

**IN THE FAIR WORK COMMISSION
AT SYDNEY**

MATTER: AM2014/263; 2014/266
AM2018/18; AM2018/20

**REVIEW OF MODERN AWARDS – STAGE 4
*EDUCATIONAL SERVICES (TEACHERS) AWARD 2010***

Application by the Independent Education Union of Australia

IEU OUTLINE OF SUBMISSIONS

INTRODUCTION

1. The Independent Education Union has, as part of the 4 Yearly Review of Modern Awards, made application to vary the *Educational Services (Teachers) Award 2010 (the Award)* as follows:
 - a. a variation to the definition of ‘teacher’, to clarify the coverage of employees in early childcare centres who have teacher qualifications and are engaged as Directors; and
 - b. a variation to cl.14.5(b)(ii) to clarify the minimum pay entitlements of casual employees in children’s or early childhood education services.
2. Both claims are consistent with what the IEU contends is the correct interpretation of the Award as it currently stands, and are intended to address ambiguities that are, or have the potential to, give rise to disputation. The proposed drafting varies slightly from what was outlined in the Revised IEU Submission (4 December 2018), but the claims remain in substance the same.

GENERAL PRINCIPLES

3. This application is made as part of the 2014 4 Yearly Review being conducted by the Commission per s.156 of the *Fair Work Act 2009* (Cth) (commenced before its repeal). The general principles governing the approach to this review are well established, and were recently summarised in *Re 4 Yearly Review – Pharmacy Industry Award 2010* [2018] FWCFB 7621 at [126] (citations omitted):

- *section 156(2) provides that the Commission must review all modern awards and may, among other things, make determinations varying modern awards;*
- *“review” has its ordinary and natural meaning of “survey, inspect, re-examine or look back upon”;*
- *the discretion in s 156(2)(b)(i) to make determinations varying modern awards in a review, is expressed in general, unqualified, terms, but the breadth of the discretion is constrained by other provisions of the FW Act relevant to the conduct of the review;*
- *in particular the modern awards objective in s 134 applies to the review;*
- *the modern awards objective is very broadly expressed, and is a composite expression which requires that modern awards, together with the NES, provide “a fair and relevant minimum safety net of terms and conditions”, taking into account the matters in ss 134(1)(a)–(h);*
- *fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question;*
- *the obligation to take into account the s 134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process;*
- *no particular primacy is attached to any of the s 134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award;*
- *it is not necessary to make a finding that the award fails to satisfy one or more of the s 134 considerations as a prerequisite to the variation of a modern award;*

- *the s 134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives;*
- *in giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in s 134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance;*
- *what is necessary is for the Commission to review a particular modern award and, by reference to the s 134 considerations and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net;*
- *the matters which may be taken into account are not confined to the s 134 considerations;*
- *section 138, in requiring that modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective, emphasises the fact it is the minimum safety net and minimum wages objective to which the modern awards are directed;*
- *what is necessary to achieve the modern awards objective in a particular case is a value judgment, taking into account the s 134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence;*
- *where an interested party applies for a variation to a modern award as part of the 4 yearly review, the task is not to address a jurisdictional fact about the need for change, but to review the award and evaluate whether the posited terms with a variation meet the objective.*

PROPOSED VARIATION ONE – TEACHERS

4. The first proposed variation deals with a potential ambiguity in the coverage of the Award.

5. The IEU has filed evidence from Lisa James setting out the regulatory regime which applies to early childhood centres. Relevantly, they are required to employ a certain number of qualified teachers (depending on the number of places in the centre), and in addition are required to have an employee appointed as a Director whose responsibilities include the co-ordination of the centre's educational program.
6. Ms James, and the IEU's other witnesses Ana Mravunac, Julie Frennd and Lindy Farrant, give evidence that the employee appointed as the Director is, more often than not, one of the qualified teachers employed by the service. The Director role can, depending on how the centre organizes its staffing, have no direct teaching responsibilities. However, as the IEU's witnesses set out, the skills used in that role are those flowing from and gained as a result of that individual's teaching qualifications: that is, the person is still working as a teacher.
7. Usually, these teacher-qualified Directors are paid as teachers (either in accordance with the Award, or another industrial instrument which applies). However, the IEU is aware of some isolated instances in for-profit, award-reliant child care centres where teacher-qualified Directors are paid under the *Children's Services Award 2010*. This means they are paid less.
8. Ms Mravunac was until recently in this situation. Her evidence shows that:
 - a. she is the only teacher employed by her service;
 - b. she performs teaching duties as well as being an 'office based' director;
 - c. she uses her skills and qualifications as a teacher in her Director role;
 - d. she was until recently classified as a level 6.2 in the Children's Services Award and paid \$31.69 per hour (with no Director's allowance paid).

