

IN THE FAIR WORK COMMISSION
4 Yearly Review of Modern Awards
National Disability Services
Submission in Reply – AM2018/26
Social, Community, Home Care and Disability Services Industry Award 2010
Substantive Issues Tranche 2 – Travel Time Claims

Introduction

1. National Disability Services (NDS) makes the following submission in reply pursuant to the Directions made on 13 May 2019 and as amended on 2 September 2019.
2. NDS is the peak organisation for non-government disability providers with about 1,000 members across Australia.
3. NDS members operate several thousand services for Australians with all types of disability. Members range in size from small support groups to large multi-service organisations. They provide person-centred support for people with a disability – through personal one-to-one care in homes and in group settings, professional therapy, education, training and life-skills development, employment, accommodation support, respite and recreation.
4. The implementation of the National Disability Insurance Scheme (NDIS) is driving a growth in the amount of work performed for participants in their private homes, and a consequent growth in the use of broken shift arrangements in order to accommodate participant preferences regarding the time of delivery of supports^{1,2}.
5. In particular, a core aim of the NDIS is to provide participants with more choice and control in their daily lives. This is an important public policy objective informed by a human rights approach to disability.
6. A corollary is that employers who are engaged by clients to provide supports have less power than in the past to dictate timetabling to meet their administrative convenience.
7. NDS makes the point that the use of broken shift is not something that is done at the whim of the employer. Broken shift is a necessary way of organising certain types of work in a manner that meets the legitimate needs and preferences of people with disabilities.
8. Similarly, the way in which an employer arranges the work of employees who are required to travel between clients at different locations is constrained by the requirements of the clients, as well as by the pricing arrangements which limit the amount that the employer can claim to cover the costs of employee travel.

¹ Witness statement of David Moody [51-63]

² Witness statement of Steven Miller [19], [21-39]

9. At the same time, NDS is aware of international evidence of the risks of a market-based system such as NDIS leading to employment practices that undermine reasonable minimum employment standards, resulting in high levels of employee turnover and deskilling of the workforce, resulting in a higher risk of abuse and neglect of clients³.
10. NDS acknowledges that there are potential ambiguities and problems with the way in which travel time connected with broken shifts is currently treated by the award. If the Commission determines that the award needs to be varied with respect to travel time, and in light of the foregoing discussion, this submission outlines some possible approaches.
11. NDS opposes the union claims as currently drafted because they go further than is necessary to resolve the potential problems that we identify.

The travel time claims

12. There are three claims made by unions to vary the award with respect to travel time:
 - a) United Voice travel time claim. United Voice propose a variation to the effect that time required to travel between clients shall be treated as time worked, but excluding commuting the beginning and end of the shift;
 - b) HSU travel time claim. HSU propose that where a broken shift is worked an employee will be paid for the reasonable time of travel from the location of the last client before a break to the next client at the end of that break; and
 - c) HSU travel allowance claim. HSU also propose that the current travel allowance for an employee's use of their private vehicle be varied to specifically require payment for commuting to and from their residence and any client, as well as requiring payment when travelling between clients.
13. The claims are related to a number of other claims made by the unions regarding broken shift and minimum engagements. They reflect union concerns that the growth in non-standard working arrangements together with pricing and other commercial pressures, are leading some employers to arrange work in such a way as to avoid paying workers for significant periods of time during their working day.

Terminology

14. In this submission, NDS will use the following terminology.
15. A “**shift**” is taken to be the rostered day's work for an employee. If a shift is rostered outside the span of hours a shift penalty may apply in accordance with clause 29 of the award. Clause 29.4 then also states that
“Shifts are to be worked in one continuous block of hours that may include meal breaks and sleepover”.

³ See for example, Moody [36] and reference therein

16. For home care and disability workers, clause 25.6 provides that the shift may be broken by one or more breaks which are not meal breaks and prescribes certain requirements to be met. In effect, this clause provides an exception to the requirement of clause 29.4 that shifts be continuous.
17. For the purpose of this submission, the parts of the shift that are worked before and after a break will be referred to as “**portions**”. We make this point because in common usage, the separate periods of work in a broken shift are sometimes also referred to as shifts, which is potentially confusing in the context of responding to the present union claims regarding travel and broken shift.

General concepts about travel

18. NDS submits that conceptually there are three types of travel that the union claims seek to deal with.
 - a) Direct travel between clients. Travel directly between clients during a continuous shift or within a portion of a broken shift.
 - b) Travel during breaks. Travel between the last client of a portion of a broken shift and the first client of the next portion, which occurs during a break in the shift; and
 - c) Commute. Travel between the employee’s residence and a client;
19. The first and second types of travel are covered by both the United Voice and HSU travel time claims.
20. The third of these types of travel is covered in the HSU travel allowance claim.
21. NDS submits that it is useful to distinguish between the different types of travel as each requires different considerations in responding to the union claims.

