conferences in relation to the Award.

4. THE TYPE OF CASE TO BE RUN (MERITS OR EVIDENTIARY BASED)

- 4.1 Our clients propose to run an evidentiary case, and intend to file witness statements outlining the position of employers and efficacy of the proposed variations at both an industry and individual operator level.

5. IF THE CASE IS EVIDENCE-BASED, HOW MANY WITNESSES WILL BE CALLED?

- 5.1 It is estimated that 4-6 witnesses will be called in support of the proposed variations.

If you have any questions, please contact Sina Mostafavi on (02) 9458 7802.

Yours faithfully



Luis Izzo
Director

Australian Business Lawyers & Advisors Pty Ltd
(02) 9458 7640
luis.izzo@ablawyers.com.au



Sina Mostafavi
Senior Associate

Accredited Specialist – Employment & Industrial Law
Australian Business Lawyers & Advisors Pty Limited
(02) 9458 7802
sina.mostafavi@ablawyers.com.au

<<FileNo>> <<PrintNo>>

FAIR WORK COMMISSION

DRAFT DETERMINATION

Fair Work Act 2009

Part 2-3, Div 4 – 4 Yearly reviews of modern awards

Supported Employment Services Award 2010

[MA000103]

Supported employment services industry

COMMISSION MEMBER

SYDNEY, XX YYY 2016

Review of modern awards to be conducted.

Further to the Decision and Reasons for Decision <<DecisionRef>> in AM2014/286, it is determined pursuant to section 156(2)(b)(i) of the *Fair Work Act 2009*, that the *Supported Employment Services Award 2010* be varied as follows:

[1] By inserting a new clause 4.8 as follows:

Subject to clause 4.1, the award covers employees in the classifications listed in Schedule B who are of school age and engaged in casual supported employment.

[2] By updating the approved wage assessment tools at clause 14.4(b) to refer to new versions of existing wage assessment tools.

[3] By inserting a new clause 14.1(b)(xxxi) as follows:

(xxxi) ABI Wage Assessment Tool

and inserting a new clause 14.4(f) (with consequent renumbering of subsequent clauses), as follows:

(f) The Wage Assessment Tool referred to at clause 14.4(b)(xxxi) above is at Schedule I.

[4] By inserting the following at Schedule I:

Schedule I – ABI WAGE ASSESSMENT TOOL

1. WAGE ASSESSMENT FOR AN EMPLOYEE WITH A DISABILITY

1.1 Employer to Assess an Employee with a Disability

Subject to clause 1.7 below, the employer shall assess an employee with a disability into the relevant assessment criteria set out in **Annexure A**.

The employer shall use the **Indicative Task Schedules** found in **Annexure C** to assist in the wage assessment process.

No employee will remain in the Training and Assessment Level for a period of more than 6 months or 600 hours, whichever comes first.

All wage assessments in accordance with this clause are to be carried out by a qualified wage assessor and appropriate assessment documentation in relation to wage assessment must be kept for review or dispute purposes.

1.2 Reassessment for assessment to a Higher Level

Having initially assessed an employee in accordance with this Schedule, the employer shall review the assessment of an employee at least every 12 months as part of the employee's individual plan to determine whether the employee should be reassessed to a higher Level.

1.3 Reassessment to a Higher Level

If, having undertaken a reassessment under clause 1.2 above, the reassessment demonstrates that the employee can reliably perform work at a higher Level, the employer shall reassess the employee into the higher Level effective from the next full pay period.

1.4 Reassessment for Reassessment to a Lower Level

From time to time an employee may no longer be capable of performing work at the Level they are assessed at. Where, after having observed the employee over a period of not less than six months, an employer reasonably believes this to be the case, they may reassess the employee to determine whether they can no longer reliably perform work at the Level the employee is assessed at.

1.5 Reassessment to a Lower Level

If, having undertaken a reassessment under clause 1.4 above, the employer demonstrates that the employee can no longer reliably perform work at the Level the employee is assessed in, the employee may be reassessed to a relevant lower Level provided that the employer:

- (a) gives the employee concerned no less than 8 weeks' notice of their intention to reassess the employee;
- (b) provides the employee the opportunity to be represented by their union or advocate in any further discussions in relation to the employer's intention; and
- (c) having consulted the employee, gives the employee two weeks' notice of the reassessment.

