Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission – Employer Claims

Social, Community, Home Care and Disability Services Industry Award 2010 (AM2018/26)

26 September 2019

AM2018/26 SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010

EMPLOYER CLAIMS

1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) advances these submissions in relation to certain variations (**Employer Claims**) to the *Social, Community, Home Care and Disability Services Industry Award 2010* (**Award**) that are sought by Australian Business Industrial, the New South Wales Business Chamber, Aged and Community Services Australia and Leading Age Services Australia Limited (**ABLA's Clients**).

2. Specifically, the relate to the following changes proposed by ABLA's Clients:

   (a) Changes proposed to clause 25.1 of the Award (**Ordinary Hours Claim**);

   (b) Changes to clause 25.5(d)(ii) of the Award (**Rostering Claim**); and

   (c) Changes to clause 25.5(f) of the Award (**Client Cancellation Claim**).

2. THE ORDINARY HOURS CLAIM

3. Clause 25.1 of the Award is presently in the following terms:

> **25.1 Ordinary hours of work**
>
> **(a)** The ordinary hours of work will be 38 hours per week or an average of 38 hours per week and will be worked either:
>
> **(i)** in a week of five days in shifts not exceeding eight hours each;
>
> **(ii)** in a fortnight of 76 hours in 10 shifts not exceeding eight hours each; or
>
> **(iii)** in a four week period of 152 hours to be worked as 19 shifts of eight hours each, subject to practicality.
>
> **(b)** By agreement, the ordinary hours in clause 25.1(a) may be worked up to 10 hours per shift.

4. The provision enables an employee's ordinary hours to be averaged over a period of one week, two weeks or four weeks.

5. ABLA's Clients propose that clause 25.1 be replaced with the following: (our emphasis)

> **25.1 Ordinary hours of work**
>
> **(a)** The ordinary hours of work will be 38 per week or an average of 38 hours per week <u>over the employee's roster period</u>, up to a maximum of four weeks.
>
> **(b)** Subject to clause 25.1(c), the maximum ordinary hours that can be worked per shift is 38.
>
> **(c)** By agreement between an employer and an individual employee, ordinary hours may be worked up to 10 hours per shift.

6. The intention underpinning the proposed clause is explained by ABLA's Clients as follows:

> 4.7 Our clients propose a simplified clause 25.1, that retains all of the key elements of the existing provision, but which removes unnecessary and superfluous prescription which does not actually have any operative effect.[1]

[1] ABLA's Clients' submission dated 2 July 2019 at paragraph 4.7.

7. The proposed variation introduces the notion of an employee's "roster period" to the Award's regulation of the period over which an employee's ordinary hours may be averaged. The underlined words in the proposed clause 25.1(a) are, at the very least, confusing. Moreover, we are concerned that they potentially substantively alter the operation of the extant clause 25.1 in a manner that removes existing flexibility and is seemingly unintended by ABLA's Clients.

8. Clause 25.5(a) of the Award requires an employer to display a fortnightly roster for each employee (subject to the exemptions otherwise provided by the Award[2]). The Award thereby prescribes a roster period of two weeks.

9. Read in the context of clause 25.5(a), the changes proposed by ABLA's Clients would appear to have the effect of limiting the period of time over which an employee's ordinary hours may be averaged. Whilst the Award presently enables that an employee's ordinary hours maybe averaged over a period of four weeks, the underlined portion of the proposed clause 25.1(a) would potentially limit this to a fortnight. To that extent the proposed provision is also internally inconsistent. This is because the clause goes on to state that an employee's ordinary hours may be averaged over a period of up to four weeks.

10. The relevant aspect of the proposed variation is inconsistent with the need to promote flexible modern work practices and the efficient and productive performance of work[3]. The proposed variation is also likely to have an adverse impact on business[4].

11. There is no material before the Commission that would justify the change. In Ai Group's submission, the reference to an employee's roster period should not be introduced to clause 25.1(a).

[2] For example, clause 25.5(c) of the Award.

[3] Section 134(1)(d) of the *Fair Work Act 2009*.

[4] Section 134(1)(f) of the *Fair Work Act 2009*.

