

INFORMATION ABOUT CHALLENGE COMMUNITY SERVICES ('CHALLENGE')

1. Challenge is a registered National Disability Insurance Scheme (NDIS) provider. As well as the provision of foster care and therapeutic services, Challenge also provides services, employment and supports to people with disability.
2. Disability services programs include supported independent living, assistance with daily living, day programs and supported employment programs.
3. The Supported Independent Living ('SIL') program is for participants with a disability who are unable to live independently. SIL helps participants to live independently in a home provided by Challenge whereupon disability support workers assist participants with day-to-day needs such as personal care, social and medical needs, banking, preparation of meals, washing, cleaning, shopping, getting in and out of bed in the mornings and evenings.
4. Assistance with daily living is the provision of services in the participant's own home to assist the participant to live as independently as possible at home and in the community. Services include assistance with daily personal activities (such as helping the participant get ready for the day including showering, dressing, getting in and out of bed etc), and household tasks (such as cleaning).
5. Challenge and most of its employees are covered by the Social, Community, Home Care and Disability Services Industry Award 2010 ('the Award').
6. As at today's date, Challenge employs over 1000 employees, with over 600 disability support workers. Out of this number, we have close to 600 workers who are regularly rostered on broken shifts.

THE FOUR YEARLY REVIEW OF THE AWARD

7. Challenge has kept abreast of:
 - a. the Fair Work Commission's ('the Commission') Decisions dated 4 May 2021¹ and 25 August 2021;² and
 - b. the Commission's draft variation determination dated 4 May 2021 ('draft variation determination').
8. Challenge understands that:
 - a. the Commission has decided to, amongst other matters, vary the broken shift provision in clause 25.6 of the Award; and
 - b. the draft variation determination replaces clause 25.6(b) which currently provides "*Payment for a broken shift will be at ordinary pay with penalty rates and shift allowances in accordance with clause 29—Shiftwork, with shift allowances being determined by the finishing time of the broken shift*"³, with new clause 25.6(d), which

¹ [2021]FWCFB2328.

² [2021]FWCFB5244.

³ Clause 25.6(b), the Award.

provides “Payment for a broken shift will be at ordinary pay with weekend and overtime penalty rates to be paid in accordance with clauses 26 and 28”.⁴

9. Challenge is aware of the Commission’s Statement dated 9 August 2021 (‘the Statement’) concerning the issue of broken shifts and the Commission’s direction for submissions to be filed in relation to:
 - a. National Disability Services (‘NDS’) proposal that:
 - i. clause 25.6 of the Award be amended to read ‘this clause only applies to day workers who are social and community service employees when undertaking disability services work and home care employees’; and
 - ii. clause 25.6(d) of the draft variation determination be amended to read ‘payment for a broken shift will be at ordinary pay with weekend and overtime penalty rates, including for time worked outside the span of hours, to be paid in accordance with clauses 26 and 28’
 - b. Australian Services Union (‘ASU’) proposal that clause 25.6(d) of the draft variation determination be amended to ‘payment for a broken shift will be at ordinary pay with shift, weekend, public holiday, and overtime, penalty rates to be paid in accordance with clauses 26, ~~and 28~~, 29 and 34’.
10. Challenge is aware of submissions filed with the Commission by the ASU dated 26 August 2021 (the ‘ASU submissions’).
11. Challenge has only recently become aware of the controversy surrounding the rostering of broken shifts with ordinary hours that go past 8:00pm.
12. These submissions are filed in response to paragraph 7 of the Statement.

CLAUSE 25.6 OF THE AWARD SHOULD NOT BE LIMITED TO DAY WORKERS

13. Clause 25.6 of the Award should not be limited to day workers, for the reasons that follow.
 - (a) There is a need for shift workers to work broken shifts in disability services
14. Challenge has reviewed its rosters for the period 1 January 2021 to 1 August 2021 specifically focussing on broken shifts that finished past the day worker span of hours, that is, after 8pm Monday to Sunday. During this period Challenge rostered a total of 8,185 broken shifts and 972 out of 8,185 of the broken shifts were rostered past 8pm. This equates to approximately 12% of total broken shifts.
15. In accordance with NDIS principles and guidelines, these shifts are necessary to meet the needs of participants.⁵
16. Participants’ needs vary. Most participants do not require ongoing and continuous assistance or care throughout the day and only require services for short periods of time. A typical example care plan is:

⁴ Clause 25.6(d) draft variation determination.

⁵ [Reasonable and necessary supports | NDIS](#)

Time of Day	Assistance provided
Morning (7am – 9am)	<ul style="list-style-type: none"> • help getting out of bed • shower • breakfast
Afternoon (3pm – 5pm)	<ul style="list-style-type: none"> • shopping • banking
Evening (8pm – 10pm)	<ul style="list-style-type: none"> • help getting into bed

17. There will usually be a gap during the day when participants do not require assistance because they are not in the house (usually between 9:00am to 3:00pm). For example, if the participant is attending a day program.
18. Challenge's shifts can be rostered to end as late as 11:30pm.
19. As industry participants, it is our understanding that these types of shifts are not unusual in this sector. Due to participant needs, broken shifts are required, and in light of the finishing time of the shift (i.e., which can be after 8pm), employees rostered on such shifts are regarded as shiftworkers.

