

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission – Substantive Claims

Hair and Beauty Industry Award 2010
(AM2017/50)

25 JANUARY 2019

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GROUP

4 YEARLY REVIEW OF MODERN AWARDS

AM2017/50 Hair and Beauty Industry Award 2010

1. On 28 December 2018, the Fair Work Commission (**Commission**) issued a decision¹ (**Decision**) regarding proposed substantive changes to the *Hair and Beauty Industry Award 2010* (**Award**).
2. This submission is filed on behalf of the Australian Industry Group (**Ai Group**) and Hair and Beauty Australia (**HABA**) in accordance with the directions contained at paragraph [67] of the Decision, in response to the provisional views expressed by the Full Bench at paragraphs [58], [61] and [64]. Those provisional views relate to amendments that were proposed jointly by Ai Group, HABA and the Shop, Distributive and Allied Employees' Association (**SDA**) (collectively, **Parties**).

The Roster Notification Variation

3. Clause 29.1 of the Award is currently in the following terms:

29.1 The employer will notify staff of:

- (a) the number of ordinary hours to be worked each week;
- (b) the days of the week on which work is to be performed; and
- (c) the commencing and ceasing time of work for each day of the week.

4. The Parties had proposed that clause 29.1 be varied as follows:

29.1 The employer will provide permanent employees with a written roster (which may be by electronic means) that identifies ~~notify staff of:~~

- (a) the number of ordinary hours to be worked each week;
- (b) the days of the week on which work is to be performed; and
- (c) the commencing and ceasing time of work for each day of the week.

¹ 4 yearly review of modern awards – Hair and Beauty Industry Award 2010 [2018] FWCFB 7874.

5. The Commission has expressed the provisional view that clause 29.1 should instead be varied as follows:

29.1 The employer must ensure that a work roster is available to all employees, either on a notice board which is conveniently located at or near the workplace or through accessible electronic means.

(a) The roster must show for each employee ~~will notify staff of:~~

~~(a)(i)~~ the number of ordinary hours to be worked by them each week;

~~(b)(ii)~~ the days of the week on which they will work ~~is to be performed;~~ and

~~(c)(iii)~~ the times at which they start and finish ~~commencing and ceasing time of work for each day of the week.~~

6. The Full Bench's reasoning in relation to its provisional view is set out in the following paragraph of the Decision: (our emphasis)

[57] In relation to the proposed *roster notification variation*, it is apparent that the amendment proposed has the effect of altering the obligation on employers to provide a 'written roster' as opposed to simply notifying staff, as is the requirement under the current provision. We are of the view that the reference to electronic means is a logical and contemporary amendment, and is consistent with a number of other clauses in modern awards. We note that the proposed *roster notification variation* only provides the obligation to 'permanent employees' rather than to 'staff' which is the requirement under the existing provision. This variation has the effect of removing the obligation to provide casual employees with the information contained in the existing clause 29.1(a)-(c). We do not agree with this aspect of the variation. In our view the obligation to provide employees with the information should continue to extend to all employees, not just permanent employees while noting that it is only permanent employees who must be provided with this information 14 days in advance.

7. Respectfully, the Commission's decision is based on a false premise. The variation proposed by the Parties does not have the effect of *removing* the obligation to provide casual employees with the information contained in the existing clauses 29.1(a) – (c). No such obligation arises under the Award. This is because, by virtue of clause 13.4, clause 29 does not apply to casual employees.
8. There is no evidence or material before the Commission that justifies extending the obligation to provide a written roster to casual employees. In the absence of any basis for such a significant substantive change, the Commission should not depart from this element of the Parties' proposal to vary clause 29.1.

9. The Commission’s proposal also prescribes the manner in which the roster is to be provided to employees. That is, it requires that the roster be provided to employees “either on a notice board which is conveniently located at or near the workplace or through accessible electronic means.”
10. There is no basis articulated in the Commission’s decision for limiting the method by which a roster is to be provided to employees. For instance, the Commission’s reasoning does not reveal any basis for precluding an employer from providing the roster to its employees by simply handing each employee a copy of the roster. There is no evidence or material before the Commission that justifies narrowing the means by which an employer may provide an employee with a copy of their roster. Accordingly, the Commission should not depart from this element of the Parties’ proposal to vary clause 29.1.
11. Ai Group and HABA do not oppose the various minor amendments proposed by the Commission to the current subclauses 29.1(a) – (c).