3. THE ROSTERING CLAIM

12. Clause 25.5(d) of the Award provides for changes to rosters in the following terms: (our emphasis)

> **(d) Change in roster**
>
> **(i)** Seven days' notice will be given of a change in a roster.
>
> **(ii)** However, a roster may be altered at any time to enable the service of the organisation to be carried on where another employee is absent from duty on account of illness, or in an emergency.
>
> **(iii)** This clause will not apply where the only change to the roster of a part-time employee is the mutually agreed addition of extra hours to be worked such that the part-time employee still has four rostered days off in that fortnight or eight rostered days off in a 28 day roster cycle, as the case may be.

13. The extant provision requires that seven days' notice be provided by an employer to an employee of a roster change. However, such notice is not required where a roster is altered in order to enable the service of the organisation to be carried on where another employee is absent on account of illness. The clause does not require that the employee absent on account of illness is taking personal/carer's leave during their absence.

14. ABLA's Clients propose that clause 25.5(d)(ii) be replaced with the following: (our emphasis)

> **(ii)** However, a roster may be altered at any time:
>
> **A.** by agreement between the employer and the relevant employee, provided the agreement is recorded in writing;
>
> **B.** to enable the services of the organisation to be carried out where another employee is absent from work on account of personal/carer's leave, compassionate leave, community service leave, ceremonial leave, leave to deal with family and domestic violence, or in an emergency; or
>
> **C.** where the change involves the mutually agreed addition of hours for a part-time employee to be worked in such a way that the part-time employee still has four rostered days off in that fortnight or eight rostered days off in a 28 day roster cycle.

15. The proposed provision would limit the scope of the exemption currently afforded by clause 25.5(d)(ii) to the extent that it would no longer apply where another employee is absent on account of illness but is not taking personal/carer's leave. Ai Group opposes this element of the claim and submits that the reference to "illness" should be retained (in addition to the specific forms of leave that ABLA's Clients have proposed be referenced in the clause).

16. ABLA's Clients have made only the following submission in support of the proposed variation: (our emphasis)

> 4.13 Our clients propose a relatively minor variation to clause 25.5(d)(ii) to:
>
> …
>
> (b) clarify the operation of the existing provision allowing for roster changes in the event of another employee being absent from duty on account of "illness".
>
> 4.14 The wording proposed is consistent with the Full Bench decision in the 4 yearly review of the modern awards – *Nurses Award 2010* [2018] FWCFB 7347.[5]

17. ABLA's Clients contend that the variation proposed "clarifies" the operation of the current clause where another employee is absent due to illness. We respectfully disagree. The proposal instead:

    (a) Expands the scope of the exemption afforded by clause 25.5(d)(ii) to the extent that it would apply:

        (i) Where an employee takes carer's leave. The entitlement to carer's leave under the NES arises in circumstances that extend beyond an illness suffered by the employee taking the leave (or, for that matter, the person to whom they are providing care or support).

        (ii) Where an employee takes compassionate leave. The entitlement to compassionate leave under the NES arises in circumstances that extend beyond an illness suffered by the employee taking the leave (or, for that matter, another person).

[5] ABLA's Clients' submission dated 2 July 2019 at paragraphs 4.13 – 4.14.

(iii) Where an employee takes community services leave or ceremonial leave. The entitlement to these forms of leave under the NES and / or the Award self-evidently arise in circumstances that extend beyond an illness suffered by the employee.

(iv) Where an employee takes leave to deal with family and domestic violence. Whilst in some cases an employee taking such leave may be absent due to illness, there are a range of other circumstances in which such lave may be taken, which are not associated with illness.

(b) Narrows the scope of the exemption afforded by clause 25.5(d)(ii) to the extent that it would apply in the event of another employee's absence due to illness only if the employee had taken personal/carer's leave.

18. An employee will not in all circumstances take personal/carer's leave when absent from work due to illness. For example, an employee may be absent from work due to illness whilst on workers' compensation or on (authorised or unauthorised) unpaid leave because the employee has exhausted their paid leave entitlements.

19. There is no warrant or justification for narrowing the application of the current exemption in the manner proposed. Clause 25.5(d)(ii) of the Award relieves employers of needing to provide 7 days' notice of a roster change in a manner that better enables employers to respond to employee absences. The rationale for such flexibility also applies to employee absences due to illness, even if the employee is not taking personal leave.

