

IN THE FAIR WORK COMMISSION

Matter No: AM2016/31

Applicant: Australian Nursing & Midwifery Federation

Respondent: Blue Care

Written Submissions of Blue Care

Overview

- 1 Blue Care opposes the variations to the *Nurses Award 2010* (**Award**) proposed by the Australian Nursing and Midwifery Federation (**ANMF**) on the following grounds:
 - a. ANMF has failed to provide sufficient evidence to demonstrate that the proposed variations are necessary to achieve the modern award objective; and
 - b. ANMF has failed to demonstrate that the proposed variations would provide a fair and relevant minimum safety net of terms and conditions.
- 2 In respect of its opposition to these proposed variations, Blue Care repeats and relies on its outline of submissions filed on 22 May 2017.

Legislative context

- 3 In reviewing the Award, the Fair Work Commission (**FWC**) must ensure that it complies with the modern awards objective. Relevantly this includes ensuring that the Award, together with the National Employment Standards, provide a **fair and relevant minimum safety net of terms and conditions** taking into account¹:

¹ Section 134(1) of the Fair Work Act 2009 (Cth)

Matter no: AM2016/31

Application by: Australian Nursing & Midwifery Federation

Lodged by: The Respondent, Blue Care

Address for GPO Box 9925 Telephone: (07) 3228 9847

service: BRISBANE QLD Fax: (07) 3228 9444

4001 Email: claire.brattey@corrs.com.au

“(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.”

4 In achieving the modern awards objective, a modern award may include terms that are permitted and must include terms that are required, but only to the extent necessary to achieve the modern awards objective.²

5 In the recent Full Bench decision regarding *4 Yearly Review of Modern Award -penalty rates*, the Full Bench held:³

“[269] The following general propositions apply to the Commission’s task in the Review:

1..

- 2. Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation.⁴ Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible,⁵ probative evidence.*
- 3. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. For example, the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time it was made. The particular context in which those decisions were made will also need to be considered.*
- 4. The particular context may be a cogent reason for not following a previous Full Bench decision, for example:*

- the legislative context which pertained at that time may be materially different from the FW Act;*
- the extent to which the relevant issue was contested and, in particular, the extent of the evidence and submissions put in the previous proceeding will bear on the weight to be accorded to the previous decision; or*

² Section 138 of the Fair Work Act 2009 (Cth).

³ Re 4 Yearly Review of Modern Awards –Penalty Rates [2017] FWCFB 1001 at 269.

⁴ Re 4 Yearly Review of Modern Awards — Award Flexibility [2016] FWCFB 6178 at [60]-[61].

⁵ See Re Shop, Distributive and Allied Employees’ Association (2011) 211 IR 462 at [24] per Lawler VP, Watson SDP, Hampton C.

• *the extent of the previous Full Bench's consideration of the contested issue. The absence of detailed reasons in a previous decision may be a factor in considering the weight to be accorded to the decision.*"

- 6 The variations proposed by ANMF are as follows:
- a. In-charge and leading hand allowance;
 - b. Recalled to work clarification;
 - c. Extra leave for excessive on-call;
 - d. Free from duty and on-call clarification;
 - e. Increase to minimum rest break between shifts; and
 - f. Timing of meal breaks and compensation.

Sufficient evidence

- 7 Blue Care provides residential aged care and community care services in Queensland. Relevantly, this includes employing approximately:
- a. 8,381 employees; and
 - b. 1,940 nursing employees under the *Blue Care/ Wesley Mission Brisbane Nursing Employees Enterprise Agreement 2013 (Blue Care Enterprise Agreement)*, which is underpinned by the Award.⁶
- 8 ANMF seeks to rely on six witness statements in support of its application. Three witnesses were at the relevant time employed by Blue Care:
- a. Ms Fletcher and Ms Mathews were employed at the same centre as Registered Nurses based at Wirunya Centre of Care, Carbrook, Queensland.⁷ The centre has 42 or 43 beds.⁸
 - b. Ms Ball worked as a Registered Nurse and as Clinical Nurse working the Community.⁹ Her geographical location was Redlands, Queensland.¹⁰
- 9 Of the remaining three witnesses, two are employed at Gympie Private Hospital,¹¹ Queensland as Registered Nurses covering 28 beds.¹²

⁶ See paragraph 2 of Statement of Maria McLaughlin-Rolfe.

⁷ See paragraph 1 of Statement of Cherise Nicole Matthews and Susan Elizabeth Fletcher.

