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Sent: Thursday, 30 March 2017 5:36 PM
To: AMOD; Chambers - Hatcher VP
Cc: rachell@hsu.net.au; jlight@meridianlawyers.com.au; Sharlene Wellard; chrisk@business-sa.com; Katie Biddlestone; Margaret Chan; Jacki Baulch; Karen Van Gorp
Subject: AM2016/28 Pharmacy Industry Award

Dear Sir/Madam

We refer to matter AM2016/28 Pharmacy Industry Award, which is the subject of hearing tomorrow.

Attached by way of filing are submissions on behalf of ABI and NSWBC with respect to these proceedings.

We acknowledge that these submissions are filed late in accordance with the Directions and respectfully seek permission from the Commission to file out of time.

We confirm we have copied all relevant parties into this email by way of service.

Please do not hesitate to contact me if you require any information. I note my colleague Ms Chan will be appearing on behalf of ABI and NSWBC tomorrow.

Yours sincerely

Kate Thomson
Lawyer
Australian Business Lawyers & Advisors

AUSTRALIAN BUSINESS
Lawyers & Advisors

Fair Work Commission: 4 Yearly Review of Modern Awards

SUBMISSIONS IN REPLY

PHARMACY INDUSTRY AWARD 2010
SDA SUBSTANTIVE CLAIM
(AM2016/28)

29 MARCH 2017

AUSTRALIAN BUSINESS INDUSTRIAL
- and -
THE NSW BUSINESS CHAMBER LTD

1. BACKGROUND

1.1 These submissions are filed on behalf of Australian Business Industrial (**ABI**) and the NSW Business Chamber Ltd (**NSWBC**). ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) and has some 4,200 members. NSWBC is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisation) Act 2009* (Cth) and has some 18,000 members.

1.2 ABI and NSWBC have a material interest in the Four Yearly Review of the Award given that both entities represent numerous employers who operate in the pharmacy industry.

1.3 These submissions are made in reply to the submissions of the Shop Distributive and Allied Employees' Association (**SDA**) dated 17 February 2017 (**SDA Submissions**). The SDA Submissions relate to an application to vary the terms of engagement of full time employees covered by the Pharmacy Industry Award 2010 (**Award**).

1.4 ABI and NSWBC oppose the variations sought by the SDA, and advance the following submissions in opposition to the changes sought by the SDA.

2. THE SDA'S MISCHARACTERISATION OF THE PROPOSED VARIATIONS

2.1 ABI and NSWBC considered that the SDA have inappropriately characterised the proposed variations as *"uncontroversial and self-evident"*. A cursory examination of the proposed variations demonstrate that they represent a significant departure from the provisions of the current Award; an Award which has functioned effectively in its current form for over seven years.

3. The changes sought are quite clearly substantive in nature. The Preliminary Jurisdictional Issues decision issued by the Full Bench of the Fair Work Commission[1] at the commencement of the Four Yearly Review provided direction to parties seeking substantive changes to a modern award. Relevantly, the Full Bench in that decision held that:

> "*The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s 134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation... The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, 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 properly directed to demonstrating the facts supporting the proposed variation."* [emphasis added]

3.1 It cannot seriously be contended that the changes proposed by the SDA are *"self evident"* in nature. Rather, they are substantive, contentious, and impose new obligations on employers with respect to the arrangement of working hours for full-time employees. These proposed changes represent a *"significant"* change of the type envisaged by the Full Bench.

[1] [2014] FWCFB 1788.

Probative evidence required

3.2 The SDA proposal must be supported not only by submissions, but by probative evidence addressing the facts supporting the variation.

3.3 The SDA has not filed or advanced any evidence at all in support of the proposed changes.

3.4 Therefore, there is no evidence before the Commission as to issues such as:

(a) how full time working hours are structured by employers;

(b) how full time working hours are averaged by employers;

(c) the duration and incidence of short shifts;

(d) to the extent that there is an incidence of short shifts for full-time employees in the industry, the extent of that practice; or

(e) the incidence or extent of employers varying working hours or patterns of work of full-time employees.

