Fair Work Commission

s. 156 - Four Yearly Review of Modern Awards

Pharmacy Industry Award 2010

AM2014/209

Joint Union Submission in Reply

Revised Plain Language Draft of 20 January 2017

By

Shop Distributive and Allied Employees' Association (SDA)

Association of Professional Engineers, Scientists and Managers, Australia (APESMA)

Health Services Union (HSU)

Dated: 10 February 2017

Lodged by:

Katie Biddlestone	**Jacki Baulch**	**Leigh Svendsen**
SDA	APESMA	HSU
katie@sda.org.au	jbaulch@professionalsaustralia.org.au	leighs@hsu.net.au

1. The Shop Distributive and Allied Employees' Association (SDA), the Association of Professional Engineers, Scientists and Managers Australia (APESMA) and the Health Services Union (HSU) makes these submissions in reply to submissions filed by the Pharmacy Guild of Australia(PGA) and Business SA on the – Pharmacy Industry Award – Plain Language Draft (20 January 2017) in accordance with the decision issued by the Full Bench on 20 January 2017[1].

Clause 4 – Coverage – Intended outcome of on-hire provision

2. At paragraph [77] of the Decision, the Full Bench invited submissions from parties as to whether the intention of the current provision is that a person to whom labour is supplied is also to be an employer covered by the award.

3. In our submissions filed on 6 February 2017, we provided a response to this at paragraphs [3] - [5], that whilst an employer who is supplied labour is most likely to be an employer covered by the award by virtue of employing other employees working in the community pharmacy, we submit that the intention is that they also acquire the status by being supplied with the labour as they would satisfy clause 4.1.

4. The PGA have provided a similar response to this question at paragraphs [19] – [22] of its submission filed on 7 February 2017[2].

5. Business SA do not agree with the submissions filed by the unions or the PGA. Business SA submit that the current provision does not require or intend that the person to whom labour is supplied is an employer covered by the award[3].

[1] [2017] FWCFB344
[2] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201615-209-sub-pga-070217.pdf
[3] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201615-209-sub-bussa-060217.pdf

6. The union parties do not fully understand the submissions made by Business SA. If Business SA is asserting that clause 4.1 is enlivened by clause 4.5 then we disagree. Both clauses can and should be read separately.

7. The first sentence of the coverage clause 4.1 is clear and unambiguous, that is, an employer in the Community Pharmacy Industry is covered by this award. Clause 4.5 is to be read in conjunction with Clause 4.1. Clause 4.1 is the critical clause defining coverage. This clause applies to both on-hire employers, the employees they supply and the Community Pharmacies to which they are supplied.

8. Further, Clause 4.2 indicates that employees with a classification defined in Schedule A – Classification Definitions of the award are covered by this award. The unions believe that it logically follows that 'on hire' employees doing the work detailed in these Classification Definitions who are working in workplaces that conform with Clause 4.1 must be covered by this award.

9. We don't understand the arguments proposed by Business SA. At PN2(sixth paragraph) the submission reads 'regardless which award (if any) may cover the person to whom labour has been supplied with regard to any other employees that person may engage, the on-hire arrangements described above do not automatically cause the Pharmacy Industry Award to cover that person'. The relevance of this sentence is unclear. We submit that clause 4.5 covers any on-hire employer providing an on-hire employee to a Community Pharmacy as this is required by its reference to clause 4.1 and that Community Pharmacy would be covered by the Award.

Clause 11 - Casual Employment

10. The PGA, at PN [7-12] has provided a response in relation to the provisional view of the Full Bench that clause 11.2 be removed and a casual conversion clause be inserted. The PGA submit that in order for the Full Bench to do this it would need to be 'supported by a merits based argument on the basis of probative evidence demonstrating the need for the variation in order to provide a fair and relevant safety net'.

11. The union parties are perplexed by this sudden change in the response provided by the PGA in relation to this. On numerous occasions, including on transcript before the Casual and Part-time Full Bench and before the Pharmacy Industry Award Plain Language Full Bench, the PGA have stated that no application or case needs to be advanced to vary the award to insert a casual conversion clause because the common and agreed interpretation of the casual employee clause already provides for casual conversion.

