Australian Industry Group

Application to vary the Social, Community, Home Care and Disability Services Industry Award 2010

Reply Submission
(AM2020/18)

2 May 2020

AM2020/18 APPLICATION TO VARY THE SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010

1. INTRODUCTION

1. The Australian Services Union, Health Services Union, United Workers' Union and National Disability Services (collectively, **Applicants**) have filed an application in the Fair Work Commission (**Commission**) seeking a variation to the *Social, Community, Home Care and Disability Services Industry Award 2010* (**Award**). Specifically, the Applicants seek the introduction of a new allowance, titled the 'COVID-19 Care Allowance'.

2. The Australian Industry Group (**Ai Group**) opposes the claim and files this submission in response to the Applicants' submissions and evidence of 29 April 2020.

2. THE APPLICANTS' CASE

3. The Applicants' case can be succinctly summarised. They contend that the proposed variation is necessary to ensure that the Award achieves the modern awards objective.

4. Central to the Applicants' case are the contentions that:

   (a) The performance of disability services work by an employee is more onerous in the circumstances in which the proposed clause would apply vis-à-vis the performance of the same work in other circumstances.

   (b) Employers are concerned that absent the introduction of an Award-derived incentive, there may be an insufficient supply of labour.

5. The Applicants accept that the proposed claim could impose significant employment costs on an employer and that existing funding afforded through the National Disability Insurance Scheme (**NDIS**) does not include a component for the proposed allowance:

   > To date, the incidence of situations where this allowance would apply has been quite small with only a small number of cases of Covid-19 infected NDIS participants known. However, in individual situations where this would apply, the cost to an individual employer of this allowance could be significant, and is not covered by existing NDIS pricing.[1]

6. The Applicants go on to state that:

   > The parties have been in discussion with the Commonwealth about this matter with a view to securing funding support for such an allowance, on the basis that it will help to meet public health objectives and secure ongoing quality support for people with disability.[2]

[1] Applicants' submission at paragraph 10.

[2] Applicants' submission at paragraph 11.

3. ISSUES CONCERING NDIS FUNDING

7. As is well known to the Commission, most disability services work is Commonwealth funded through the NDIS. Relevantly, the funding arrangements currently impose price caps on providers of those services, many of whom are not-for-profit organisations.

8. Due to the funding arrangements, employers are unable to recover increased employment costs through increased fees for their services. We also note that, as submitted by Ai Group in other proceedings concerning the Award[3], it is our understanding that employers covered by the Award hold serious concerns about the inadequacy of NDIS funding when considered against extant Award entitlements due to various flawed assumptions that underpin the basis upon which the price caps are calculated.

9. As earlier stated, the Applicants accept that existing NDIS funding does not contemplate that payment of the proposed allowance, which is of a significant quantum. Though the Applicants state that they have been engaging with the Commonwealth about additional funding in relation to the proposed allowance, as at the time of preparing this submission, we are not aware of any such funding having been granted.

10. In the absence of a change to funding arrangements that would alleviate any additional cost burden on employers as a result of the proposed allowance, it is strongly opposed by Ai Group. Should the position in respect of the funding arrangements change, Ai Group may seek an opportunity to revise its position.

[3] Ai Group submission dated 13 July 2020 re AM2018/26 at paragraphs 88 – 93 and Ai Group submission dated 18 November 2019 re AM2018/26 at paragraphs 16 – 21.

4. THE PROPOSED CLAUSE

11. The proposed clause is in the following terms:

X.3 COVID-19 CARE ALLOWANCE

(a) This clause applies to social and community services employees undertaking disability services work.

(b) Clause X.3 reflects the additional responsibilities and disabilities associated with specific duties that may arise due to the COVID-19 pandemic and does not set any precedent in relation to award entitlements after its expiry date.

(c) This clause operates from 4 May 2020 until 28 September 2020. The period of operation can be extended on application.

