

BEFORE THE FAIR WORK COMMISSION

Fair Work Act 2009 (Cth)

Title of matter: *Social, Community, Home Care and Disability Services Industry
Award 2010 – Tranche 2 proceedings*

Matter Number: AM2018/26

Section: s.156 – 4 yearly review of modern awards

Document: Submission pursuant to Amended Directions of 13 September
2019

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Background

1. These submissions are made pursuant to the Amended Directions of 13 September 2019.
2. These submissions are in response to claims made by the United Voice, and the Health Services Union (HSU) in relation to travel time under the Social, Community, Home Care and Disability Services Industry Award 2010 ('the Award').
3. The Australian Federation of Employers and Industries (AFEI) has an interest in the Award.

The Claims

4. The HSU are seeking variation to the Award so that an employer will be required to pay an employee for what is described as the 'reasonable time of travel' between clients, and for such time to be treated as time worked. A similar claim is advanced by the United Voice. The United Voice claim is supported by the ASU, who has also filed submissions and materials in respect to the claim.
5. The submissions and witness evidence of the relevant unions indicate that the claim is directed at disability services and home care employees, when performing broken shifts.
6. AFEI objects to the claims.

Breaks between working time

7. The Award specifically provides for broken shifts, which may be performed by home care employees, or social and community services employees when undertaking disability services work.
8. A 'broken shift' is one that can include '*one or more breaks (other than a meal break) and where the span of hours is not more than 12 hours.*'
9. The Award does not specify any particular length required for a break in shifts. The period of a break in a broken shift can be a short or substantial period of time. On the evidence of Robert James Steiner, he describes breaks exceeding 5hrs during a broken shift.¹

¹ Statement of Robert James Steiner, at [16]

10. By the very nature of being 'breaks' an employee does not undertake any work during breaks in a broken shift, or is subject to the employer's instructions. During breaks in broken shifts, an employee could conceivably:
 - 10.1 Undertake personal errands, such as collecting children from school and dropping them at extra-curricular activities etc.;
 - 10.2 Undertake social engagements, such as meeting friends for golf;
 - 10.3 Return home; or
 - 10.4 Conduct other private affairs, unrelated to the employment.
11. It is therefore appropriate that such periods are not treated as time worked, or as attracting the ordinary rate of pay.
12. These circumstances are distinguishable from other Awards which require travel between locations of work to be treated as time worked, such as the Commercial Sales Award 2010. As the period of travel in such Awards is not undertaken during a 'break,' the employee is performing work, whereas a break between broken shifts in the SCHADSI Award will generally include time which the employee can conduct their own private affairs.
13. To the extent the break includes any periods of time which can be used privately by the employee, the break should not attract payment of the ordinary hourly rate.
14. Even during the break in a broken shift, where an employee is engaged in travel from one client to another, an employer has no control over such travel, including:
 - 14.1 Which travel route is taken and at what times;
 - 14.2 The means of travel;
 - 14.3 The time taken; and
 - 14.4 Whether cost are incurred.
15. In such circumstances, the treatment of travel time as time worked would inappropriate and would require imprecise calculations, and would be disproportionate to the extent of actual disutility to the employee during time that is a 'break' for the purpose of the Award.
16. The claim, if accepted, would inevitably involve increased cost and administrative burden to employers, in circumstances where the employer would not receive any productivity increases. Rather, the proposed variation would mean that service providers would be delivering less direct care services for the same number of hours' pay to employees.

Employers affected by the claim

17. Not all end users of home care services are funded through the NDIS. The Commonwealth Home Support Programme (CHSP) 'helps senior Australians access entry-level support services to live independently and safely at home.'² Services covered in the CHSP include domestic assistance, home maintenance, and personal care services such as 'help with showering, self-care, hygiene and grooming.'³
18. Both the NDIS and the CHSP have quality standards which service providers which are independently assessed and audited against. The introduction of these quality standards has meant that service providers have needed to designate resources to developing, reviewing, and maintaining systems for quality assurance, which are capable of being presented in a format appropriate for auditing purposes.
19. As highlighted in our submissions of 23 July 2019, broken shift provisions as they currently stand, were inserted into the Award to specifically address the needs of the disability services and home care industries. This is evident in:
 - 19.1 the terms of the Award, by limiting operation of the broken shift provision to the social and community services employees performing disability work, and home care employees; and
 - 19.2 submissions made to the AIRC during Award Modernisation proceedings for the SCHADSI Award about the operational requirements of the industries.
20. The existing broken shifts provisions enable service providers to:
 - 20.1 Roster employees to attend to in-home personal care requirements of clients who have varying degrees independence and only require specific services at certain times of the day; and,
 - 20.2 roster specific staff to specific clients, improving relationship-building, ideal skill/suitability matching of staff to clients, and providing continuity of care.
21. The extent of efficiencies that can be introduced into staff rostering for greater continuity of in-home care shifts are constrained, particularly in the circumstances that service demand will depend on regional, demographic and other factors outside the service provider's control.

² <https://www.myagedcare.gov.au/help-at-home/commonwealth-home-support-programme>

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22. Any substantive amendment affecting the broken shift provisions could adversely impact the viability of this crucial type of service delivery. Costs savings measures which may need to be considered by employers if faced with increased labour costs associated with providing in-home care services include:

22.1 Reducing overheads by restructuring and reducing back-office staff levels or hours (such back-office roles include supervisory positions, and quality assurance);

22.2 Moving away from providing higher-cost services, to other more attractive markets; or

22.3 Increasing client fees for services;

In the circumstances further increases to government funding are not guaranteed, the first to experience the adverse impacts of increased costs will likely be either those most vulnerable members of the community who require in-home services, or other employees.

23. Given the industry imperatives for broken shifts, and the potential implications of the proposed variation, the claim should be rejected.

The evidence

24. The volume of evidence filed in support of the claims is limited, and insufficient to provide an indication of the work patterns for a single organisation, let alone an entire industry sector. Further, the veracity of the evidence is limited in the circumstances that three of the HSU statements are from persons whose names and employers are not given.

25. Given the limited nature of the evidence, it does not establish a merit basis for variation to the Award.

Australian Federation Employers & Industries

17 September 2019