(b) Limiting clause 25.6 to day workers would create significant challenges

20. If broken shifts are restricted to day workers, Challenge would need to substantially reorganise its rostering practices. Challenge would essentially face two options, either roster two different employees to provide the required services to the participant or where a participant's care plan requires that an employee be rostered to finish after 8pm, roster that employee to work a 'continuous block of hours' with no breaks.
21. In relation to the first option and using the example at paragraph 16 above, Challenge would be required to roster one employee to undertake a broken shift, say from 7:00am until 5:00pm and roster another employee to undertake the 2-hour shift from 8:00pm until 10:00pm.
22. This roster arrangement would be undesirable for those participants who request, or require, assistance by the same employee as far as practicable. Our employees provide care services to participants with a range of disabilities (physical, intellectual, mental health or neurological). Participants with complex care needs often request services from the same person(s) (as far as practical) particularly for services of a sensitive and personal nature such as toileting, showering and being put to bed. Trust is important between employees and participants as well as an employee's thorough understanding of the participant's care needs.
23. It would also be less attractive for employees to work 2 hour shift only between the hours of 8pm – 10pm, and particularly where this employee would not be permitted to be rostered on another shift until he/she has had a 10-hour break.
24. The second option of paying for hours not required would not be sustainable.

(c) Limiting broken shifts to day workers is not preferable for shiftworkers

25. In Challenge's experience, it is not unusual for some employees to prefer to work broken shifts. Employees may have other personal commitments that they need to attend to during the day – such commitments may even include other employment. The breaks between the periods of work allows them to attend to other affairs that they would otherwise not be able to address if they were working a continuous block of hours. As such, it is not necessarily correct to assume that all employees who perform shiftwork find it inconvenient and/or undesirable.

(d) Significant cost impact if payment of overtime instead of shift penalties

26. Restricting broken shifts to day workers would mean that all hours rostered after 8:00pm would result in the payment of overtime instead of shift penalties. Challenge has identified that the payment of overtime rather than shift penalties for all time worked past 8:00pm, would lead to a significant increase in costs to the penalty payments, by more than 100%.

(e) All work within a day must be considered

27. A reason relied upon by the ASU in support of its submission that there is 'no significant need for shiftworkers to work broken shifts in disability services' is because 'work outside the day worker span of hours is largely worked continuously'. As indicated above, even if work is continuous (i.e. not broken) for hours worked after 8:00pm (i.e. outside of the span of hours), the ASU's proposition does not take into account situations where a participant requires assistance only at certain times of the day.

(f) Reorganisation as proposed by the ASU is highly impracticable

28. A further reason relied upon by the ASU in support of its submission that there is 'no significant need for shiftworkers to work broken shifts in disability services' is because 'discontinuous work outside the day time span of hours could be reorganised to be worked continuously...these cases could be dealt with by...the making of an Individual Flexibility Arrangement (IFA), or through enterprise bargaining.⁶

29. We refer to paragraph 24 above explaining the impracticalities of shiftworkers not able to have their shifts broken. In our view neither IFAs or an Enterprise Agreement are practical solutions to matters that can be addressed by the Award.

30. The ASU's suggestion for hours to be reorganised so that they can be worked continuously oversimplifies the way that disability providers work with the National Disability Insurance Agency ('NDIA'). In SIL, for example, providers develop a care roster ('roster') using NDIS Pricing Arrangements and Price Limits Assistance with Daily Living prices to help the NDIA decide the type of supports to be included in a participant's plan. Providers submit the roster to the NDIA for consideration. Material changes to an existing roster will require detailed documentation to support the changes (for example, an allied health professional report). Before a plan with supported independent living is approved, the NDIA will ask the participant (or their nominee) to confirm that they have had an opportunity to see and provide input to the Roster.⁷ It is therefore not a simple nor straightforward process as indicated by the ASU to simply reorganise hours.

⁶ ASU submissions at paragraph 28.

⁷ [Providing Supported Independent Living | NDIS](#)

(g) Any limitation to shiftworkers working broken shifts would not reflect operational requirements

31. In our experience broken shifts with ordinary hours of work extending beyond 8pm are required in our industry. For the reasons set out above, Challenge opposes the limiting of broken shifts to day workers as proposed by the NDS and the ASU.

BROKEN SHIFT ALLOWANCE AND PAYMENT OF SHIFT PENALTIES

32. The ASU submit that *“paying the broken shift allowance in addition to shift penalties, is unlikely to significantly increase costs for employers”* for reasons including that it is unlikely that a shift worker will work a broken shift that is also a night, afternoon, or public holiday shift.⁸

33. For the period of rosters review by Challenge 972 out of 8,185 shifts formed broken shifts that included the payment of afternoon or night shift penalties. 86 out of 8,185 shifts formed broken shifts that included the payment of public holiday penalty.

34. If Challenge were to pay broken shift allowance in addition to the shift penalties, it would result in additional costs of close to \$40,000, just for the review period alone.

35. Challenge is not aware of any changes to NDIS funding to cover broken shift allowances. Accordingly, these additional costs would be borne by Challenge.

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⁸ ASU submissions at paragraph 35.