- e. she is, following a request for review, now paid as a Level 11 under the Award and earning \$38.31 per hour (including a Director's allowance).
9. The IEU contends that Ms Mravunac, like all teacher-qualified Directors, is in fact covered by the Award. Per cl.4.1, the Award relevantly covers:

employers throughout Australia in the...early childhood education industry and their employees as defined in clause 3.1 to the exclusion of any other modern award.
 10. Clause 3.1 relevantly defines 'employee' as:

'a person employed as a teacher in the...children's services and early childhood education industry'
 11. 'Teacher' is currently defined

'teacher means a person employed as such by a school, children's service or early childhood education service and who performs duties which include delivering an educational program, assessing student participation in an education program, administering an education program and performing other duties incidental to the delivery of the education program. So as to remove any doubt, teacher includes a teacher in a senior leadership position, but not a principal or deputy principal.'
 12. A person employed as a Director by an early childhood centre who:
 - a. has teaching qualifications;
 - b. is engaged in a role which is centrally concerned with the administration of an educational program and ancillary tasks;
 - c. uses the skills learned as part of obtaining the teaching qualification in the performance of this role; and
 - d. is, or can be, counted toward the service's mandatory minimum number of employed teachers,

i.e. a non-teaching Director like Ms Mravunac, is correctly considered as being '*employed as a teacher*' within the meaning of cl.3.1, giving those words their ordinary meaning.

13. The IEU is bolstered in this construction by the pre-modern Award history of regulation, which is summarised in Ms James' statement as to NSW in detail. In short, teacher Directors in preschools generally and in childcare centres in NSW and the ACT¹ have historically been covered by the relevant award for teachers. There is no indication in the decisions leading to the Award being made that the Commission had any intention of departing from this. Childcare centres in other states did not deliver educational programs at that time requiring qualified teachers, and as such this issue was not contemplated in the childcare awards.
14. This is an unsurprising outcome. The Award system has long recognised the significance of qualifications for a person's classification and rate of pay. As the Full Bench said in *Re Child Care Industry (Australian Capital Territory) Award 1998* (PR954938) at [372]:

Prima facie, employees classified at the same AQF levels should receive the same minimum amounts of pay unless the conditions under which the work is performed warrant a different outcome. Contrary to the employer's submissions the conditions under which the work of child care workers is performed do not warrant a lower rate of pay than that received by employees at the same AQF level in other awards. Indeed if anything the opposite is the case. Child care work is demanding, stressful and intrinsically important to the public interest.

15. Nevertheless, as Ms Mravunac and Ms James' statement arises, on the current drafting of the Award a dispute occasionally arises as a result of an employer's misunderstanding of the Award and how employees are classified (i.e. on the mistaken belief that it is designation, rather than qualification and substantive work, that defines an employee's role).

¹ *Child Care Industry (Teachers) (Australian Capital Territory) Award 1999*

16. This is undesirable. It means the Award is not necessarily ‘*simple*’ or ‘*easy to understand*’ within the meaning of s.134(1)(g) of the *Fair Work Act 2009* (Cth). Accordingly, a variation to Clause 3.1 of the Award to remove this potential ambiguity is necessary to achieve the Modern Awards Objective. The IEU proposes the following:

‘teacher means a person employed as such by a school, children’s service or early childhood education service and who performs duties which include delivering an educational program, assessing student participation in an education program, administering an education program and performing other duties incidental to the delivery of the education program. So as to remove any doubt, teacher includes a person with teaching qualifications appointed as a Director of an early childhood education service (whether or not that person directly performs day to day teaching activities), teacher in a senior leadership position, but not a principal or deputy principal.’