20. The relevant aspect of the proposed variation is inconsistent with the need to promote flexible modern work practices and the efficient and productive performance of work[6]. The proposed variation is also likely to have an adverse impact on business[7].

[6] Section 134(1)(d) of the *Fair Work Act 2009*.

[7] Section 134(1)(f) of the *Fair Work Act 2009*.

21. The remaining considerations listed at s.134(1) of the Act are either not enlivened by the claim or are neutral considerations.

22. ABLA's Clients refer to a recent decision[8] made by the Commission to vary the *Nurses Award 2010* (**Nurses Award**) in relevantly similar terms to the change here proposed.

23. The relevant aspect of the decision concerning the Nurses Award related primarily to a claim advanced by the Aged Care Employers:

> **[146]** ACE proposes to vary clause 8.2 of the Nurses Award exposure draft (clause 25 of the current award) in order to provide an employer with the ability to alter an employee's roster without the requirement of giving the employee seven days' notice, in circumstances where the employee has agreed to the roster change.[9]

24. The Commission determined not to grant the claim, but went on to say as follows: (our emphasis)

> **[159]** We do not intend to make the change proposed by ACE however we will provide greater flexibility. We will remove the words "due to illness" from clause 25.4 and insert the words "pursuant to clauses 33 – Ceremonial leave; 34 – Personal/carers' leave and compassionate leave and 36 – Leave to deal with Family and Domestic Violence."
>
> **[160]** We propose that clause 25.4 will read as follows:
>
> **25. Rostering**
>
> …
>
> 25.4 Seven days' notice of a change of roster will be given by the employer to an employee. Except that, a roster may be altered at any time to enable the functions of the hospital or facility to be carried out where another employee is absent from work pursuant to clauses 33 – Ceremonial leave; 34 – Personal/carers' leave and compassionate leave and 36 – Leave to deal with Family and Domestic Violence, or in an emergency. Where any such alteration requires an employee working on a day which would otherwise have been the employee's day off, the day off instead will be as mutually arranged.
>
> **[161]** Interested parties are invited to file submissions in relation to the proposed wording of clause 25.4.[10]

25. Respectfully, it appears to us that the change proposed (and ultimately made) by the Commission to the Nurses Award does not in fact have the Commission's

[8] *4 yearly review of modern awards—Nurses Award 2010* [2018] FWCFB 7347.
[9] *4 yearly review of modern awards—Nurses Award 2010* [2018] FWCFB 7347 at [146].
[10] *4 yearly review of modern awards—Nurses Award 2010* [2018] FWCFB 7347 at [159] – [161].

stated intent. That is, in the context of illness, the amended provision does not provide “greater flexibility”.

26. It appears that no interested party raised this issue in response to the above decision. The Full Bench subsequently determined that it would vary the Nurses Award in the terms proposed at paragraph [160] above.[11]

27. In the circumstances, the Full Bench should not simply adopt the decision made by the Commission in the context of the Nurses Award. The absence of submissions before the Commission in that matter in relation to this issue is a cogent reason for departing from it.

[11] *4 yearly review of modern awards—Nurses Award 2010* [2019] FWCFB 121 at [24].

4. THE CLIENT CANCELLATION CLAIM

28. Clause 25.5(f) of the Award provides for client cancellation. It operates as follows:

    (a) The clause applies only to home care services.

    (b) Where a client cancels or changes a rostered home care service, it requires an employer to provide an employee with notice of a change to their roster by 5pm the day before the service.

    (c) Where notice is provided in accordance with paragraph (b) above, the employee is not entitled to any payment. Accordingly, if a client cancelled their service and an employer notified the relevant employee before 5pm on the day prior that they are no longer required to work, the employee would not be entitled to any payment.

    (d) Where notice is not provided in accordance with paragraph (b), the employee is entitled to payment for their minimum specified hours.

    (e) An employer has an Award-derived right to direct an employee to perform make-up time where a client cancels or changes a rostered home care service. Further:

        (i) The employer may direct the employee to work make-up time only during the same or the following fortnightly period.

        (ii) The time may be made up working with other clients or in other areas of the employer's business, if the employee has the skills and competence to perform the work.

29. ABLA's Clients have proposed a significantly different regime for dealing with client cancellations. It is our understanding that it would operate as follows:

(a) The clause would apply to home care and disability services.