(d) Where an employer requires an employee to work with a client who:

(i) is required by government or medical authorities to self-isolate or self-quarantine due to a reasonable suspicion, pending testing, that the client is likely to have COVID-19; or

(ii) is required on the advice of a medical practitioner to self-isolate or self-quarantine due to a reasonable suspicion, pending testing, that the client is likely to have COVID-19; or

(iii) the employer reasonably suspects has COVID-19; or

(iv) has COVID-19;

the employee will be paid an hourly allowance of 0.5% percent of the Standard Rate.

(e) In this clause, the following words:

- self-isolate; and
- self-quarantine

has the meaning given to them by the government of the state or territory where the work described in clause X.3(d) is performed, and is distinct from general requirements for members of the community to stay at home during the COVID-19 pandemic.

12. The proposed quantum of the allowance is $4.94 per hour.

13. Significant deficiencies in the proposed provision (and the case advanced in support of it) are obvious when the specific terms of the clause are considered:

(a) There is no apparent justification for the quantum of the proposed allowance. Nor is there any attempt in the Applicants' material to explain why the particular amount proposed has been selected. Accordingly, for this reason alone, the Commission cannot be satisfied that the proposed term is *necessary*, in the relevant sense, and the claim should accordingly not be granted.

(b) There is no definition in the Award for the phrase "disability services work". If a monetary entitlement is to be payable on an hourly basis for the performance of a particular type of work it is essential that the nature of the work is precisely defined so that it can be delineated from other tasks that might be performed by the employee but not attract the payment.

(c) The Commission cannot be satisfied, on the material before it, that it is *necessary* that the term operate until September, as contemplated by proposed clause X.3(c).

(d) Proposed clause X.3(d) creates an obligation to provide a payment where an employer requires an employee to work in certain circumstances. The practical application of this clause would be very problematic. It is foreseeable that an employer will not (and could not) always be aware when such circumstances arise.

(i) To take the most obvious example, an employer will not always be aware as to whether a client has COVID-19, especially if the client is a-symptomatic or only experiencing mild symptoms. Regardless, it is unreasonable for an award clause to operate in a manner that makes an employer responsible for assessing whether a client has COVID-19 in order to determine whether an allowance is payable.

(ii) It is similarly unclear how an employer would, in all instances, be able to find out or verify that the circumstances contemplated by proposed clauses X.3(d)(i) and X.3(d)(ii) have arisen.

(e) The proposed definition of the terms “self-isolate” and “self-quarantine” are unclear. They depend upon meanings “given to them by the government of the state or territory where the work is performed” and are subject to the confusing caveat that the meaning is “distinct from general requirements for members of the community to stay at home during the COVID-19 pandemic”. It is not apparent where an employer would need to look in order to find the government proclaimed meanings for such words. This aspect of the clause is far from simple and easy to understand.

(f) By linking the monetary entitlement to a characteristic of a client, the proposal logically creates a financial disincentive for an employer to service that client. This is potentially very problematic given the nature of work undertaken by employers and employees covered the Award and there is not sufficient evidence before the Commission to assess whether or not the claim will cause employers to refrain from servicing such clients. In such circumstances, the risk that this could occur weighs against the grant of the claim.

5. THE APPLICANTS' KEY CONTENTIONS

14. As earlier stated, the Applicants have advanced the following key contentions in support of their claim:

    (a) The performance of disability services work by an employee is more onerous in the circumstances in which the proposed clause would apply vis-à-vis the performance of the same work in other circumstances.

    (b) Employers are concerned that absent the introduction of an Award-derived incentive, there may be an insufficient supply of labour.

15. We deal with each in turn.

The Work Performed is More Onerous

16. The Applicants submit that the work performed by employees in the relevant circumstances is more onerous because:

    (a) The performance of an employee's duties where they involve close contact with the client will be physically difficult and demanding;

    (b) The use of PPE may cause personal discomfort; and

    (c) The employee may be required to perform additional tasks.

17. The material presented by the Applicants does not establish any of the above. Whilst we acknowledge that the performance of an employee's duties in relation to a client who has or is suspected of having COVID-19 will require the employee to carefully follow infection control measures, the Commission cannot be satisfied on the material before it that the employee:

    (a) Would experience a disability that warrants the introduction of a new allowance.

