

## FAIR WORK COMMISSION

Matter No.: AM2018/26

### ***4 yearly review of modern awards—Social, Community, Home Care and Disability Services Award 2010***

#### **SUBMISSIONS - UNITED WORKERS UNION**

1. On 9 August 2021 the Fair Work Commission (**FWC**) published a Statement in relation to this matter<sup>1</sup> (**the 9 August Statement**). In the 9 August Statement FWC made directions which included that the parties file any submissions and evidence in relation to three issues by 4:00PM on 25 August 2021. The United Workers Union (**UWU**) makes these submissions in relation to those directions.
2. The three issues that are the subject of the directions are:
  - a. Remote response
  - b. Damaged clothing
  - c. Issues raised in the Statement relating to broken shift.
3. Each of these issues was the subject of a decision issued by FWC in relation to this matter on 4 May 2021<sup>2</sup> (**the decision**).
4. UWU made submissions in relation to this matter, including, to some extent, in respect to the three issues that are the subject of the directions, on 3 August 2021 (**3 August Submissions**)
  - a. at [9] – [24], in relation to broken shift;
  - b. at [32] – [37], in relation to remote response;
  - c. at [43] – [45], in relation to damaged clothing.
5. We refer to and rely upon our 3 August Submissions.

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<sup>1</sup> [2021]FWCFB 4863

<sup>2</sup> [\[2021\]FWCFB 2383](#).

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6. A hearing was held in relation to this matter on 6 August 2021 during which the parties made various submissions about these matters.

### **Broken shift**

7. In our 3 August Submissions, we suggested at [24] that the removal of the words “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” from clause 25.6(b) of the award (which would be the result of clause 25.6(d) of the draft determination) may have the unintended result of removing from an employee who would otherwise be entitled to a shift penalty, entitlement to that penalty when they work a broken shift.
8. In response, it appears some parties have suggested this was not unintended, but deliberate because:
  - a. it is intended that, consistent with the award, an employee who works a broken shift which includes working beyond their span of hours would be entitled to be paid overtime rates for time worked as such; and
  - b. only a day worker can work in a manner that is not continuous (ie “broken”); an employee who might be entitled to a shift penalty (a “shiftworker”) cannot work shifts other than in one continuous block of hours (clause 29.4 of the award); and
  - c. accordingly, employees who work broken shifts which include time worked outside of their span of hours are adequately compensated for the disutility associated with such work by the payment of overtime.
9. In the statement, FWC confined the matters in respect of which parties may file further submissions and evidence to four matters.
10. The first two of those four matters relate to proposals made by NDS to:
  - a. amend clause 25.6 of the draft variation determination to provide that the proposed broken shift clause only applies “day workers”; and
  - b. amend clause 25.6(d) of the draft variation determination to provide specifically that 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”.

11. NDS’ proposals appear to have been made arising from the matter referred to in these Submissions above – namely – the possibility that under the award, a shiftworker cannot work a broken shift. The proposals appear to be an attempt to clarify any controversy in relation to that issue.
12. Various parties submit that as a matter of practical reality, employees covered by the award work hours that are not performed in one continuous block, receive a shift penalty and are treated as shift workers for the purposes of the award. It may be that it is submitted that operationally, it is necessary for employees to be rostered to work in a manner that is not continuous, in a “shift” which finishes after 8:00PM and at or before 12 midnight or after 12 midnight or commencing before 6:00AM. UWU understands various parties will make evidentiary submissions to this effect.
13. With this in mind, NDS’ proposals do not clarify the position at all. The result of the variation if made would be:
  - a. the broken shift clause, which regulates the manner in which a broken shift may be worked (including limiting the breaks in a shift which are permissible) would only apply to day workers and not shift workers.
  - b. if employees who are not day workers continue to be required to work in a manner that is not continuous, then these rostering practices would continue unregulated; and
  - c. the employees concerned would not be entitled to the broken shift allowance as compensation for the disutility of working a broken shift.
14. We make this submission cognisant of the apparent difficulty as to how an employee could be required to work “shiftwork” in a manner that is not one continuous block of hours, in the context of section 29.4. We make further submissions about this below.
15. The third and fourth of the four matters referred to in the statement relate to proposals made by ASU that:
  - a. Clause 25.6(d) of the draft determination be amended to result in an entitlement to shift, weekend, public holiday and overtime payments for employees covered by the award who work broken shifts in a manner that

would also qualify them for those entitlements under clauses 26, 28, 29 and 34 of the award; and

- b. FWC adopt the terms of a draft determination filed which would provide that time spent travelling by an employee covered by the award during a meal break or a tea break will count as work and be paid as such.

16. UWU made a similar proposal in relation to clause 25.6(d) at [12] of our 3 August Submissions. The short point made in support of that proposal is:

- a. An employee who works a broken shift suffers from particular disutilities arising from working a broken shift. The broken shift allowance is intended to compensate for these disutilities. The quantum of the allowance should be set to compensate for those disutilities taking into account the circumstances in which the work is performed. In our 3 August Submissions, we submit that the quantum of the allowance proposed in FWC's provisional view is the appropriate quantum for the reasons we refer to in our Submissions.
- b. An employee who works a "shift" as defined in the award, suffers from particular disutilities associated with working shift work. FWC should take the view that the penalty rates provided for in clause 29 of the award have been set at a level appropriate to compensate for the disutilities associated with working shift work under the award.
- c. If an employee working shift work in a non continuous block of hours – hours that are broken – is not entitled to a shift-work penalty, and is only entitled to a broken shift allowance, they will not receive compensation for the disutility associated with working shift work, at all. This would be an unjust outcome.
- d. The ASU and UWU proposal ensures against this unjust outcome, by making it clear that an employee who works a broken shift is entitled to be paid the broken shift allowance, and other applicable penalties including shift penalties.

