HSU NATIONAL

IN THE FAIR WORK COMMISSION

AM2014/286

Four yearly review of modern awards

Supported Employment Services Award

SUBMISSIONS

Filed on behalf of:	**Health Services Union**		
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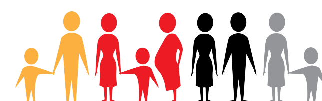

Introduction

1. The Health Services Union (HSU) provides these outline of submissions in accordance with the directions issued by Vice President Hatcher on 10 July 2017.

2. The HSU supports the submissions of AED Legal in these proceedings.

3. These submissions are filed in response to the variation proposals of ABI and the NSWBC ('ABI'), the National Disability Services ('NDS') and Greenacres Disability Services ('Greenacres') in relation to the Supported Employment Services Award ('SES Award').

Preliminary matters

4. The legislative basis for the Fair Work Commission's four yearly review of the modern awards is s 156 of the FW Act, which sets out the requirement to conduct the review.

5. In its foundational decision concerning the 2014 four yearly review,[1] the FWC Full Bench outlined the preliminary jurisdictional issues which are required to be met in order for a substantive variation to be made to a modern award.

6. Firstly, the Commission must ensure that the modern awards, together with the National Employment Standards (NES), provide a fair and relevant minimum safety net of terms and conditions, taking into account the modern award objective set out in s 134(1) of the FW Act.[2]

7. Secondly, any variation to a modern award must adhere to the requirements surrounding the content of modern awards, according to s 136 of the FW Act, which sets out the matters that may and may not be included in a modern award.[3]

8. Discriminatory terms, per s 153, are one such matter that may not be included in modern awards on the basis of s 136(2)(a).

9. In seeking to ensure a '*stable*' system of modern awards, in accordance with the modern award objective, in particular s 134(1)(g), the Full Bench held that where a '*significant change*' to a Modern Award is proposed in the four yearly review process, '*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*'.[4]

Submissions of ABI, NDS and Greenacres

10. The ABI's submission of 25 September 2017 and its Draft Determination filed on 31 July 2017, includes proposals to vary the SES Award by:

    a. inserting a new wage assessment tool (the 'ABI tool');

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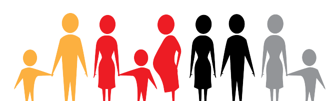
[1] 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788.
[2] [2014] FWCFB 1788, [23].
[3] [2014] FWCFB 1788, [40].
[4] [2014] FWCFB 1788, [23].



b. replacing the definitions of 'employee with a disability' and 'supported employment services' with new definitions; and

c. varying penalty rates in the Award for employees working in the retail and fast-food industries.

11. The NDS proposal seeks to replace the current definitions of 'employee with a disability' and 'supported employment services' with new definitions.

12. The Greenacres proposal supports the ABI tool. It also seeks to retain the Greenacres tool in clause 14.4(b)(vi).

13. The HSU opposes these variations.

14. ABI's submissions are lacking for a number of reasons. Firstly, they do not address the relevant legislative provisions. ABI do not address how their claims meet the modern award objective under s 134(1). This objective is a fundamental consideration for the FWC in determining whether a variation should be made, yet these considerations are not referred to in ABI's submission.

15. ABI's submissions also mischaracterise their claim to insert the ABI tool into the SES Award as a 'work value' claim, per s 156(4). Their claim is to vary the award to include a new tool for assessing the proportion of the minimum wage paid to employees in supported employment. It is not a claim to vary modern award minimum wages. The considerations addressed by ABI in paragraph 5.1(d)(i)-(iii) are therefore irrelevant.

16. ABI have not adequately addressed how their claims are not a discriminatory terms and therefore allowable in light of s 153. They have not shown how their ABI tool differs from the BSWAT tool which was found to be discriminatory by the Full Federal Court in *Nojin v Commonwealth (2012)* 208 FCR 1.

17. The HSU opposes NDS and ABI's proposal to replace the definitions of 'supported employment service' and 'employee with a disability' in the SES Award. As discussed above, a proposal for substantial change to an award must be supported by submissions and probative evidence.[5] Neither NDS nor ABI has not met this condition as it has not provided evidence nor adequate reasons to support so radical a change to the award definitions.

18. The above also applies to the submissions of Greenacres. Its submission lacks adequate reasons and probative evidence to support its claims.