⁸ See paragraph 4 of Statement of Susan Elizabeth Fletcher and paragraph 3 of Statement of Cherise Nicole Matthews.

⁹ See paragraph 2 Statement of Felicity Ball.

¹⁰ PN550 of Transcript of Proceedings dated 28 November 2017.

¹¹ See paragraph 1 of Statement of Sonia Le Compte and Sherrelle Fox.

- 10 The final witness statement is by Professor Drew Dawson and Jessica Paterson, Senior Lecturer of Appleton Institute at CQ University and is confined to research about lack of sleep from being on call and having insufficient rest. This statement does not directly relate to the evidence before the FWC and is of little probative value.
- 11 It is unclear from the evidence how many employees are covered by the Award. Relevantly however, coverage includes 75,000 nursing personnel employed across Australia.¹³
- 12 The FWC does not have sufficient evidence before it to demonstrate the variations proposed by the ANMF are necessary to achieve the modern award objective.
- 13 At best, the evidence put forward by the ANMF demonstrates that the witnesses consider that their workloads are too high and/or that work demands are too intrusive on their personal time. These are not relevant factors to determine whether the modern awards objective has been achieved.
- 14 The question to be determined is whether the Award provides a fair and relevant minimum safety net of terms and conditions, or put simply whether employees are adequately compensated for their working patterns.
- 15 As outlined further in this submission, the Award already provides a fair and relevant minimum safety net of terms and conditions.
- 16 The evidence before the FWC in respect of each variation proposed by the ANMF is discussed further below.

In-charge and leading hand allowance

- 17 In respect of the submission by the ANMF to introduce an 'in charge' and 'leading hand' allowance under the Award, the matters that underpin these submissions have already been considered and rejected by the Fair Work Commission (**FWC**) in the 2012 awards review.¹⁴

¹²See paragraph 2 of Statement of Sonia Le Compte.

¹³ PN108 of Transcript of Proceedings dated Monday 27 November 2017.

¹⁴ Modern awards review – application by Aged Care Association Australia Ltd & Others, Australian Nursing Federation, Australian Business Industrial to vary the Nurses Award 2010 [2012] FWA 9420.

18 In the decision of *4 yearly Review of Modern Awards: Preliminary Jurisdictional Issues*, the Full Bench held¹⁵:

"[60] On the basis of the foregoing we would make the following general observations about the Review:

1..

2..

3..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 decision were made will also need to be considered. Previous Full Bench decision should generally be followed, in the absence of cogent reasons for not doing so. The Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made."

19 In the decision of *2012 Awards review*¹⁶, VP Watson held:

"[23] The matter was addressed in the award modernisation process. In my view, in an award such as this with wide-ranging application, there are sound reasons for leaving matters of this nature of the agreement or overaward area where the precise circumstances can be considered and appropriate compensation can be given to the extent that it is agreed to be warranted."

20 There is nothing materially new now advanced by the ANMF that would warrant revisiting the FWC's decision. Blue Care supports the reasoning adopted by the FWC in declining to include an allowance of this kind. Such an allowance (if warranted) should continue to be regulated by enterprise specific arrangements so that the precise circumstances of the employer and employee can be considered, and an appropriate determination made as to whether the allowance is justified.

21 The FWC's conclusion is also supported by the witnesses as they highlight that even within the same facility those in charge do not necessarily perform the same additional duties. As such matters are best regulated by enterprise specific arrangements:

- a. *"I am expected to attend to any maintenance issues that arise on my shift, as there is no one else there to attend to these things."*¹⁷

¹⁵ 4 yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788.

¹⁶ Modern awards review – application by Aged Care Association Australia Ltd & Others, Australian Nursing Federation, Australian Business Industrial to vary the Nurses Award 2010 [2012] FWA 9420.

- b. *"I guess through the week there is the maintenance man who is there and he most people may directly go to him, but the staff come to the person in charge of the shift.."*¹⁸
- c. *"For maintenance issues? If the manager was there, they would probably maybe take it to the manager."*¹⁹
- d. *"The performance of these additional tasks is incidental to the nurse's normal duties and a small component of all duties they actually perform.."*²⁰
- e. *"Well in all of our facilities the nurses that are in charge have access to a manager at all times, and that is 24/7, so the manager is always available for them. In relation to maintenance, we actually have a 24- hour property line, so it would just involve a phone call.."*²¹

22 The addition of a component dealing with a 'leading hand' allowance doesn't alter the fundamental position previously advanced and, for the same reasons outlined above, should be rejected.