The employee shall have the right to have the matter dealt with as per the grievance procedure set out in this Agreement.

1.6 Progression to Full Award Rate and/or Open Employment

Once a person has reached Level D a discussion will take place with the employee about their employment aspirations, including their ability to transition to a full award wage within the organisation or options which might be available should the employee want to work in open employment. The result of such discussions will be recorded in the employee's Individual Plan.

1.7 Employees carrying out majority of their duties above Grade 2

A supported employee carrying out the majority of their work at Grade 3 level or above in the Award shall be assessed under the Supported Wage System.

2. RATE OF PAY

2.1 Weekly Ordinary Rate

An employee that is assessed in accordance with clause 1 above shall be paid at the percentage of the weekly ordinary rate of pay set out in the Wages Table below:

Each employee shall have their output assessed within their skill level using the **Output Guidelines in Annexure D** to determine their salary point within the level.

Output at each level will be determined as follows:

- (a) if 25% or under output on average across level work, the first wage point shall apply;
- (b) if over 25% on average across level work but under 50%, the second wage point shall apply;
- (c) if over 50% on average across level work but under 75%, the third wage point shall apply; and
- (d) if 75% and over the fourth wage point shall apply.

Level Grade 2 SESA Award	Percentage of Weekly Ordinary Rate of Pay
Training and assessment Level	15%
Level A	15%
A2	20%
A3	25%
A4	30%
Level B	30%
B2	35%
B3	40%
B4	45%
Level C	45%
C2	50%
C3	55%
C4	60%
Level D	70%
D2	80%
D3	90%
D4	100%

3. DEFINITIONS

3.1 Definitions to be Applied

Definitions used in this Schedule are set out in **Annexure B**.

4. REVIEW OF WAGE ASSESSMENT

4.1 Right to Review Wage Assessment

Each of the persons set out in clause 4.3 below may seek a review of the wage assessment.

4.2 Review Process

A review of the wage assessment in accordance with clause 4.1 above shall be conducted in accordance with the following procedure:

- (a) The review shall first be discussed between the person seeking the review and the employer; and then if the matter remains unresolved.

- (b) Either party can notify the matter to the Fair Work Commission in accordance with clause 9 – Dispute Resolution of the Award and the matter shall then be dealt with in accordance with that clause.
- (c) For the purposes of this review the Fair Work Commission may utilise a qualified independent assessor to assist it in resolving a dispute in relation to an employee’s assessment.

4.3 Persons Eligible to Seek a Review

The following persons may seek a review in accordance with clause 4.1 above:

- (a) the employee concerned;
- (b) a legal guardian of the employee, or
- (c) if authorised by the employee/legal guardian concerned:
 - (i) a registered employee organisation of which they are a member and which is entitled to represent their industrial interests at the employer’s workplace;
 - (ii) a parent of the employee; or
 - (iii) a disability advocacy organisation.

Annexure A – Wage Assessment Descriptors

A.1 Training and Assessment

An employee at this Level is undergoing training and assessment. The employee has rudimentary Base Work Skills. During the employees time at this level they will:

- (a) require a very high level of Work Support;
- (b) always require Personal Support;
- (c) always requires their work to be closely and directly supervised;
- (d) not work to any pre-set pace;
- (e) has the quality of their work constantly checked; and
- (f) during their employment at this level are being assessed as to their future skill level.

An employee shall only be assessed to be at the Training and Support Level for 6 months or 600 hours, whichever comes first, at which time they will be offered a permanent position or not.

A.2 Level A

An employee at this level has rudimentary Base Work Skills and:

- (a) is directly supervised;
- (b) continually requires a high level of Work Support;
- (c) continually requires Personal Support;
- (d) is incapable of organising their own work;
- (e) does not work to any pre-set pace;
- (f) has some difficulty staying on task or remaining at their work station;
- (g) has the quality of their work constantly checked; and
- (h) performs very basic tasks.