12. The union parties made a deliberate decision not to include the Pharmacy Industry Award in the common claim made by the ACTU because of the agreed interpretation of the Award. The PGA appeared at and made oral submissions to this effect, as agreed between the parties, to the Casual and Part-time Full Bench asserting that:

> *PN279 MS WELLARD: Your Honours, Commissioner, I'll also be brief because I think a lot of it has been canvassed already. With respect to the pharmacy industry award, the position of the Pharmacy Guild is that – and this has already been mentioned by most of my friends - that there is no probative evidence, in fact, there is no evidence at all led with respect to the pharmacy industry.* ***The ACTU does not seek to insert a casual conversion clause in the pharmacy industry award.***
>
> ***PN280 The current clause in the pharmacy industry award - and I presume this is upon which the basis - the basis upon which the ACTU doesn't seek to insert the casual conversion clause, defines a casual employee as an employee engaged as such and who does not have an expectation or entitlement to reasonably predictable hours of work. That ends the argument with respect to the pharmacy award and that current clause being fair and relevant and appropriate for the pharmacy industry.*** *The ACTU does seek to advance changes with respect to all of the other elements of its claim to the pharmacy award: the minimum engagement for casuals and part-time employees of four hours. But, as I said, there is absolutely no evidence filed to date that supports that, let alone probative evidence that would support the change required as part of the review.*

13. This demonstrates that the Guild interprets the current clause 13.1 as a casual conversion clause. The assertion made now by the PGA that we will have to provide a merit based argument and probative evidence to support the inclusion of a casual conversion clause is in order to provide a fair and relevant safety net is disingenuous and completely contradictory to this.

14. The PGA also made the following comments before the Full Bench on 15 December 2016 that:

> PN371 VICE PRESIDENT HATCHER: So are you pointing to A.9.3? So it says on 1 July 2014 all employees deemed casual who have expectation and entitlement will be converted to permanent.
>
> PN372 MS LIGHT: That's so.
>
> PN373 VICE PRESIDENT HATCHER: And what you're saying that's an ongoing requirement now?
>
> PN374 MS LIGHT: **It's not strictly an ongoing requirement in accordance with the terms of the award but it is a practise that the guild certainly advises its membership.**

15. An application for a casual conversion clause was not deemed necessary by the SDA or the PGA because the interpretation of the Award and practise in the Pharmacy Industry on the advice of the PGA is that if a casual has an expectation and entitlement to reasonably predictable hours of work they are converted to part-time or full-time employment. In light of the comments as recently as December it is a demonstration of bad faith that the PGA are now altering their position.

16. The union parties submit that a requirement to now provide a merits based argument supported by probative evidence is unnecessary and would not provide due process. The ACTU has put forward a case for a casual conversion clause in modern awards and we would rely on the submissions and evidence filed in support of that claim. We have already established that casual conversion is common practice in the pharmacy industry and this has been supported in oral submissions by the PGA before the Commission and in discussions regarding claims with the unions. Further submissions on the point of whether or not including a casual conversion clause in the Award is necessary to provide a fair and relevant safety net should not be required.

17. The union parties do, however, agree that submissions should be invited regarding the wording of any proposed draft determinations arising from the Casual and Part-time Full Bench decision.

Clause 14 – Rostering Arrangements – full-time and part-time employees

18. The union parties are somewhat surprised and confused by the submissions the PGA have made in response to the Full Bench redraft of clause 14.1(e). The issue of 'regularly works Sundays' was first raised by the PGA in its outline of variations sought on 25 November 2014[4]:

> *The following clauses have been identified as ambiguous or containing out of date terminology:*
>
> *c. Clause 25.4 (iv) Definition of "regularly works Sundays"*

19. This claim was discussed during a number of conferences, including a conference before Commissioner Bissett. Following discussions and a conference, the SDA filed a table of agreed matters, including proposed wording on 15 July 2015. The agreed wording was:

> *An employee may be rostered to work a maximum of 3 Sundays in any 4 week cycle and must have three consecutive days off every four weeks, including a Saturday and Sunday.*

20. This wording was agreed because the understanding of the provision by the parties was that an employee would be entitled to 3 consecutive days off, including a Saturday and Sunday if they work 3 Sundays in a 4 week period. At no time during discussions did the PGA raise any contrary view as to how this provision applies.

