AM2018/13: 4 YEARLY REVIEW OF MODERN AWARDS - AGED CARE AWARD 2010

SUBMISSION REGARDING QUESTIONS ON NOTICE DURING HEARING ON 10 APRIL 2019

Background

1. This submission addresses two matters that arose during the course of the hearing before the Full Bench on 10 April 2019:

   (a) first, the relevance of the classification structure in the *Social, Community, Home Care and Disability Services Industry Award 2010* (the **SCHCDS Award**) and, in particular, the language in Schedule E.3.5 regarding qualifications; and

   (b) second, the operation of clause 22.8(c) of the *Aged Care Award 2010* (the **Aged Care Award**) in relation to shift loadings applicable to broken shifts.

Question regarding classification structure

2. During the course of the hearing on 10 April 2019, reference was made to Schedule E.3.5 of the SCHCDS Award, which sits within the classification structure for employees in the home care stream.

3. At PN327-PN343, the President inquired about the difference in the classification definitions between the Aged Care Award and the SCHCDS Award, with particular reference to Schedule E.3.5 of the SCHCDS Award. Specifically, the President sought views as to whether it would be appropriate to adopt the language in Schedule E.3.5 into the Aged Care Award.

4. At the outset, we reiterate the submissions advanced during the hearing regarding the need for the classification structure to link any qualification that may be held by an employee to the nature of the work actually being performed by that employee.

5. In our respectful submission, the reference to the holding of a Certificate III qualification in Level 4 of the Aged Care Award must meet each of the following requirements:

   (a) firstly, that the employee holds the qualification; and

   (b) secondly, that the qualification is relevant to the role performed by the employee; and

   (c) thirdly, that the employee utilises the skills and knowledge derived from the qualification competencies in the performance of their work.

6. Our clients do not oppose a variation to the current provision, provided the formulation of words contains each of the above necessary elements.

7. In relation to the proposition that the classification definition should encompass employees who do not hold the relevant qualification but who "possess equivalent knowledge and skills gained through on-the-job training", we note that this type of formulation is not an uncommon feature of classification structures in other modern awards and appears in a number of comparable awards.[1]

8. Schedule E.3.5 of the SCHCDS Award is one of a number of such examples.

9. To the extent that the Commission was minded to broaden the relevant part of the Level 4 classification definition in the Aged Care Award to encompass employees who do not hold a certificate III qualification but who possess equivalent knowledge and skills, the language in Schedule E.3.5 would appear to be appropriate, subject to one caveat. We consider that the following words should also be included in the form of a Note:

> *Note: Any dispute about the classification of a particular employee may be referred to the Fair Work Commission in accordance with clause 9 of this Award. The Fair Work Commission may require an employee to demonstrate to its satisfaction that the employee utilises the requisite skills and knowledge, and that these are relevant to the work the employee is doing.*

10. This form of language appears at clause 3 of the *Hospitality Industry (General) Award 2010* under the definition of "appropriate level of training". In our submission, such a Note would be an appropriate inclusion in the event that the Commission was minded to adopt the language in Schedule E.3.5 or something similar.

Question regarding operation of shift loadings during broken shifts

11. At PN564, reference was made to a shift loading being payable where a broken shift is worked. This matter was then the subject of discussion between PN564 - PN619, and the Commission invited parties to provide a short submission in relation to this issue.

12. We set out below our assessment of the operation of clause 26 in relation to broken shifts.

13. Clause 22.8 deals with broken shifts. Clause 22.8(a) defines a "broken shift" as:

> *... a shift worked by a casual or permanent part-time employee that includes breaks (other than a meal break) totalling not more than four hours and where the span of hours is not more than 12 hours.*

[1] See, for example, Schedule E.3.5 of the SCHCDS Award; Schedule B.1.4 of the *Health Professionals and Support Services Award 2010*; Schedule B.1.4 of the *Children's Services Award 2010*.

14. Clause 22.8(b) provides that a broken shift may only be worked where there is mutual agreement between the employer and employee to work the broken shift.

15. Clause 22.8(c) sets out the payment arrangements applicable to broken shifts. It provides:

> *Payment for a broken shift will be at ordinary pay with penalty rates and shift allowances in accordance with clauses 25 Overtime penalty rates and 26 Shiftwork, with shift allowances being determined by the commencing time of the broken shift.*

16. In accordance with clause 22.8(c) above, the circumstances in which an employee will receive a payment in excess of their "ordinary pay" for working a broken shift are as follows:

    (a) where they work in excess of 38 hours per week or 76 per fortnight;[2]

    (b) where they work in excess of 10 hours per day;[3]

    (c) in respect of part-time employees, where they work in excess of their rostered hours;[4]

    (d) where they work beyond the maximum span of 12 hours;[5]

    (e) where an employee works 38 or more hours per week, the applicable shift allowances in clause 26.1(a)-(d);[6] and

    (f) where an employee works less than 38 hours per week, the applicable shift allowances in clause 26.1(a)-(d), but only where the shift commences prior to 6.00 am or finishes subsequent to 6.00 pm.[7]

17. The above scenarios constitute the circumstances in which a premium is payable for broken shifts.

18. In respect of shift allowances, the quantum of the shift allowance payable is determined by the commencing time of the broken shift.[8]

19. The interaction of clause 22.8(c) and the second sentence of clause 26.1 means that, unless you are working 38 or more hours per week, a shift allowance will only be payable where an employee:

    (a) commences a broken shift prior to 6am; or

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[2] Clause 25.1(b)(i).
[3] Clause 25.1(b)(ii).
[4] Clause 25.1(b)(iii).
[5] Clause 22.8(d).
[6] Clause 26.1.
[7] Clause 26.1.
[8] Clause 22.8(c).

(b) finishes a broken shift work subsequent to 6pm.

20. Where an employee meets the requirements contained in paragraph 19 above, the quantum of the shift allowances payable are determined in accordance with clause 26.1(a)-(d).

21. We trust this provides a more fulsome response to that which was provided during the hearing on 10 April 2019.

22. To the extent that the Commission is minded to make any variation to the broken shifts provision which differs from the variation that was sought by the Health Services Union, our clients respectfully request an opportunity to be heard further in relation to this issue.

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On behalf of Australian Business Industrial and the New South Wales Business Chamber Ltd

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