A.3 Level B

An employee at this level has intermediate Base Work Skills and:

- (a) is directly supervised;
- (b) requires a high level of Work Support;
- (c) requires Personal Support;
- (d) is incapable of organising their own work but can communicate with their supervisor/trainer if they have some issues with their work;
- (e) does not work to any pre-set pace;
- (f) generally stays on task but can be distracted and sometimes wanders from their work station;
- (g) has the quality of their work routinely checked; and
- (h) is capable of performing variety of basic tasks and in training to do more complex tasks.

A.4 Level C

An employee at this level has intermediate Base Work Skills and:

- (a) is directly supervised;
- (b) requires a moderate level of Work Support;
- (c) occasionally requires Personal Support;
- (d) is capable of organising some of their own work within limits with the assistance of their supervisor;
- (e) stays on task unless deliberately distracted by others;

- (f) has the quality of their work periodically checked by their supervisor; and
- (g) is generally capable of performing all basic tasks and some complex tasks.

A.5 Level D

An employee at this Level has achieved good Base Work Skills and:

- (a) is directly supervised;
- (b) requires limited Work Support;
- (c) occasionally requires Personal Support;
- (d) is capable of organising their own work with the assistance of their supervisor;
- (e) assists other employees in their work group by leading by example;
- (f) works at a pace with pre-determined output targets agreed to with their supervisor;
- (g) generally stays on task;
- (h) has the quality of their work occasionally checked by their supervisor; and
- (i) can perform complex tasks within grade 2.

NOTE: An employee who has the ability to competently carry out tasks at a higher level shall not be paid at a lower level simply because higher level tasks are not available.

Annexure B - Definitions

B.1 Personal Support

- (a) ***“Personal Support”*** is the care and support of an employee with a disability in the workplace provided by a trainer and/or supervisor.
- (b) Personal Support may take many forms including:
 - (i) encouragement;
 - (ii) mentoring;
 - (iii) counselling; and/or
 - (iv) behavioural intervention.
- (c) Personal Support may relate to different issues in the workplace including:
 - (i) interpersonal skills;
 - (ii) life issues:

(iii) personal needs; and/or

(iv) personal behaviour.

B.2 Work Support

(a) ***“Work Support”*** is the support of an employee with a disability in the workplace provided by a trainer and or supervisor including:

(i) the design of work tasks (including the disaggregation of work tasks to sub-tasks) tailored to the employee to allow them to perform a productive task;

(ii) coaching and/or training in Base Work Skills and/or work tasks and/or the use of machinery; and/or

(iii) coaching and/or training in communicating with others in the workplace or commuting to and from work.

B.3 Base Work Skills

“Base Work Skills” refers to an employee’s ability to:

(i) work safely;

(ii) follow instructions;

(iii) perform their work at a reasonable pace;

(iv) have fewer errors associated with their work;

(v) stay on task;

(vi) remain at an employee's workstation or area

(vii) not disturbing the work of others or workflow generally; and

(viii) be punctual and reliable with respect to work attendance.

B.4 Rudimentary Base Work Skills

(a) A person at this level finds it difficult to stay on task and is easily distracted. The person can stay on task but only if the supervisor/trainer is in close proximity. The person needs reminding of work related issues and needs time to develop their understanding of new tasks. A person at a rudimentary level must be constantly observed with respect to WHS issues as their ability to carry out their duties can be limited.

B.4 Intermediate Base Work Skills

(a) A person at this level generally can stay on task for periods of time (e.g. an hour at a time) but not at a consistent pace. A person can be distracted by other things happening in the workplace. A person at this level can generally learn new tasks within their skill level and have a very basic understanding of

WHS issues in their immediate work area under the observation of their supervisors/trainers.

B.5 Good Base Work Skills

- (a) A person at this level generally stays on task at a reasonable pace as determined with their supervisor. The person is rarely distracted and has a basic understanding of WHS issues with respect to the work they are carrying out. A person at this level can pick up new work tasks following initial training or instruction reasonably well. A person at this level can also communicate reasonably well with their supervisor/trainer regarding work issues. A person at this level does not require ongoing motivation other than when they require Personal support.

Annexure C - Indicative Task Schedules

- C.1** Indicative tasks to be undertaken by an employee are referenced for each Level in the wage assessment structure in accordance the Schedule below. The exact task to be performed may not be listed in the indicative task schedule for the Level concerned. Where this is the case the employer should seek to match the task performed by the employee with indicative tasks that are similar in overall character.