(b) The clause would apply in the event of <u>any</u> cancellation to a service by a client, regardless of whether an employee is provided with notice of the cancellation (and, by extension, regardless of the period of notice provided to the employee).

(c) In the event of a client cancellation, the clause would provide an employer with two options:

Option 1: The employer would have the right to direct the employee to perform other work during the hours that they were rostered to work; in which case the employer would be required to pay the employee the amount they would have been paid had the employee performed the cancelled service or the amount payable for the work actually performed; whatever is greater.

Option 2: The employer would be permitted to cancel the shift; in which case, the employer would be required to:

(i) Pay the employee the amount they would have received had they performed the cancelled service; or

(ii) Provide the employee with make up time. Such make up time must be rostered to be performed within 3 months of the date of the cancelled shift. The employer must consult with the employee about when the make up time will be performed.

30. We also note that whilst the proposed clause 25.5(f)(i) states that the clause is to apply where a client cancels or changes a service; clause 25.5(f)(ii), which is the operative provision, is expressed to apply only where a service is *cancelled* by a client. Read literally, neither it nor the rest of the clause appear to apply where a client *changes* a service. In this way, the proposed clause appears to limit the scope of the flexibility currently afforded under the Award.

31. The written submissions filed on behalf of ABLA's Clients summarised the funding arrangements that applied to client cancellations under the National Disability Insurance Scheme as at the time that the submissions were prepared.[12] Those funding arrangements have since changed. They now operate as follows:

> **Cancellations**
>
> Where a provider has a short notice cancellation (or no show) they are able to recover 90% of the fee associated with the activity, subject to the terms of the service agreement with the participant. Providers are only permitted to charge for a short notice cancellation (or no show) if they have not found alternative billable work for the relevant worker and are required to pay the worker for the time that would have been spent providing the support.
>
> A cancellation is a short notice cancellation if the participant:
>
> - does not show up for a scheduled support within a reasonable time, or is not present at the agreed place and within a reasonable time when the provider is travelling to deliver the support; or
> - has given less than two (2) clear business days' notice for a support that meets both of the following conditions:
>   - the support is less than 8 hours continuous duration; AND
>   - the agreed total price for the support is less than $1000; or
> - has given less than five (5) clear business days' notice for any other support.
>
> …
>
> There is no limit on the number of short notice cancellations (or no shows) that a provider can claim in respect of a participant. However, providers have a duty of care to their participants and if a participant has an unusual number of cancellations then the provider should seek to understand why they are occurring.

[12] ABLA's Clients' submission dated 2 July 2019 at paragraphs 5.11 – 5.13.

The NDIA will monitor claims for cancellations and may contact providers who have a participant with an unusual number of cancellations.[13]

32. Having summarised the NDIS funding arrangements as they then applied, ABLA's Clients submit:

> 5.14 While the intention behind the NDIS cancellation rules is to attempt to strike a balance between the interests of service providers and participants, the reality is that the cancellation rules place service providers in a very difficult position.
>
> 5.15 Unless there is an ability to cancel the rostered shift (without being required to pay the employee), or redeploy the rostered employee to other available work, service providers will incur costs regardless of the scheduled service having been cancelled, yet not derive any revenue.
>
> …
>
> 5.16 There is a clear disconnect between the terms of the Award and the funding arrangements under the NDIS when it comes to client cancellations. The disconnect is having a materially adverse impact on the viability of businesses operating in this sector.[14]

33. The disconnect between the Award's extant client cancellation provisions and the NDIS funding arrangements is potentially less problematic than was previously the case in light of the revised NDIS rules concerning client cancellations. The proposal advanced by ABLA's Clients will, however, exacerbate or further any existing disconnect between the two in some respects.

[13] National Disability Insurance Scheme, *Price Guide 2019 – 2020* (valid from 1 July 2019, accessed on 26 September 2019) at pages 17 – 18.

[14] ABLA's Clients' submission dated 2 July 2019 at paragraphs 5.14 – 5.16.

34. We provide the following example. If a client cancels a home care service that is less than 8 hours in duration and $1000 in price with 72 hours' notice and the employer immediately notifies the employee that their corresponding shift is cancelled:

(a) **Under the NDIS**, the cancellation is not a "short notice" cancellation. The employer therefore cannot recover any amount under the NDIS funding arrangements.