23 Further, the quantum of the allowances sought by the ANMF far exceeds the Blue Care Enterprise Agreement²² and goes beyond what is fair and appropriate compensation as a minimum safety net for additional 'in charge' duties required to be performed. If applicable to Blue Care, the proposed variation would increase labour costs.²³

Recalled to work clarification

24 ANMF's submission dated 12 February 2018 concedes that the *Polan*²⁴ decision does not support a construction of the 'recalled to work' provisions in the Award applying to situations where an employee performs work remotely (eg by receiving telephone calls at home).

25 Rather the ANMF submits:

¹⁷ See paragraph 6 of Statement of Cherise Nicole Matthews.

¹⁸ PN340 Transcript of Proceedings dated 27 November 2017.

¹⁹ PN345 Transcript of Proceedings dated 27 November 2017.

²⁰ See Paragraph 7(d) of Statement of Ms Maria McLaughlin-Rolfe.

²¹ PN413 Transcript of Proceedings dated 27 November 2017.

²² See Schedule 2 of the Blue Care Enterprise Agreement.

²³ See paragraph 8 of Statement of Maria McLaughlin-Rolfe.

²⁴ *Polan v Goulburn Valley Health* [2016] FCA 440.

- a. *“the only argument is on this clause is how much should be paid.*
- b. *“that it needs to be clear in the award what the rate is. The rate should be an overtime rate and there should be minimum amount paid for each time somebody gets call up to perform work remotely.”²⁵*

26 Blue Care does not support a variation to the Award that would have the effect of requiring a minimum of three hours pay at overtime rates for participating in phone calls whilst on call.

27 Such a variation to the Award would go beyond what is fair and appropriate compensation as a minimum safety net for the work and does not reflect the industrial realities in which the provisions operate.

28 This is supported by the statement of Ms Felicity Ball:

“On an ordinary on call shift I received between two and five phone calls, but there were some quiet weekends when I was not called...”

On average the length of each call was between five and ten minutes.”²⁶

29 Nurses are already compensated under the Award for being on-call by way of an on call allowance, calculated by reference to the shift they are required to be on-call for. This allowance provides for a payment of between \$20.05 to \$35.24 per shift.²⁷

30 As such, a minimum safety net already exists and any additional remuneration (including the proposed variation by Aged Care) should be a matter reserved for enterprise bargaining.

Extra leave for excessive on-call

31 ANMF also seeks for nurses who are required to be on-call to be compensated by way of additional annual leave accruals.

32 Blue Care opposes such a variation as this would go beyond what is fair and appropriate compensation as a minimum safety net for the work, as outlined below.

²⁵ See paragraph 25 and 25 of ANMF submissions dated 12 February 2018

²⁶ See paragraph 7 of Statement of Felicity Ball

²⁷ See clause 16.4 of the Award.

- 33 As noted at paragraph 29 above, nurses are already compensated for such telephone call work by way of an on call allowance and the Award already provides nurses with five weeks annual leave (or six weeks for shift-workers).
- 34 The ANMF submits that significant amounts of rostered on call is occurring, including on top of actual duty²⁸ and seeks to rely on the evidence of Ms Ball, Ms Matthews and Exhibit ANMF6.
- 35 The FWC cannot rely on this evidence in support of the proposed variation for the following reasons:
- a. Evidence of two RN's is not sufficient evidence to demonstrate such changes are necessary to achieve the modern award objective.
 - b. There is no evidence from Ms Matthews (either written or oral) that she was on call Sundays and public holidays as well as Saturdays in the period prior to April 2015.²⁹
 - c. Ms Maria McLaughlin-Rolfe's evidence is that some nurses request to be on call and because of this, they may do more than other nurses.³⁰
 - d. Ms Ball's evidence was that in 2007, she requested not to be on-call because her husband was overseas.³¹
 - e. Exhibit ANMF-6 was presented to Ms Maria McLoughlin-Rolfe for the first time during cross-examination. There is no evidence before the FWC to confirm that the named employees:
 - i. worked the relevant shifts; or
 - ii. were the only employees available for on-call.
 - f. Exhibit ANMF-6 also indicates that some employees did five shifts over a four month period and some did 16, which supports Ms Maria McLoughlin-Rolfe's evidence and Ms Ball's evidence that nurses can request not to be on call, or request additional on-call hours.
- 36 Such a variation, if made, would increase Blue Care's labour costs, including by requiring Blue Care to increase the number of nurses employed.³² The

²⁸ Paragraph 29 of ANMF submissions dated 12 February 2018

²⁹ Paragraph 45 of the ANMF submissions dated 12 February 2018

³⁰ PN483 Transcript of Proceedings dated 28 November 2017

³¹ PN600 Transcript of Proceedings dated 28 November 2017

³² See paragraph 19 of Statement of Maria McLaughlin-Rolfe.

evidence put forward by the ANMF does not justify a sufficient basis for this increase in cost.

