Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Nurses Award 2010

(AM2014/207)

13 August 2019

4 YEARLY REVIEW OF MODERN AWARDS

AM2014/207 4 YEARLY REVIEW OF MODERN AWARDS – NURSES AWARD 2010

1. This submission responds to Justice Ross' statement[1] of 31 July 2019 dealing with a submission of the Australian Nursing and Midwifery Federation (**ANMF**) relating to the exposure draft (**Exposure Draft**) for the *Nurses Award 2010* (**Nurses Award**) and the recent Full Bench decision *in Australian Nursing and Midwifery Federation v Domain Aged Care (Qld) Pty Ltd t/a Opal Aged Care (**ANMF v Opal Aged Care**)*[2].

2. Interested parties have been invited to file a short written submission in response to the ANMF's proposed amendments to clause 6.4(d) of the Exposure Draft ahead of a conference before Justice Ross on 20 August 2019. The Fair Work Commission (**Commission**) has not called for submissions more broadly about what changes should be made to the Exposure Draft as a consequence of the interpretation adopted in *ANMF v Opal Aged Care.*

3. At the outset, we observe that the proposed amendments to clause 6.4(d) of the Exposure Draft would not, in and of themselves, result in the instrument reflecting the interpretation stated in *ANMF v Opal Aged Care*, even though this appears to be the ANMF's intent. Additional changes would be necessary.

4. Nonetheless, Ai Group is opposed to any amendment that is directed at ensuring that the wording of the Exposure Draft reflects the interpretation adopted in *ANMF v Opal Aged Care*, in relation to the application of weekend penalty rates to casual employees. In short, Ai Group disagrees with the interpretation adopted by the Full Bench in that decision and is also concerned that it is likely inconsistent with both the intended operation of the Nurses Award, as well as industry practice.

[1] *4 yearly review of modern awards – Nurses Award 2010* [2019] FWC 5311.

[2] *Australian Nursing and Midwifery Federation v Domain Aged Care (Qld) Pty Ltd t/a Opal Aged Care* [2019] FWCFB 1716.

5. Given the narrow invitation to provide short submission relating to the proposed clause 6.4(d) and the limited period of time that we have been provided to prepare a submission, we do not seek to here deal comprehensively with the decision. We would likely seek to file further submissions in relation to this issue should the matter not be resolved at the conference on 20 August 2019.

6. For present purposes it is sufficient to observe that we respectfully contend that the Nurses Award can and should be read in a different manner to that which was adopted by the Full Bench in *ANMF v Opal Aged Care*. Relevantly, we contend that the Nurses Award should properly be read as requiring weekend penalty rates and overtime rates to be calculated using a cumulative method rather than a compounding method in respect of casual employees also entitled to the casual loading under the Award. We accept, however, that the provisions might be said to be ambiguous.

7. In support of our position we point to a Full Bench decision of the Australian Industrial Relations Commission issued in the context of the Part 10A Award Modernisation Process that dealt with the calculation of overtime rates for casual employees in a small number of health sector awards, which included the Nurses Award:

> **[150]** Some concern was raised in relation to the basis upon which a casual employee should be paid overtime. Two examples were given. The first is the separate calculation of overtime on the ordinary rate and the calculation of the casual loading also on the ordinary rate. The second is the cumulative approach. The ordinary rate plus the casual loading forms the rate for the purpose of the overtime calculation. We believe that the correct approach is to separate the calculations and then add the results together, as illustrated by the first example, rather than compounding the effect of the loadings.[3]

8. We also point to a decision of Vice President Watson considering the application of weekend penalties for causal employees covered by the Nurses Award. The former Vice President there relevantly held:

> **[33]** No party sought to advance a case for alteration of the current meaning and intent of the Award. Rather, they simply argued for clarification in line with their respective interpretations, which are diametrically opposed. It is therefore necessary to have regard

[3] *Award Modernisation* [2009] AIRCFB 345 at [150].

to the current meaning of the provisions in determining whether the justification advanced has merit.

[34] Casual employees are paid an hourly rate of 1/38th of the weekly rate plus a casual loading of 25%: clause 10.4(b). Clause 10.4(d) states:

> "(d) A casual employee will be paid shift allowances calculated on the ordinary rate of pay excluding the casual loading with the casual loading component then added to the penalty rate of pay."

[35] In my view, in the case of more than one loading applying, these provisions do not require the penalty to be calculated as a percentage of the loaded rate. Rather they require a calculation of each penalty on the base rate and the addition of the derived amounts onto the base rate. This reflects the normal notion that multiple penalties are often required to be applied, but that penalties are not applied on penalties.

[36] Clause 10.4 however only refers to shift penalties. Shift penalties are provided for in clause 29.1. Clause 29.1(e) provides:

> "(e) The shift penalties prescribed in this clause will not apply to shiftwork performed by an employee on Saturday, Sunday or public holiday where the extra payment prescribed by clause 26—Saturday and Sunday work and clause 32—Public holidays applies."

[37] The loadings for Saturday and Sunday work in clause 26 are expressed to be applicable to "an employee" and calculated on the basis of their ordinary rate of pay. There is no exclusion of casual employees from the entitlement to receive weekend penalties. It is not disputed that casual employees are entitled to shift penalties for shiftwork and weekend penalty payments on weekends. The disagreement concerns the status of the casual loading on weekends. In my view there is no basis in the Award to exclude the application of the casual loading on weekends and therefore it continues to apply when a casual works on a weekend. The loading is not however applied to the loaded weekend rate. In my view the same method of calculation applies to weekends as in the case of shift allowances. Each penalty is calculated on the base rate. The resultant amounts are added together.[4]

9. Given this context, it would not be appropriate to make the changes proposed by the ANMF. Indeed, it may be appropriate for the Full Bench dealing with the Exposure Draft to vary the Award pursuant to s.160 of the *Fair Work Act 2009* in order to address an ambiguity or error relating to the application of weekend penalty rates to casual employees, should it find that the interpretation adopted in *ANMF v Opal Aged* Care is arguable. Moreover, it may be appropriate for the Commission to make such a variation retrospective to the commencement of the operation of the Nurses Award. The availability of a remedy under s.160 was

[4] *Aged Care Association Australia & Others, Australian Nursing Federation, Australian Business Industrial* [2012] FWC 9420 at [33] – [37].

referred to in *ANMF v Opal Aged Care*, albeit the Full Bench was there considering the capacity for an individual party to seek such an outcome:

> **[20]** In arguing against the construction above, Opal sought to rely on the Award Modernisation decision of 2009, in which a Full Bench of the Australian Industrial Relations Commission stated that it considered the correct approach to the calculation of overtime for casual employees was to 'separate the calculations and then add the results together... rather than compounding the effect of the loadings'. The passage is referable to four modern awards that the Commission was publishing in that decision including the Nurses Award 2010. However, the explanation of the Commission for its decision to make an award in particular terms cannot properly be used to defeat the plain meaning of the instrument that it ultimately made. Section 160 of the Act establishes a process whereby application can be made to the Commission to vary a modern award to remove ambiguity or uncertainty or to correct an error. If a person considers that the text of a modern award contains an error, an application can be made under this provision to correct it.[5]

10. Given the issue of overtime rates for casual employees is being deal with by a differently constituted Full Bench, we do not seek to here identify what approach should be adopted in relation to this issue in the context of the Nurses Award.

[5] *Australian Nursing and Midwifery Federation v Domain Aged Care (Qld) Pty Ltd t/a Opal Aged Care* [2019] FWCFB 1716 at [20].