3.5 The SDA has failed to advance any evidence dealing with these or indeed any matters pertaining to the provisions it seeks to amend.

In light of the failure of the SDA to advance any evidence in support of its proposals, the Commission cannot grant the claims.

4. MERITS OF THE APPLICATION

4.1 Notwithstanding the above, ABI and NSWBC submit that the variations are unnecessary due to the adequacy of the current Award relating to full time employees.

4.2 Clause 10 of the Award requires an employer to inform an employee at the time of engagement of the terms of their engagement, and in particular, whether they will be full-time, part-time or casual. In accordance with clause 11, an employee engaged to work an average of 38 hours per week will be a full-time employee.

4.3 Clause 25 deals with hours of work and prescribes in some detail how those hours will be arranged. Specifically:

(a) Clause 25.2 provides for a spread of ordinary hours and requires that the hours of work on each day to be continuous and not in excess of 12;

(b) Clause 25.3 is entitled '38 hour week rosters' and allows for full-time employees to work either 38 hours in one week or 76 hours in two consecutive weeks;

(c) Clause 25.4 deals with the rostering of permanent employees and relevantly provides that:

(i) Employees must have two consecutive days off each week or three consecutive days off in a two week period;

(ii) Ordinary hours and any reasonable additional hours must not be rostered over more than six consecutive days;

(iii) Ordinary hours must not be rostered over more than five days in a week, unless if rostered over six days then the employee is rostered for four days in the following week;

(iv) Employees who regularly work Sundays will be rostered so they have three consecutive days off each four weeks (including Saturday and Sunday);

(v) The employer and employee can otherwise agree (at the employee's written request) to other arrangements, and this agreement can be terminated by the employee with four weeks' notice to the employer.

4.4 Evidently there are numerous provisions in the current Award which interact to ensure the 'free for all' rostering of full-time employees envisaged by the SDA does not occur. However, we will deal specifically with some of the submissions advanced by the SDA below.

5. MINIMUM ENGAGEMENT

5.1 At paragraph 25, the SDA argues that it is *"incongruous"* that the Award contains a three hour minimum shift provision for part-time and casual employees but no minimum for full-time employees. ABI and NSWBC disagree with this submission.

5.2 Full-time employees are engaged to work an average of 38 hours in accordance with the rostering provisions set out in clause 25 of the Award. Part-time employees work less than an average of 38 hours, and this is also often the case for casual employees. Accordingly, given their reduced total number of hours, it is more likely that part-time and casual employees will work shorter shifts. This justifies the inclusion of a minimum engagement for those employees, which is not required for full-time employees.

5.3 At paragraphs 26 and 30, the SDA alleges that the lack of a minimum shift engagement for full-time employees *"does not provide a fair and relevant safety net"*. ABI and NSWBC disagree with this submission. Employees are required to be informed at the time of engagement that they will be engaged as a full-time employee (or otherwise), which then guarantees a working week of an average of 38 hours. In combination with the rostering provisions at clause 25 (which includes an averaging period of only two weeks), this provides an adequate safety net for full-time employees.

5.4 The SDA further submits at paragraph 26 that rostering a full-time employee for an inappropriately short shift *"would also be at odds with meeting other rostering provisions contained at Clause 25 of the Award"*. With respect, this submission demonstrates the fact that there is no need for a minimum engagement for full-time employees. An employer cannot roster a full-time employee other than in accordance with clause 25. If short shifts are not permissible due to those provisions, then it is clear that the Award already provides full-time employees with appropriate protection.

5.5 At paragraph 28, the SDA submits that it is necessary to consider *"other matters such as the cost and time it takes to attend work"* when considering whether employees are appropriately remunerated. ABI and NSWBC strongly oppose the entire premise of this submission. Full-time employees covered by the Award are guaranteed a minimum weekly wage based on their 38 hour week or 76 hour fortnight, paid at the relevant rate of pay.

5.6 Furthermore, clause 25.4 has the effect of requiring working days to be no more than 10 per fortnight. If a full-time employee works a short shift on one of those days, they will merely be required to work more hours over the remaining nine days. It is improbable that a full-time employee could be rostered to work more than one short shift in a given week and still work a 38 hour week, due to the restrictions on maximum hours of work per day and days per fortnight.