Free from duty and on-call clarification

37 ANMF also seeks to require that the 'free from duty' period includes time an employee spends rostered on-call.

38 In support of this proposed variation, ANMF seeks to rely on the witness statement of Ms Ball,³³ which is not a sufficient basis to justify making the proposed change to the Award.

39 Furthermore this proposed variation would involve a significant change to the well-established industry practice, which is reflected in both the Award and the Blue Care Enterprise Agreement.³⁴

40 The impact of this proposed change, if applicable to Blue Care, could mean significant alterations to rostering arrangements. This could require increasing the number of nurses employed, thereby increasing administrative and labour costs.³⁵

Increase to minimum 'rest break' between shifts

41 ANMF seeks to increase the minimum 'rest break' required between shifts from eight hours to ten hours and to provide a penalty for breach in the form of payment at overtime rate.

42 Again, there is insufficient evidence before the FWC to justify making the proposed change to the Award.

³³ See paragraph 54 of ANMF's submissions dated 17 March 2018.

³⁴ See clauses 7.1.10 and 7.5.1 of the Blue Care Enterprise Agreement and clause 23 of the Award and paragraph 22 of Statement of Maria McLaughlin-Rolfe.

³⁵ See paragraph 23 of Statement of Maria McLaughlin-Rolfe.

- 43 Furthermore, Blue Care relies on its outline of submissions and continues to oppose the proposed variation because:
- a. it exceeds the Blue Care Enterprise Agreement;³⁶ and
 - b. the Blue Care Enterprise Agreement provides for a minimum rest break of ten hours between shifts, or eight hours in certain circumstances, with no penalty.³⁷ Failure to meet the minimum requirements would be a breach of the industrial instrument, which is sufficient incentive for compliance.³⁸

Timing of meal breaks and compensation

- 44 ANMF also seeks to vary the Award in terms which would regulate when a meal break must be taken.
- 45 This has already been considered and rejected by the FWC in the 2012 awards review where VP Watson held:³⁹

"[42] I do not consider that a case has been made out for regulating the time for the meal break in the way proposed by the ANF. Such an approach would inhibit the existing flexibility which is in no doubt necessary in many operations cover by this Award. The clarification of obligations in this decision and the availability of the disputes procedure should assist in the event of further difficulties with regard to meal breaks."

- 46 There is nothing materially new now advanced by the ANMF that would warrant revisiting the FWC's decision. The circumstances in which an employee will be entitled to take a meal break are clear (ie where an employee works a shift in excess of 5 hours) and the Award provides for the payment of overtime rates in circumstances where a meal break is not provided in the first 5 hours.⁴⁰

³⁶ See clause 7.1.10 of the Blue Care Enterprise Agreement.

³⁷ See clause 7.1.10 of the Blue Care Enterprise Agreement.

³⁸ See paragraph 25 of Statement of Maria McLaughlin-Rolfe.

³⁹ Modern awards review – application by Aged Care Association Australia Ltd & Others, Australian Nursing Federation, Australian Business Industrial to vary the Nurses Award 2010 [2012] FWA 9420

⁴⁰ See clause 27.1 of the Award.

Conclusion

- 47 There is insufficient evidence to support the ANMF's proposed variations to the Award and therefore ANMF has failed to demonstrate that each proposed variation is necessary to provide a fair and relevant minimum safety net.
- 48 Furthermore, the FWC is required to also take into account the impact any such variations would have on Blue Care's business.⁴¹
- 49 As outlined in its previous submission, the variations sought by the ANMF have the potential to materially increase Blue Care's administrative and labour costs and impact its ability to meet operational requirements.⁴² There is insufficient evidence before the FWC to justify making changes to the Award that would have this effect.

Signed:



Nick Le Mare, lawyer
On behalf of Blue Care

Dated: 12 March 2018

⁴¹ Section 134(1)(f) and section 134(1)(h) of the Fair Work Act 2009 (Cth).

⁴² See paragraph 34 of Statement of Maria McLaughlin-Rolfe.