17. Again, these submissions are made cognisant of the difficulty reconciling the fact that employees covered by the award who are treated as shift workers (and who are paid shift penalties) appear to be working patterns of work that are not continuous, with the provision at clause 29.4.

18. In the circumstances, it appears there are at least three courses of action available.

19. One course is that FWC could not resolve the apparent controversy. The award could be varied in the terms contemplated by the draft determination. In these circumstances, it appears likely employees covered by the award would continue to work shift work in a manner that is non-continuous; some might continue to be paid the shift penalty; some might only be paid the broken shift allowance; a continuing controversy would persist about whether the effect of clause 29.4 is such that such workers cannot be shift workers and should be treated as day workers.
20. The second course of action could be that the award is varied to provide, in effect, that a shift worker cannot work a broken shift. In this circumstance it is submitted clause 29 should contain an express provision to that effect.
21. The third course of action could be that the award is varied to provide, in effect, that a shift worker *can* work a broken shift. In this circumstance it is submitted that clause 25.6 should contain express provisions to the effect that:
  - a. the clause applies to both day workers and shift workers; and
  - b. a shift worker is entitled to both the relevant shift penalty and the broken shift allowance (as per the terms of the ASU and UWU proposal); and
  - c. clause 29.4 should be varied to provide that shift work should be continuous “except in the case of a broken shift worked in accordance with clause 25.6”.

### **Remote response**

22. In summary in our 3 August Submissions UWU were that:
  - a. in the decision, FWC had determined that a term will be introduced into the award dealing with remote response work.
  - b. in the decision, FWC made several observations in relation to the form and content of that term.
  - c. to conclude a term giving effect to the decision and the observations made by FWC in relation to it, several questions arose or resolution (which we set out at [37] of the 3 August Submissions).
23. In the decision, FWC noted a complexity arising in relation to the appropriate rate to be paid to employees covered by the award who perform remote response work. FWC indicated that a conference would be convened to consider that matter. A

conference was convened on 27 May 2021, which triggered a series of further discussions between the parties in relation to the matter.

24. On 23 August 2021 eight interested parties sought leave to file a draft determination in relation to the remote response issue<sup>3</sup> (**the remote response draft determination**). Save for one matter (which is referred to below) UWU submits the remote response draft determination would give effect to a term which is consistent with that apparently contemplated by FWC in the decision, and in particular:

- a. Is consistent with the observations made by FWC in relation to the form and content of the term (as referred to in our 3 August submissions); and
- b. Adequately resolves the issues in relation to the appropriate rate to be paid to employees covered by the award who perform remote response work.

25. At item 25.10(c)(B) of the remote response draft termination, the minimum payment in relation to when an employee is on call between 10:00PM and 6:00AM is “to be determined”. The parties request that FWC determine this matter, taking into account their submissions in relation to it.

26. In relation to this matter UWU submits:

- a. We accept it is appropriate that a minimum payment shorter than that specified for work that is not remote work is appropriate in these circumstances<sup>4</sup>.
- b. The minimum payment for remote work in relation to when an employee is on call between 10:00PM and 6:00AM should be 1 hour;
- c. In the decision, ABI’s submission as to a minimum payment regime for when an employee is “on call” of 15 minutes for work performed between 6:00AM and 10:00PM and 45 minutes for work performed between 10:00PM and 6:00AM is recorded but rejected<sup>5</sup>. Instead FWC expresses a provisional view that the minimum payment between 10:00PM and 6:00AM should be 1 hour<sup>6</sup>.
- d. This provisional view was reached with regard to the appropriate balance to be struck between the interaction between an appropriate minimum payment

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<sup>3</sup> [Correspondence from Australian Business Lawyers & Advisors and others, 23 August 2021](#)

<sup>4</sup> The decision at [722], point 1

<sup>5</sup> The decision at [727]

<sup>6</sup> The decision at [733]

in the circumstances and the rate of payment to be applied for such work. The provisional view should be adopted.

### **Damaged clothing**

27. In our 3 August Submissions, we noted that in the decision FWC decided to introduce into the award a term to provide for the reimbursement of reasonable costs associated with the cleaning or replacement of personal clothing which has been soiled or damaged in the course of employment<sup>7</sup>.
28. The parties were directed to confer about a suitable variation to give effect to this decision<sup>8</sup>.
29. Over the course of the past few months, the parties have conferred about this matter. UWU understands that AI Group intend to file submissions which will include a draft determination in relation to the damaged clothing issue which is supported by a number (if not all) interested parties. UWU has participated in the discussions which gave rise of this draft determination and we submit that FWC should adopt it.

UNITED WORKERS UNION

25 August 2021

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<sup>7</sup> 3 August Submissions at [43]

<sup>8</sup> The decision at [889]