17. Concurrently, to avoid any further doubt, the *Childrens’ Services Award 2010* should be amended at cl.B.1.10:

A Director is an employee who holds a relevant Degree (other than a teaching qualification), or an AQF Advanced Diploma, or a Diploma in Children’s Services, or a Diploma in Out-of-Hours Care; or is otherwise a person possessing such experience, or holding such qualifications deemed by the employer or the relevant legislation to be appropriate or required for the position, and who is appointed as the director of a service.

PROPOSED VARIATION TWO – MINIMUM ENGAGEMENT FOR CASUALS

18. The second variation proposed by the IEU relates to the minimum engagement period for casual employees in early childhood centres.
19. Clause 14.5 currently provides:

(a) The salary payable to a casual employee will be:

(i) no higher than the salary at Level 8 in clause 14.1 where the employee is engaged for less than five consecutive days; or

(ii) where the employee is engaged for five or more consecutive days the salary will be the appropriate salary for the classification as specified in clause 13—Classifications,

calculated in accordance with the table below:

Full day	Weekly rate calculated in accordance with clause 14.3 divided by 5 plus 25%
Half day	Weekly rate calculated in accordance with clause 14.3 divided by 10 plus 25%
Quarter day	Weekly rate calculated in accordance with clause 14.3 divided by 20 plus 25%

(b) Provided that:

(i) a casual employee in a school will be paid for a minimum of half a day; where a day is the usual required attendance time for an employee at that school and a half day is half the usual required attendance time; and

(ii) a casual employee in a children's service or early childhood education service may be paid for a minimum of a quarter day.

20. The IEU, as set out in Ms James' statement, is aware that (albeit very rarely) on some occasions award-reliant children's and early childhood education service operators pay casual employees for *only* a quarter of a day when they work between a quarter and a half a day.
21. This is an unsustainable interpretation. It is, as a starting point, inherently unlikely in that it countenances employees being required to work for free. Given the centrality of the work/wages bargain to an employment relationship, strong language indeed would be required to support such a conclusion.
22. Further, the alternative interpretation ignores the word '*minimum*'. The clause provides that, regardless of how long they work, an employee must

be paid *at least* for a quarter-day – not that work done between the first and second quarter of a day will be unremunerated.

23. Secondly, it is an unsound reading of the text. The second part of (b)(i), is concerned with actual required attendance time. Given the definitional table already at (a), this only has work to do if it is linking the payment to be made to the attendance required. In other words, a casual employee in a school will be paid a half day *in circumstances where they are only required to work half a day*.
24. As a conjunctive list, subsections (i) and (ii) must be read together. Correctly interpreted, what (ii) does is, effectively, amend (i) in respect of casual employees in children’s and early childhood services, to introduce a lower limit: the clause otherwise functions identically. This is shown by the use of the word ‘*may*’, construed in context.
25. Again, for the reasons set out above, this is undesirable and correcting this ambiguity is necessary to achieve the Modern Awards Objective. The IEU proposes the following variation to Clause 14.5:

(b) Provided that:

(i) a casual employee in a school will be paid for a minimum of half a day; where a day is the usual required attendance time for an employee at that school and a half day is half the usual required attendance time, and the employee is only required to attend for up to a half day; and

(ii) a casual employee in a children’s service or early childhood education service may be paid for a minimum of a quarter day, where a day is the usual required attendance time for an employee at that service and a quarter day is half the usual required attendance time at that service, and the employee is only required to attend for up to a quarter day.

(iii) For the avoidance of doubt, an employee who is required to attend for a period of time between a quarter day and a half

day will be paid a half day, and between a half day and a full day a full day.

LUCY SAUNDERS
GREENWAY CHAMBERS
15 MARCH 2019

Attachment – Statements

- 1) [Statement](#) of Lindy Farrant dated 14 March 2019
- 2) [Statement](#) of Julie Frend dated 15 March 2019
- 3) [Statement](#) and [Annexures](#) of Lisa James dated 15 March 2019
- 4) [Statement](#) of Ana Mravunac dated 15 March 2019