5.7 It follows then that the alleged decrease in the *"net financial benefit"* of attending work referred to at paragraph 29 of the SDA Submissions will simply not eventuate. The employee's income over the pay period remains the same, and the likelihood of working any more than one short shift in a roster period is minimal.

5.8 Paragraphs 31 and 32 of the SDA Submissions refer to the ACTU submission to the part-time and casual Full Bench, which is sitting as part of the Four Yearly Review. ABI and NSWBC notes that the decision of this Bench is reserved, so the persuasiveness of this submission is has yet to be considered by the Full Bench nor can it be relied upon as an accepted fact.

5.9 For this reason, it is inappropriate to rely upon this information to jusitfy the three hour minimum engagement, as the SDA attempts to do at paragraph 32. This argument is also flawed by reason of the fact that the SDA persists in considering a single day in isolation when calculating the monetary benefit to the employee, as opposed to the income obtained from the week or fortnight over which the employee works their average of 38 hours.

5.10 Finally, ABI and NSWBC disagree with the submission advanced by the SDA at paragraph 33 that short shifts detrimentally impact an employee's ability to enjoy non-working time. The total number of hours worked by the employee over the week or fortnight remains the same, regardless of the method of arrangement. Working a short shift on one day then longer shifts on other days, as opposed to shifts of equal length, actually provides the employee with a greater amount of leisure time.

6. TERMS OF ENGAGEMENT AND ROSTER VARIATIONS

6.1 ABI and NSWBC submit that the variations sought by the SDA with respect to the terms of engagement and roster variations for full-time employees must also fail, for the reasons set out in sections 2 and 3 above.

6.2 We also note that the SDA has incorrectly attempted to rely on the common law definition is the appropriate reference for determining whether an employment relationship is permanent or casual (paragraph 39) in justifying the need for prescriptive terms of engagement for full-time employees.

6.3 In *Telum Civil (Qld) Pty Ltd v CFMEU*[2] the Full Bench decided that the absence of a definition of casual employee in the Fair *Work Act 2009* (Cth) does not mean that it should be defined with reference to its common law meaning. Indeed, the Bench noted that the term is actually used in a manner which is at odds with that traditional understanding. The Bench went on to rule that the nature of casual employment should be determined with reference to the requirements in the applicable enterprise agreement or Modern Award.

6.4 Accordingly, the correct method for determining whether an employee covered by this Award is full-time, part-time or casual will be to have regard to its terms. An employee will be full-time by virtue of the fact they are engaged to work an average of 38 hours per week. No regular pattern of work is required; in any event, the method of arranging those hours is prescribed by the provisions of clause 25.

6.5 There is also no merit to the SDA submission that a full-time employee must be informed at the time of engagement of their working arrangements and roster, nor is there any evidence to suggest the absence of such information contravenes either the Award or the Act.

[2] [2013] FWCFB 2434

6.6 It also follows that there is no evidence to support the SDA's contention at paragraph 49 that such an agreement is necessary to give effect to clause 8.2 of the Award. That clause does not require that an employee agree to any changes to rosters or hours of work; merely that an employer must consult with the employee in relation to those changes.

6.7 The SDA submit at paragraph 60 that these changes will reflect the current practice in the industry and accordingly do not represent a significant change. No evidence has been adduced to support the assertion this is the current practice, nor that the changes sought by the SDA are necessary to reflect that practice in the Award. Notwithstanding this observation, this submission represents a concession on behalf of the SDA that there is no issue with how the Award currently operates, which demonstrates that it meets the Modern Awards Objective and any change is unnecessary.

7. CONCLUSION

7.1 In providing these submissions, ABI and NSWBC seek to properly assist the Commission in the discharge of its discretion pursuant to section 156 of the *Fair Work Act 2009* (Cth).

7.2 If you have any questions in relation to these submissions, please contact Kate Thomson on (02) 4989 1003.

On behalf of Australian Business Industrial and the NSW Business Chamber Ltd