    (b) Is required to undertake additional responsibilities or utilise skills that are not already contemplated by the safety net afforded by the Award or that warrant the grant of the claim.

18. The evidence presented by the Applicants falls well short of establishing the factual propositions upon which they seek to rely. Nor is the evidence sufficient in our submission to move the Commission to make the significant changes proposed. The Applicants have not called any evidence from employees performing disability services work who can testify to the nature of the work that they are required to perform in relation to clients in the relevant circumstances and any disabilities or additional responsibilities or skills that they are required to exercise. Similarly, the Applicants have not led any evidence from employers regarding any additional duties or responsibilities that they are requiring their employees to undertake when working with clients in the relevant circumstances.

19. At its highest, there is some evidence from Mr Moody about employer, employee and client experiences however his statement does not establish a proper basis for that evidence. Specifically, the evidence is potentially hearsay in nature and does not identify employers or employees that Mr Moody has spoken with about the various matters (if any).

20. Finally, we observe that disability support workers are often required to work with clients suffering from an infectious illness and that as a result, the implementation of infection control measures is not novel or unusual in this context.

Potential Labour Shortages

21. The Applicants submit as follows:

> With over 80% of the workforce being [part-time or casual employees], employers have a concern about workforce supply in the absence of some corrective economic incentive to compensate for the more onerous nature of this work.[4]

22. Ai Group contests the proposition advanced by the Applicants.

23. The Applicants have not identified the employers who are purportedly concerned about workforce supply in the absence of additional compensation for employees nor have they led any evidence in support of this proposition. We note in this regard that Mr Moody's witness statement does not deal with the issue, nor have

[4] Applicants' submission at paragraph 14.

the Applicants led evidence from employees who are withholding their labour for reasons associated with COVID-19.

24. Further, our discussions with employers in the industry has not revealed any such concern or experience. To date, they have not encountered any shortfall in labour supply associated with COVID-19.

25. The Commission cannot be satisfied that employers covered by the Award have a concern about workforce supply in the absence of the proposed clause or indeed that the grant of the claim will increase or even encourage employees who are otherwise unwilling to work in the current circumstances. For instance, the Applicants have not led evidence from employees who are withholding their labour for reasons associated with COVID-19 but would cease to do so if they were to be paid the proposed allowance.

6. SECTION 138 AND THE MODERN AWARDS OBJECTIVE

26. A modern award must only include terms that are necessary to ensure that the modern awards objective is achieved (s.138). In our submission, the insertion of the proposed allowance would not be such a term and therefore, cannot be introduced into the Award.

A Fair and Relevant Minimum Safety Net

27. The notion of "fairness" as contemplated by s.134(1) is one that applies to both employers and employees. The grant of the claim would not be fair for employers.

28. The proposed clause would require employers to pay an allowance that is not funded by the NDIS. As submitted earlier and below with reference to s.134(1)(f), the proposed allowance would impose a significant additional cost on employers in circumstances where those employers rely on Government funding.

29. The unfairness of the claim is compounded by the difficulties facing employers covered by the Award in the context of COVID-19. It is our understanding that some employers in the industry have faced a downturn in the level of demand for their services at the same time that they are endeavouring to implement appropriate measures to protect the health and safety of their employees and their clients. This has required employers to incur various unexpected costs and to devote considerable resources to matters associated with managing their human resources.

Section 134(1)(a) – the relative living standards and needs of the low paid

30. The Applicants concede that only some employees covered by the Award are 'low paid'. They have not, however, established if or how the relative living standards and needs of the low paid would be impacted by the payment of the proposed allowance.

31. The proposition that it is "not appropriate for employees to be expected to work in an environment that involves significant disability without any additional

compensation" should not be accepted. As earlier submitted, the Applicants have not established that the performance of work in the circumstances in which the proposed allowance would be payable involves significant additional disability. The matter is, in any event, irrelevant to the consideration described by s.134(1)(a) of the *Fair Work Act 2009* (**Act**).

32. Furthermore, the relative living standards and needs of the low paid are but one consideration that must be taken into account and weighed against various other countervailing considerations, as required by s.134(1).

