

For the Attention of

Justice Ross, President

Fair Work Commission

By email: Chambers.Ross.j@fwc.gov.au

27 October 2020

Dear Justice Ross

Re: 4 yearly review of the Children's Services Award 2010 – Finalisation of Substantive Claims (AM2018/18)

We write further to the Hearing before a Full Bench on 16 October 2020, the Fair Work Commission's Decision¹ and Determination² dated 19 October 2020.

The Commission decided to vary clauses 10.4(d) (**Part-time employment**) and 21.7(b) (**Rostering**) Children's Services Award in relation to the circumstance where an employer is relieved of the obligation to provide an employee with seven days' notice regarding a change in an employee's regular pattern or work and or a change is made to an employee's rostered hours as a result of an emergency outside of the employer's control as described by clause 10.4(d) and 21.7(b).

The Decision states:

*"A general consensus emerged in support of the proposition that the terms of clause 23.2(b) apply in the circumstance envisaged in clause 10.4(d)(iii). We agree... We will vary clauses 10.4(d) and 21.7(b)(iv) to give effect to that view."*³ (Emphasis added)

The Determination, at paragraph 1 and 5, provide as follows:

"(d)(iv) If the employer changes the roster in an emergency, the overtime provisions in clause 23.2-Overtime rates apply"

It is our view that the Determination, as specified above, does not reflect the discussion at the hearing nor the Decision. We have raised this with the relevant parties and the United Workers Union, Community Connections Solutions Australia Ltd and ECEC Employers have consented to revisions made to clause 10.4(d) and 21.7(b). In the circumstance, we **attach** a Draft Determination that contains the agreed wording.

Should the Australian Federation of Employers and Industries be of further assistance to the Commission, please do not hesitate to contact the writer.

Yours sincerely,



Shue Yin Lo, Senior Consultant, AFEI

¹ [2020] FWCFB 5531.

² MA000120 PR723626.

³ [2020] FWCFB 5531 at [21].

DRAFT DETERMINATION

Fair Work Act 2009

s.156—4 yearly review of modern awards

4 yearly review of modern awards

(AM2018/18)

CHILDREN'S SERVICES AWARD 2010

[MA000120]

Children's services

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT CLANCY
COMMISSIONER LEE

4 yearly review of modern awards – Award stage – Group 4 awards – Children's Services Award 2010 – Substantive issues.

A. Further to the Full Bench decisions issued by the Fair Work Commission on 10 June 2020 [[2020] FWCFB 3011] and 19 October 2020 [[2020] FWCFB 5531], the above award is varied as follows:

1. By deleting clause 10.4(d) and inserting:

(d) (i) Changes in the agreed regular pattern of work may only be made by agreement in writing between the employer and employee. Changes in the days to be worked or in starting and/or finishing times (whether on-going or ad hoc) may also be made by agreement in writing. An agreement in writing may be made by any electronic means of communication.

(ii) Where agreement cannot be reached, the employer may change the days the employee is to work by giving seven days' notice in advance of the change in accordance with clause 21—Ordinary hours of work and rostering.

(iii) The employer is not required to provide the full 7 days' notice of change of the days an employee is to work where the employer makes the change as a result of an emergency outside of the employer's control.

(iv) For the purposes of (d)(iii) the overtime provisions in clause 23.2(b) apply.

(v) In clause 10.4(d)(iii), emergency means:

- a situation or event that poses an imminent or severe risk to the persons at an education and care service premises (for example, a fire at the education and care services premises); or
- a situation that requires the education and care service premises to be locked-down (for example, an emergency government direction).

2. By deleting clause 15.2(c) and inserting the following:

(c) Where an employee is required to wear protective clothing or equipment such as hats and sunscreen lotion, goggles, aprons or gloves, the employer will either supply such clothing or equipment or reimburse the employee for the cost of their purchase. Reimbursement will be limited to reasonable costs incurred.

3. By deleting clause 21.5(a) and inserting the following:

(a) An employee responsible for the preparation, implementation and/or evaluation of a developmental program for an individual child or group of children will be entitled to a minimum of two hours non-contact time per week. During non-contact time, an employee will not be required to supervise children or perform other duties as directed by the employer.

(b) An employee appointed as the Educational Leader will be entitled to a minimum of two hours non-contact time per week. During non-contact time, an employee will not be required to supervise children or perform other duties as directed by the employer.

NOTE 1: Educational leader is defined in Regulation 118 of the Education and Care Services National Regulations (2011).

NOTE 2: The entitlements at clauses 21.5(a) and 21.5(b) are cumulative. An Educational Leader who also has programming responsibilities for an individual child or group of children will be entitled to a minimum of four hours non-contact time per week.

4. By renumbering clause 21.5(b) as clause 21.5(c).

5. By deleting clause 21.7(b) and inserting:

(b) (i) Changes in the agreed regular pattern of work may only be made by agreement in writing between the employer and employee. Changes in the days to be worked or in starting and/or finishing times (whether on-going or ad hoc) may also be made by agreement in writing. An agreement in writing may be made by any electronic means of communication.

(ii) Where agreement cannot be reached, the employer may change the days the employee is to work by giving seven days' notice in advance of the change in accordance with clause 21— Ordinary hours of work and rostering.

(iii) The employer is not required to provide the full 7 days' notice of change of the days an employee is to work where the employer makes the change as a result of an emergency outside of the employer's control.

(iv) For the purposes of (b)(iii) the overtime provisions in clause 23.2(b) apply.

(v) In clause 21.7(b)(ii), emergency means:

- a situation or event that poses an imminent or severe risk to the persons at an education and care service premises (for example, a fire at the education and care services premises); or
- a situation that requires the education and care service premises to be locked-down (for example, an emergency government direction).

B. This determination comes into operation from 1 November 2020. In accordance with s.165(3) of the Fair Work Act 2009 this determination does not take effect in relation to a

particular employee until the start of the employee's first full pay period that starts on or after 1 November 2020.

PRESIDENT

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