C.2 Level A tasks - very basic tasks

This involves tasks which are elementary and simple to carry out. Such tasks are easy to complete and can be carried out in a stationary position. Typically it would involve very basic packing or assembly or work involving simple jigs or templates that have been created to guide the employee.

Level A indicative tasks include:

- (a) TBD

C.3 Level B tasks - basic tasks

This involves tasks which involve more physical movement but like very basic tasks are easy to complete. At this level quality issues are more susceptible. Simple tools or mechanisms may be used to complete a task.

Level B indicative tasks include:

- (a) TBD

C.4 Level C tasks - more complex tasks

This involves tasks where initiative is greater than basic tasks and where WHS issues are of greater significance. Simple machinery and tools may also be used at this level and greater levels of communication skills are also of more importance. Tasks at this level may also involve greater productive interaction with the workers without disabilities or in the service sector interaction with the public.

Level C indicative tasks include:

- (a) TBD

C.5 Level D tasks - complex tasks

This involves a person who is capable of carrying out a wider variety of the work outlined in Grade 2 of the Award and as such with general training and ongoing direct supervision and support can carry out most tasks requested of them.

The person would still require a limited level of Personal Support and/or Work Support.

Level D indicative tasks include:

- (a) TBD

Annexure D - Output Guidelines

- D.1** To determine a supported employee's output and hence salary point in accordance with the outcome of their wage assessment the following shall apply.
- D.2** A supported employee will be assigned a range of tasks within their level. The employee's salary point within the Level shall be determined by their output as follows;
- (a) If 25% or under output on average across the level work, the first wage point shall apply;
- (b) If over 25% on average across level work but under 50%, the second point shall apply;
- (c) If over 50% on average across level work but under 75% third wage point shall apply; and
- (d) If 75% and over the fourth wage point shall apply.
- D.3** The supported employees output will be benchmarked against a person who has carried out the same task who does not have a disability. Such benchmarks can be historical as long as they have been updated within a 4 year period or if required to be updated in the case of a dispute relating to the salary point.
- D.4** The comparative count shall occur over a 2 hour period, allowing for a ½ hour count on each of 4 tasks that the employee spends the majority of their time on. The average percentage of the outcome of all 4 counts shall determine the output percentage figure for the level and thus determine the salary point within the level.

D.5 The following are examples:

The supported employee is at Level B of the Wage Assessment Structure

<i>Task</i>	<i>Supported employee</i>	<i>Benchmark</i>	<i>%</i>
<i>Task 1</i>	50	100	50
<i>Task 2</i>	210	350	60
<i>Task 3</i>	65	180	36
<i>Task 4</i>	35	100	35
Average %			45 %

Based on the above calculation a supported employee who is assessed at Level B will be paid at level B2 which is 35% of the minimum rate.

The supported employee is at Level C of the Wage Assessment Structure

<i>Task</i>	<i>Supported employee</i>	<i>Benchmark</i>	<i>%</i>
<i>Task 1</i>	40	100	40
<i>Task 2</i>	210	350	60
<i>Task 3</i>	50	180	28
<i>Task 4</i>	35	100	35
Average %			41 %

Based on the above calculation a supported employee who is assessed at Level C will be paid at level C2 which is 50% of the minimum rate.

- [5] By amending clause 20.3 to read as follows (underlined text is new to the clause):

Where work is carried out on weekends, payment will be at time and half on Saturdays and double time on Sundays, other than for employees engaged on catering services who will be paid at the rate of time and three quarters on Sunday and for employees engaged in the retail or hospitality industries, who will be paid at the rate of time and a quarter on Saturday and time and a half on Sundays.

- [6] By amending clause 20.5 to read as follows (underlined text is new to the clause):

By agreement between an employer and an employee, an employee who works their rostered hours of work or hours in a rotating roster shift which finishes after 12.00 midnight and at or before 8.00 am Monday to Friday, will be paid for the whole shift 30% more than their ordinary rate.

The determination shall operate on and from XX YYY 2016.

BY THE COMMISSION