Section 134(1)(b) – the need to encourage collective bargaining

33. We accept that this is likely a neutral consideration in this matter.

Section 134(1)(c) – the need to promote social inclusion through increased workforce participation

34. The Applicants argue that the "variation will be apt to promote social inclusion through increased workforce participation" in the absence of any material in support of that proposition. As we have earlier submitted, there is no evidence before the Commission that might establish that the introduction of the proposed allowance would result in increased workforce participation. Nor is there material of any other nature in this regard. The Applicants' submission is merely speculative.

35. To the extent that the Applicants seek to draw comparisons between the minimum rates prescribed by the Award and social welfare payments paid by the Commonwealth to unemployed persons, their submissions are speculative and based on assumptions that cannot properly be made.

36. The Applicants assert that performing disability services work covered by the Award "will be less attractive" than unemployment for certain workers because the differential between the minimum wages prescribed by the Award and welfare benefits is in some circumstances limited.

37. The extent of the difference between the relevant Commonwealth entitlements and an employee's entitlements under the Award will vary significantly, depending upon, for instance:

    (a) Whether the employee is engaged on a full-time, part-time or casual basis;

    (b) If the employee is engaged on a part-time or casual basis; the number of hours worked by the employee; and

    (c) Whether the employee performs work that entitles them to shift loadings, overtime rates, weekend penalty rates, allowances etc which have the effect of increasing their total earnings.

38. The Applicants' submissions also suggest that an employee's decision-making process as to whether to participate in the labour force involves a simplistic equation comparing an employee's earnings as compared to the social welfare benefits that would be payable if they were unemployed. It is trite to observe that any such decision is multi-factorial and would also involve a consideration of the many indirect and non-financial benefits that flow from a person's employment.

39. The Commission cannot be satisfied that the grant of the claim will promote social inclusion through increased workforce participation.

Section 134(1)(d) – the need to promote flexible modern work practices and the efficient and productive performance of work

40. The Applicants submissions appear to wholly misunderstand s.134(1)(d) of the Act and as a result they seek to inappropriately rely upon it. The payment of an additional allowance plainly does not advance the need to promote flexible modern work practices or the efficient and productive performance of work.

Section 134(1)(da) – the need to provide additional remuneration for employees working overtime etc

41. This is a neutral consideration.

Section 134(1)(e) – the principle of equal remuneration for work of equal or comparable value

42. Section 134(1)(e) requires that the Commission take into account the principle of equal remuneration for men and women employees for work of equal or comparable value.[5]

43. The Applicants have not established that a comparison of the remuneration paid to employees performing work that is of equal or comparable value to disability services work or, more specifically, to the work that would be performed by employees in the circumstances where the allowance would be payable, when compared to such work offends the principle espoused by s.134(1)(e) or that the proposed allowance would remedy this.

Section 134(1)(f) – the likely impact of any exercise of modern award powers on business including on productivity, employment costs and the regulatory burden

44. The proposed allowance will have a negative impact on business.

45. As has been accepted by the Applicants, in the absence of funding, the grant of the claim would impose a significant cost on employers who are required to pay the proposed allowance of close to $5 per hour.

46. Whilst the "overall burden on the sector" is a relevant consideration, s.134(1)(f) also requires that consideration be given to the impact of the claim on individual employers. In any event, it cannot be assumed that the "overall burden on the sector is likely to be small". As acknowledged by the Applicants, that proposition is based on an assumption that the rate of infection will be low.

47. The administration of the proposed clause would also increase the regulatory burden.

48. The consideration required by s.134(1)(f) tells against the grant of the claim.

[5] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [206].

Section 134(1)(g) – the need to ensure a simple, easy to understand, stable and sustainable modern awards system

49. Given the deficiencies in the drafting of the provision identified at section 4 above, aspects of the proposal are not simple and easy to understand. This consideration weighs against the granting of the claim.

Section 134(1)(h) – the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

50. The material presented by the Applicants does not establish that s.134(1)(h) supports the grant of the claim.