21. The first time the PGA raised an issue with the change in wording which replaced 'regularly works Sundays' was in its submission on 5 September 2016. But at no point, prior to its most recent submission, has it made any reference to defining 'regularly works Sundays' as 34 Sundays.

22. The union parties do not agree with the assertions at PN 17 of PGA's most recent submission, which states that[5]:

[4] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014209-proposedvar-pga-251114.pdf
[5] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201615-209-sub-pga-070217.pdf

We note that the concept of an employee being "regularly rostered to work Sundays" is used frequently with respect to defining who is a shift worker for the purpose of the additional week of annual leave provided for at section 87(b) of the Fair Work Act 2009, including at clause 22.2 of the Revised Exposure Draft. Neither the award, the Act itself, nor the explanatory memorandum defines this term. The meaning of this term has however developed as a result of cases including Shift Workers case 1972 AR (NSW) 275 and Media, Entertainment and Arts Alliance [MEAA] and Theatrical Employees (Sydney Convention and Exhibition Centre) Award 1989 [1995] AIRC Print M7325. It is now understood to mean 34 Sunday shifts.

23. Firstly, shift work is not a feature of the Pharmacy Industry Award. The only circumstance shift work is mentioned in the Pharmacy Industry Award is in clause 29.2 which defines a shift worker for the purpose of providing an extra week of annual leave, when working *'in a business in which shifts are continuously rostered 24 hours a day for seven days a week'*.

24. There is no other reference in the Award to a shift worker. In our strenuous view shift work has absolutely no connection to the rostering provision contained in clause 25.4 and for the PGA to suggest as such is completely misleading.

25. The intention of the provision, which has previously been agreed by the parties is that the entitlement to three consecutive days off, including a Saturday and Sunday is enlivened when an employee works 3 Sundays in 4.

26. Subsequently, we submit that reference to the *Shift Workers case 1972 AR (NSW) 275 and Media, Entertainment and Arts Alliance [MEAA] and Theatrical Employees (Sydney Convention and Exhibition Centre) Award 1989 [1995] AIRC Print M7325* has absolutely no relevance to the Pharmacy Industry Award as this is not an Award which contains provisions for shift workers, aside from the annual leave provision for a specific situation that is very rarely utilised within the industry. Applying precedent regarding shift work for the purpose of the rostering provisions contained in Clause 25.4 in this Award would be completely inappropriate.

27. There would also be significant issues with the application of the clause if 'regularly works Sundays' is defined as 34 Sundays, as per the PGA's submission. The Pharmacy Industry Award only provides annualised salaries for Pharmacists. There would be no way for this provision to operate for other employees covered by this Award who work to a weekly or fortnightly roster.

28. The PGA have changed their long held view regarding this provision in order to avoid the current obligation to pay an employee at overtime rates if they are rostered to work on the 4th Sunday. The example provided at PN 16 of the PGA submission demonstrates that they do not want to have to pay an employee who works 'each four week cycle three Sundays' if they are needed to cover leave taken by another employee on the fourth Sunday.

29. The union parties submit that the provisional view of the Full Bench as to the intended meaning of the current clause and the proposed re-draft accurately reflect the current Award clause 25.4 and should be adopted by the Full Bench.

30. We believe that a change to the clause as suggested by the PGA would represent a significant change to the legal effect of the Award and as determined by the Preliminary Jurisdictional Issue Decision in the 4 Yearly Review of Modern Awards parties seeking to vary a modern award must advance a merit based argument in support of the variation and where a significant change is proposed, it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence supporting the proposed variation.