19. The submissions of ABI, NDS and Greenacres also fundamentally misconstrue the SWS tool and how it operates. It is incorrect to state that the SWS tool does not incorporate a skills-based approach.[6] Under the SWS, employees are assessed according to the skill Classification Grades of Grade 1 – Grade 7 under Schedule B of the SES Award. The assessment of an employee's capacity, and the applicable percentage of the award rate paid, is based on the relevant Classification Grade. The premise of the ABI, NDS and Greenacres' argument in support of the

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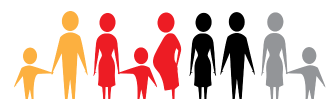
[5] [2014] FWCFB 1788, [23].
[6] See, eg, Greenacres Submission [10]-[11], ABI Submission [4.2].



ABI tool – that it is necessary to ensure a skills-based approach for wage determination – is therefore erroneous.

Issues with evidence

20. The ABI has filed a vast quantity of evidence. However, it is the HSU's view that much of their evidence is irrelevant and should be treated with caution by the Commission. S 591 of the Fair Work Act provides that the Commission is not bound by the rules of evidence and procedure.[7] Nevertheless, it is not allowed to ignore the rules of evidence either. In *Australian Meat Industry Employees Union v Dardanup Butchering Co Pty Ltd* [2011] FWAFB 3847 ('*Dardanup'*), the Full Bench held that:

    The rules of evidence are not arbitrary and were developed by reference to notions of what is fair and appropriate and, as such, they often provide a good starting point for a consideration of whether an objection to the reception of particular evidence by the tribunal should be upheld or rejected.[8]

21. It is our view that the question of relevance is still an important threshold issue. Relevance is not a legal concept but an ordinary one. Evidence that is relevant is that which assists in deciding the issue in a rational way.

22. Much of the evidence supplied by ABI can be said to be irrelevant, as it rests on the unproven assumption that without the insertion of the ABI tool in the SES Award, supported employment services will be forced to close, and employees will lose their jobs. We do not believe that ABI have proven the facts to support this assertion.

23. Another issue with ABI's evidence is hearsay. The discussion in *Dardanup* related to the Commission's approach to hearsay evidence in relation to a right of entry dispute. In that case, the Full Bench warned about the admission of hearsay evidence from an employer about the attitude of employees. The Full Bench stated:

    The tribunal should take particular care in exercising its discretion to receive hearsay evidence from an employer to the effect that employees do not wish to participate in discussions with a permit holder for reasons that include the following:

    (i) like all hearsay evidence, such evidence cannot properly be tested through cross-examination; and

    (ii) it is generally accepted that employees will sometimes be reluctant to disclose to their employer support for a union or interest in engaging with a union for fear of adverse consequences…

    When a tribunal member is confronted with an attempt to call hearsay evidence from a manager as to the attitude of employees to participating in discussions with a permit holder, the member should give serious consideration as to whether evidence going to that issue is more properly received directly from one or more employees rather than by hearsay evidence of that sort and

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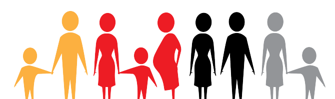
[7] Fair Work Act 2009, s 591 '('FW Act').

[8] *Australian Meat Industry Employees Union v Dardanup Butchering Co Pty Ltd* [2011] FWAFB 3847 ('Dardanup') [28]



decline to receive the hearsay evidence unless a satisfactory explanation is provided as to why it is not appropriate to call direct evidence from one or more employees. This is particularly so in a workplace where there is little or no union penetration and thus little or no justification for fearing some form of reprisal for taking a public stand against the union.[9]

24. While *Dardanup* concerned a right of entry dispute, it raises an important warning about admitting hearsay evidence from managers about the attitudes of employees towards their employment. There are many examples of such hearsay evidence in ABI's witness statements. For example, Bradley Raymond Burridge, Manager at Centacare, states in paragraph [68] of his witness statement, that '*If our supported employees did not attend work, they would not have much to do and many would be home-bound and rely on their families more'*. Anne Lynette Constable, CEO of Asteria Business Services, states in paragraph 55 of her statement that, '*[a]t ABS the interaction between employees, DSWs and other staff creates a positive environment with a "can do" attitude and it is this sense of achievement and pride that boosts our supported employees' self-esteem and feeling of belonging*'. We are of the view that such evidence, as well as other instances of hearsay evidence from managers about the attitudes of their employees towards their work should be treated with caution.

21 November 2017

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Health Services Union

[9] *Dardanup* [2011] FWAFB 3847 [29]-[30].