

IN THE FAIR WORK COMMISSION
4 Yearly Review of Modern Awards
National Disability Services
Submission in Reply – AM2018/26
Social, Community, Home Care and Disability Services Industry Award 2010
Substantive Issues and Provisional Views

Introduction

1. National Disability Services (NDS) makes the following submission in reply pursuant to the Statement made on 9 August 2021 ([2021] FWCFB 4863 and in relation to the provisional view regarding transitional arrangements set out in the Decision of 25 August 2021 ([2021] FWCFB 5244).

Broken Shift

2. NDS agrees with the submissions of ABI and AiG to the effect that, while there is a tension between clause 29.4 which deals with continuous shifts, and clause 25.6 dealing with broken shifts, the current award does not prohibit the working of broken shifts by shiftworkers.
3. NDS also does not contest submissions and evidence from various employer and union parties that broken shift is currently sometimes worked by shiftworkers.
4. At [42] in our submission of 25 August 2021, we stated that we did not press our earlier proposal that clause 25.6 be amended to limit broken shift to day workers. At [38] of that submission we submitted an alternative approach to resolve any apparent tension between clause 25.6 and 29.4 by making an amendment to clause 29.4.
5. We note that ABI and AiG have also proposed amendments to clause 29.4 in similar terms to our submission and we support that approach to resolving the apparent tension.
6. The unions have proposed that shift penalty payments, as prescribed in clause 29, should be payable in addition to the broken shift allowance arising from the May Decision.
7. NDS opposes the union claims in their current form because they would result in an outcome and cost that goes beyond the scope of the decision.
8. However, NDS accepts that there should be compensation for working outside the span of hours. In the case of day workers this is achieved by the variations to clause 28 to provide for penalty rates for all work performed outside the span of hours.
9. In the case of shift workers working broken shift, there is a reasonable argument that work outside the span of hours which is regularly rostered should not be treated as overtime. Hours rostered for shiftworkers are their ordinary hours, and if treated as overtime associated entitlements such as accrual of leave and superannuation would be affected.

10. NDS submits that if a shift penalty were to apply, there should be a reduction in the quantum of the broken shift allowance in order to ensure that there is not a disproportionate cost to employers.
11. NDS agrees with the proposal put by AiG that if a shift penalty were to be paid in addition to the broken shift allowance, the shift penalty should be restricted to those hours of work which fall outside the span of hours, and the quantum of broken shift allowance should also be reduced.
12. The AiG proposal has the effect of setting separate types of compensation for the different disutilities which are associated with working broken shift and with working shiftwork outside the span of hours.
13. Broken shift is limited to work carried out in disability and home care services. These types of services, under NDIS and CDC respectively, often involve the provision of support on an individualised basis to different clients throughout the working day.
14. In our submission of 3 August 2021 at [20-21] we made some observations about the desirability of restricting overtime penalty rates to the hours worked outside the span of hours in relation to assigning labour costs to the relevant clients where services are provided on an individualised basis. The same observations apply to shift penalty rates for broken shift.
15. The ASU at [50] of their submission of 25 August 2021 refer to the amendment to clause 25.6(d) that we proposed in our submission of 3 August 2021 at [14]. The ASU have put forward a further proposed amendment at clause 26.5(d) which cross references clause 25.2 (a). The proposed change adds clarity and we do not oppose it.

Transitional arrangements relating to minimum payments

16. In the Decision of 25 August, the Full Bench determined that there should be a transitional provision in relation to minimum payments for part-time work, and published a draft determination for a new clause 10.5A.
17. The proposed clause 10.5A applies where an employee has an agreed pattern of work that provides for periods of work that are less than 3 hours for SACS employees except when undertaking disability work, or 2 hours for all other employees.
18. NDS has no objection to the draft determination regarding the proposed clause 10.5A.

Michael Pegg

On behalf of National Disability Services

30 August 2021