

BEFORE THE FAIR WORK COMMISSION

NURSES AWARD 2010
(MA000034)

4 yearly review of modern awards – Nurses Award 2010

AM2014/207

SUBMISSIONS IN-REPLY BY
AGED CARE EMPLOYERS

22 May 2017

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Overview

1. Aged Care Employers¹ (**ACE**) make this submission in response to the substantive variations sought by the Australian Nursing and Midwifery Federation (**ANMF**) to the *Nurses Award 2010* (**the Award**).
2. The starting point is that prima face the Award achieved the Modern Awards Objective at the time it was made. To depart from this prima face position, the ANMF is required to show cogent reasons for doing so.² This would ordinarily require appropriate evidence showing changed circumstances and/or support for the variation on the merits and/or identifying why previous decisions on the same issues should not be followed.
3. It is submitted that the ANMF has failed to meet the requisite standard by which the Commission can be satisfied that the variations it seeks ought be made. On that basis, ACE submit that all of the ANMF's variations should be dismissed.

ANMF Claim 1 – In-Charge Allowance for Registered Nurses (RNs)

4. ACE opposes this claim. This claim was rejected in the initial award modernisation process before the AIRC in 2008. It was dealt with again in the 2012 Review and dismissed.³
5. The claim now pressed in these proceedings by the ANMF is broader than the claims made by the ANMF in 2008 and in 2012. In this regard, the ANMF in-charge claim has now been extended to any and all days and shifts, and also includes application to a “section of a facility” (which would include different wards of a residential aged care facility within the one building).
6. There is no evidence of any changed circumstances from 2008 to date, nor is there any evidence supporting the broad expansion of the in-charge claim (ie as compared to the in-charge claims sought in 2008 and 2012 by the ANMF).
7. Inherent in the Level 1 and 2 classification definitions for an RN is the in-charge responsibility. Seen in this light, the ANMF in-charge allowance claim is little more than a claim for a pay rise, absent any increased work value or merit to support such a claim.

¹ Aged Care Employers: Aged and Community Services Australia, Leading Age Services Australia Ltd

² *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2015] FWCFB 1788 (at [60])

³ [2012] FWA 9420 (at [21]-[23])

8. The ANMF in-charge claim is a substantial claim not supported by cogent evidence or other reasons. It ought be dismissed. It is a matter for bargaining.

ANMF Claim 2 – Leading Hand Allowance Enrolled Nurses (ENs) and Assistants In Nursing (AINs)

9. The ANMF has brought no evidence from any EN or AIN to support this claim. The evidence brought from the four RNs the ANMF has brought evidence from goes no way to support a leading hand allowance claim.
10. ACE does not accept the bald assertion by the ANMF that ENs and AINs are sometimes placed in supervisory roles. Both ENs and AINs report to RNs. That is part of the RNs career structure, and fits within the RN pay-scale and scope of practice.
11. The ANMF has not explained how the leading hand allowance applies to part-time and casual employees.
12. The ANMF has identified no historic basis under former federal awards and NAPSAs where a leading hand allowance for ENs and AINs existed.
13. The ANMF's reference to the existence of a leading hand allowance in the *Aged Care Award 2010 (AC Award)* is not a relevant comparator, ie the ACE4 classification under the AC Award has no requirement to be supervised like an EN or and AIN. Further, the leading hand allowances claimed by the ANMF are well above those contained in the AC Award.
14. The ANMF leading hand claim is a substantial claim not supported by cogent evidence or other reasons. It ought be dismissed. It is a matter for bargaining.

ANMF Claim 3 – Recall to work when on-call, and when not on-call

15. The ANMF claim seeks that employees who take a work call from their lounge chair for 1 minute are paid at least 3 hours for such a call. Such a claim defies common sense. It is not supported on the evidence as being a fair safety net entitlement. There is no historical basis to support such a claim. Being physically recalled to the workplace is not the same as answering a telephone. Not all work performed by a part-time or casual employee will automatically be overtime during a period of on-call.
16. The ANMF recall to work when on-call and when not on-call is a substantial claim not supported by cogent evidence or other reasons. It ought be dismissed. It is a matter for bargaining.

ANMF Claim 4 – Excessive on-call and additional annual leave

17. The ANMF's claim for the accrual of up to one week's additional annual leave, based upon the number of times an employee is on-call, has no historical basis to support it, and is not supported on the evidence.
18. The ANMF excessive on-call claim is a substantial claim not supported by cogent evidence or other reasons. It ought be dismissed. It is a matter for bargaining.

ANMF Claim 5 – Free from duty and on-call

19. The ANMF's claim for on-call to be included in the definition of "duty" for the purposes of its proposed 21.4 of the Award has no historical basis to support it, and is not supported on the evidence. The assertion that all nursing employees are either at work or on-call is baseless.
20. To effectively remove the ability for an employee to be placed on-call on their rostered days off means there will be nearly nobody to be placed on-call. Given the aged care industry operates 24/7 and regularly has staff shortages and/or the need to call upon staff not at work in emergencies or where another employee is absent, this ANMF claim is not only unworkable, but contrary to existing rostering practices.
21. The ANMF free from duty and on-call claim is a substantial claim not supported by cogent evidence or other reasons. It ought be dismissed. It is a matter for bargaining.

ANMF Claim 6 – Rest breaks between rostered work

22. The ANMF's claim for a rest break of 10 hours between shifts was considered in the award modernisation process in 2008 and rejected. There is no historical basis to support this claim, and it is not supported on the evidence (ie only one ANMF witness statement refers to it).
23. The ANMF 10 hour rest break between rostered work claim is a substantial claim not supported by cogent evidence or other reasons. It ought be dismissed. It is a matter for bargaining.

ANMF Claim 7 – Meal breaks

24. The ANMF's claim for a meal break to be taken between the 4th and 6th hour of a shift was considered in 2008 and 2012⁴ and rejected on both occasions. There is no evidence to support any cogent reasons for change beyond those already considered in 2008 and 2012. Further, the existing award provision contains a provision for the payment of overtime where an employee works during his/her meal break.
25. The ANMF meal break claim is a substantial claim not supported by cogent evidence or other reasons. It ought be dismissed. It is a matter for bargaining.

Conclusion

26. The ANMF proposes significant variations to the Award in circumstances where such matters have been considered previously and rejected, are not supported historically and are not supported by the limited evidence advanced by the ANMF in these proceedings. On that basis, there is warrant to vary the Award as sought by the ANMF.
27. ACE will further expand on the matters set out in these submissions orally at the hearing.

Aged Care Employers

22 May 2017

⁴ [2012] FWA 9420 (at [39]-[42])