The Mutual and Unilateral Change Variations

12. The following provisions of the Award permit variations to rosters for full-time and part-time employees (noting again that there is no obligation under the Award to provide casual employees with a written roster):

12. Part-time employees

...

12.8 Rosters

- (a) A part-time employee’s roster, but not the agreed number of hours, may be altered by the giving of seven days’ notice in writing or in the case of an emergency, 48 hours, by the employer to the employee.
- (b) Rosters will not be changed from week to week, or fortnight to fortnight, nor will they be changed to avoid any award entitlements.

...

29. Notification of rosters

...

29.2 Due to unexpected operational requirements, an employee's roster for a given day may be changed by mutual agreement with the employee prior to the employee arriving for work.

...

29.4 Rosters may be changed at any time by mutual agreement between the employer and employee.

29.5 An employee's roster may not be changed with the intent of avoiding payment of penalties, loadings or other benefits applicable. Should such circumstances arise the employee will be entitled to such penalty, loading or benefit as if the roster had not been changed.

13. The Parties proposed the following changes to the above provisions:

12. Part-time employees

...

12.8 Rosters

(a) A part-time employee's roster, but not the agreed number of hours, may be altered by the giving of seven days' notice in writing or in the case of an emergency, 48 hours, by the employer to the employee.

(b) Rosters will not be changed from week to week, or fortnight to fortnight, nor will they be changed to avoid any award entitlements.

...

29. Notification of rosters

...

~~**29.2** Due to unexpected operational requirements, an employee's roster for a given day may be changed by mutual agreement with the employee prior to the employee arriving for work.~~

29.3 A full-time employee's roster for a particular day may be varied by the provision of at least 48 hours' notice if this is due to an unexpected change in operational requirements (for example, staff absences or changes in customer demand).

NOTE: Clause 29.3 is to be read in conjunction with clause 8.2 of this Award.

29.4 Rosters may be changed at any time by mutual agreement between the employer and employee.

29.5 An employee's roster may not be changed with the intent of avoiding payment of penalties, loadings or other benefits applicable. Should such circumstances arise the employee will be entitled to such penalty, loading or benefit as if the roster had not been changed.

14. The Commission has expressed the provisional view that the relevant provisions should instead be varied as follows:

12. Part-time employees

...

12.8 Rosters

- (a) A part-time employee's roster, but not the agreed number of hours, may be altered by the giving of seven days' notice in writing or in the case of an emergency, 48 hours, by the employer to the employee.
- (b) Rosters will not be changed from week to week, or fortnight to fortnight, nor will they be changed to avoid any award entitlements.

...

29. Notification of rosters

...

~~29.2 Due to unexpected operational requirements, an employee's roster for a given day may be changed by mutual agreement with the employee prior to the employee arriving for work.~~

...

29.3 (a) An employee's roster may be changed at any time by:

(i) mutual agreement between the employer and employee prior to the employee arriving for work; or

(ii) the employer giving 48 hours' notice to the employee in the case of an emergency.

(b) This clause does not apply to casual employee who may have their roster changed at any time.

~~29.4 Rosters may be changed at any time by mutual agreement between the employer and employee.~~

29.5 An employee's roster may not be changed with the intent of avoiding payment of penalties, loadings or other benefits applicable. Should such circumstances arise the employee will be entitled to such penalty, loading or benefit as if the roster had not been changed.

15. The proposed amendments remove the ability for an employer and employee to reach agreement to change the roster at any time. Rather, a roster could only be varied by agreement prior to the employee arriving for work.

16. In our submission, the overlap between the current clauses 29.2 and 29.4 should not be addressed by simply deleting clause 29.4. Clause 29.4 provides an important flexibility for employers and employees. For example, if an employee wants to complete their shift early on a given day due to personal commitments, with their employer's consent, the roster can be so altered. Equally, if customers cancel their appointments or if additional appointments are made with little notice, clause 29.4 gives the employer the ability to reduce or extend the length of the employee's shift for that day, if the employee consents. The clause safeguards against unilateral variations by requiring the agreement of the employer and employee. There is no evidence or material before the Commission that would allow it to conclude that that protection is not working effectively.
17. Accordingly, clause 29.3(a)(i) as proposed by the Commission should be amended by deleting the words "prior to the employee arriving for work". Respectfully, there is no basis for removing the flexibility currently available to employers and employees under clause 29.4.
18. As earlier explained, clause 29 does not apply to casual employees. Further, clause 12.8 applies to part-time employees. If the Commission accepts our submissions in relation to application of clause 29.1 to casual employees, the proposed clause 29.3(b) is superfluous and should be deleted.