(b) **Under the current Award clause:** the employer is not required to pay the employee or to afford the employee make-up time. The employee's shift can be cancelled.

(c) **Under ABLA's Clients' proposal:** the employer no longer has the ability to cancel the employee's shift without payment to the employee. The employer must either:

(i) Direct the employee to perform other work at the same time and pay the employee in accordance with clause 25.5(f)(iii); or

(ii) Cancel the shift and pay the employee the amount they would have received had they performed the cancelled service; or

(iii) Provide the employee with make-up time.

35. Ironically, a claim advanced by the HSU in relation to client cancellations is more modest than that of ABLA's Clients. The HSU has proposed that clause 25.5(f) be varied as follows:

> **(f) Client cancellation**
>
> **(i)** Where a client cancels or changes the rostered home care service, an employee will be provided with notice of a change in roster at least 48 hours' in advance ~~by 5.00 pm the day prior~~ and in such circumstances no payment will be made to the employee. If a full-time or part-time employee does not receive such notice, the employee will be entitled to receive payment for their rostered hours of that visit ~~minimum specified hours~~ on that day.
>
> **(ii)** The employer may direct the employee to make-up time equivalent to the cancelled time, in that or the subsequent fortnightly period. This time may be made up working with other clients or in other areas of the employer's business providing the employee has the skill and competence to perform the work.

36. Under the HSU's claim, in the above scenario, the employer would not be required to pay the employee or to afford the employee make-up time. The employee's shift would simply be cancelled.

37. The claim advanced by ABLA's Clients is in some respects more onerous, more costly and more inflexible than the existing client cancellation scheme. It is problematic in at least the following respects.

38. *First,* it operates in the event of *any* client cancellation, even where ample notice of the cancellation is provided by the client to the employer and, in turn, by the employer to the employee. No justification for this significant expansion of the current clause is provided by ABLA's Clients.

39. The extant clause is clearly designed to deal with changes to an employee's roster at short notice due to client cancellations or changes. It appears intended to strike a balance between ensuring that an employer has some flexibility to respond to changes to service demands (which, in the context of the NDIS, are entirely beyond its control) and the inconvenience caused to an employee by changes made to their rosters at short notice.

40. Under the proposal advanced by ABLA's Clients, even where an employee has, for instance, four weeks of notice of a cancellation, the clause will require the employer to either pay them or to afford them make-up time. There is, however, no foundation for proceeding on the basis that the purpose or rationale underpinning the requirement to pay an employee in the context of a short notice change under the current clause is also relevant in the context of an employee having weeks of notice. Rather, the proposition that an employee should be compensated in the same way for a roster change with multiple weeks of notice as they should for a change made after 5pm on the preceding day, self-evidently has little force.

41. *Second*, the proposed clause will in many instances increase employment costs and the regulatory burden. The clause will require an employer, in the context of any client cancellation to either pay the employee for the shift or to find other work for the employee to perform (either at the same time or later, in the form of make-up time).

42. Whilst the existing provision creates an Award-derived employer *right* to direct an employee to perform make-up time, the proposed clause instead creates an employer *obligation* to provide make-up time (unless payment is made to the employee). In our consultation with employers covered by the Award, they have repeatedly expressed concern about the regulatory burden associated with managing accrued make-up time under the proposed clause, particularly given the frequency with which client cancellations occur.

43. The proposal potentially overlooks the complexities associated with allocating other work to an employee either at the same time as the cancelled shift or subsequently. Various factors are taken into account by an employer when allocating employees to the performance of home care and disability services including client preferences, continuity of care, the employees' skills and the clients' location.

44. Whilst Ai Group supports greater flexibility being afforded in respect of client cancellations to the provision of disability services; the scheme proposed by ABLA's Clients for dealing with client cancellations is not consistent with the need to afford flexible modern work practices[15] and it will have an adverse impact on many employers[16].

45. In Ai Group's submission, any scheme dealing with client cancellation should retain an ability to cancel an employee's shift without payment where a client cancels or changes their service request.

[15] Section 134(1)(d) of the *Fair Work Act 2009*.

[16] Section 134(1)(f) of the *Fair Work Act 2009*.