Response to the union claims

Direct travel between clients

22. NDS accepts that where an employee is required to travel directly from one client to the next as directed by their employer in order to perform their duties (11 (a) above), without any break, then the employee should be compensated for that time.
23. Under this award, where employees other than home care or disability workers are required to travel between different locations or clients in the course of their duties that time would form part of their shift for the day and would be paid at the appropriate rate for hours worked.
24. NDS submits that the same logic would apply to direct travel required within a portion of a broken shift.
25. The United Voice travel time claim would capture travel associated with breaks, but it would also apply to direct travel between clients as part of a continuous shift or within a portion of

a broken shift. In our view that aspect of the United Voice claim reflects the current position and so is not necessary.

26. However, to the extent that there is any doubt about payment for such travel under the current provisions of the award, NDS does not oppose a variation to clarify the situation.
27. Where such travel requires the employee to use their private vehicle "*in the course of their duties*", clause 20.5 (a) requires the payment of an allowance of \$0.78 per kilometre. This allowance is compensation for the cost of running and maintaining the vehicle and is separate to payment for time.
28. Our understanding is that generally employers pay the travel allowance for such travel, and may also pay travel time. The union witnesses also provide evidence that at least some employers also pay travel time, or have done until recently.⁴

Travel during breaks

29. The more difficult issue is the question of how to deal with travel that is undertaken during the unpaid break between portions of a broken shift.
30. A break, other than a meal break, in a broken shift can total several hours. During that time the employee is at least notionally free to do as they please, provided they arrive in time to attend at their next location of work for the next portion of the broken shift.
31. The component of travel that is necessarily required to get from the last client of the earlier portion to the first client of the next portion of the shift has the appearance of being a commute.
32. The unions object that, in fact, this is travel that is required by the employer and is undertaken in the course of their duties. It is not travel for private or recreational purposes.
33. When an employee is on a break, they are not on duty and their movements are not controlled by the employer. NDS considers there are practical difficulties in quantifying the travel required when undertaken during a break. It is different to the situation of direct travel between clients where the employer has some control over the timetabling of appointments within a portion of a broken shift.
34. Alternatively, if travel during breaks were to be considered as akin to the commute at the start and finish of the working day, then on the face of it there should not be any separate compensation.
35. However, NDS accepts that there is the potential for this to be onerous on the employee where there are a number of such periods of travel and in particular where the portions of the shift are of short duration.
36. To the extent that the modern award system acknowledges the cost and disruption of a commute, it is in the concept of a minimum engagement which is taken to ensure that each engagement to attend the workplace provides sufficient compensation for the employment to be economically viable for the employee.

⁴ United Voice supplementary witness statements of Dion Fleming and Trish Stewart, 1 April 2019

37. The SCHADS award sets minimum engagements for casual home care employees of one hour, and for casual SACS employees engaged in disability work, two hours (clause 10.4 (c)). There is no minimum engagement for part-time or fulltime employees.
38. NDS notes the reasoning of the Full Bench in the review of the *Aged Care Award 2010*, in relation to broken shifts⁵. The SCHADS award does not specify whether the casual minimum engagement applies to each portion of a broken shift, or only to the sum of the hours worked across a broken shift.
39. If the Commission were to determine that there is ambiguity in relation to the application of minimum engagements in broken shifts, then consistent with our earlier submission in relation to union claims regarding broken shifts⁶, NDS submits that resolving that ambiguity by specifying a minimum engagement for each portion of a broken shift could provide a basis for ensuring reasonable compensation for associated travel during the break.
40. NDS is aware of the submission filed on behalf of ABI, NSWBC, ACSA and LASA (ABI & others) and their alternative formulation for an allowance to deal with this issue.
41. If the Commission is not persuaded that the issue can be adequately resolved by setting a minimum engagement for each portion of a broken shift, NDS does not oppose the alternative formulation for an allowance instead, as proposed by ABI & others.
42. Finally, the United Voice claim applies to all employees covered by this award and is not limited to home care or disability employees engaged to work broken shifts. As submitted above at [22-25], the claim is not necessary for workers who do not work a broken shift.

Commute

43. There is a longstanding presumption that employees are not entitled to payment for the daily commute to and from their place of work.
44. NDS opposes the HSU travel allowance claim that would impose an allowance to be paid for the daily commute.
45. Modern awards are required to provide minimum entitlements and the payment of an allowance for an employee's commute goes beyond the terms allowed by s139 of the Act. Commuting is not carried out in the course of an employee's duties, the extent of commute is unique to each employee and is outside the control of the employer.
46. The HSU travel allowance claim should be refused.



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on behalf of National Disability Services
16 September 2019

⁵ [2019] FWCFB 5078, 26 August 2019

⁶ NDS submission in reply, 16 July 2016 [28-49]