

Schedule

Definitions

Abbreviation	Meaning
2FASOC	Second Further Amended Statement of Claim filed 30 November 2022
2010 Policy Directive	PD2010_074 titled "Employment Arrangements for Medical Officers in the New South Wales Public Health System"
2015 Policy Directive	PD2015_034 titled "Medical Officers – Employment Arrangements in the NSW Health Service"
2016 Policy Directive	PD2016_059, titled "Medical Officers – Employment Arrangements in the NSW Public Health Service"
2017 Policy Directive	PD2017_042, titled "Employment Arrangements for Medical Officers in the NSW Public Health Service"
2019 Policy Directive	PD2019_027, titled "Employment Arrangements for Medical Officers in the NSW Public Health Service"
Allegedly Disentitling Conduct	<p>conduct relied on at paragraph 51(a)-(b) of the Defence – specifically, any scenario in which a Junior Medical Officer:</p> <ul style="list-style-type: none"> (a) undertook unrostered overtime which did not fall within one of the categories of authorised unrostered overtime in clause 8.2 of the 2010 Policy Directive, clause 9.2 of the 2015, 2016 or 2017 Policy Directives or clause 9.1 of the 2019 Policy Directive (as applicable), and in respect of which the Junior Medical Officer did not obtain prior approval; (b) undertook unrostered overtime which fell within one of the categories of authorised unrostered overtime in clause 8.2 of the 2010 Policy Directive, clause 9.2 of the 2015, 2016 or 2017 Policy Directives or clause 9.1 of the 2019 Policy Directive (as applicable), in circumstances where: <ul style="list-style-type: none"> i. the Junior Medical Officer had been told or invited to leave work by his or her supervisor or a more senior employee; or ii. another employee was available to take over the Junior Medical Officer's duties; (c) certified his or her timesheet at the end of each pay period without including unrostered overtime; or (d) undertook unrostered overtime and failed to submit a claim for payment within four weeks after the time was worked in accordance with clause 8.2 of the 2010 Policy Directive, clause 9.2 of the 2015, 2016 or 2017 Policy Directives or clause 9.3 of the 2019 Policy Directive (as applicable), or during the term of his or her employment contract.
Awards	<p>Collectively, the following industrial instruments:</p> <ul style="list-style-type: none"> (a) Public Hospital Medical Officers (State) Award 2014; (b) Public Hospital Medical Officers (State) Award 2015; (c) Public Hospital Medical Officers (State) Award 2016; (d) Public Hospital Medical Officers (State) Award 2017; (e) Public Hospital Medical Officers (State) Award 2018; (f) Public Hospital Medical Officers (State) Award 2019; and (g) Public Hospital Medical Officers (State) Award 2021.

Abbreviation	Meaning
Defence	Defence to the Second Further Amended Statement of Claim filed 19 December 2022
Defendant	The first defendant or, in the alternative, the second defendant.
Group Member	A person falling within paragraph 1(b) of the 2FASOC, including the plaintiff.
Junior Medical Officer	A person employed by the Defendant in the position of intern, resident medical officer, registrar and/or senior registrar at any time in the period from 16 December 2014 to 27 April 2022.
Meal Break Time	Time: <ul style="list-style-type: none"> (a) in respect of which a Junior Medical Officer is entitled to be paid, but has not been paid by the defendant, under clause 10 of the Award; and (b) which occurred during the Junior Medical Officer's first 80 hours of work in a fortnight; and (c) which met one of the following criteria, occurred during a shift: <ul style="list-style-type: none"> i. between 8:00 am and 6:00pm on a weekday, and was a meal break during which the Junior Medical Officer was required to work; ii. that commenced before 8:00 am or finished after 6:00 pm on a weekday; or iii. on a weekend.
Reply	Reply filed 2 July 2021

Common questions

Clause 9 of the Awards

1. For the purposes of clause 9 of the Awards, to establish that a Junior Medical Officer was "required by the employer to be in attendance at a hospital" during an alleged instance of unrostered overtime, is it sufficient that the instance falls within one of the categories of authorised unrostered overtime within clause 8.2 of the 2010 Policy Directive, clause 9.2 of the 2015, 2016 or 2017 Policy Directives or 9.1 of the 2019 Policy Directive (as applicable) – namely, that the Junior Medical Officer was:
 - a. treating a critically ill patient, or a patient whose condition had changed dramatically at the conclusion of the shift, and the unrostered overtime was undertaken until other adequate medical attention could be arranged;
 - b. treating a patient who required transfer, and the unrostered overtime was undertaken until the transfer process was completed;
 - c. already working in theatre and the procedure continued past the scheduled end of shift, and the unrostered overtime was undertaken until their responsibilities concluded;
 - d. responsible for the admission and/ or discharge of a patient at the completion of a shift, and the unrostered overtime was undertaken until their responsibilities concluded;
 - e. unable to complete outstanding patient transfer/discharge summaries during their normal rostered hours, or the task was unable to be handed over to

another medical officer to finish, and the unrostered overtime was undertaken until the documentation was completed;

- f. requested by a superior to attend a late ward round outside of their rostered shift, and the unrostered overtime was undertaken until their ward round responsibilities concluded or where it was feasible for this work to be handed over to another medical officer to complete;
- g. attending to ward round responsibilities that extended beyond the length of the shift, and the unrostered overtime was undertaken until their ward round responsibilities concluded or where it was feasible for this work to be handed over to another medical officer to complete;
- h. completing mandatory training outside of their shift at the direction of their employer;
- i. unable to undertake designated clinical handover within the shift, and the unrostered overtime was undertaken until clinical handover was completed;
- j. assigned to work in a hospital-based outpatient clinic and the clinic extends beyond the shift, and the unrostered overtime was undertaken until their clinic duties were completed?

(2FASOC [16]-[24]; Defence [24]-[27]; Reply [2])

2. For the purposes of clause 9 of the Awards, does “time worked” exclude alleged instances of unrostered overtime:
 - a. which do not fall within one of the categories of authorised unrostered overtime in clause 8.2 of the 2010 Policy Directive, clause 9.2 of the 2015, 2016 or 2017 Policy Directives or 9.1 of the 2019 Policy Directive (as applicable), and in respect of which a Junior Medical Officer did not obtain prior approval;
 - b. in respect of which a Junior Medical Officer took their allowed meal break;
 - c. in respect of which a Junior Medical Officer attended of their own volition;
 - d. in respect of which a Junior Medical Officer remained in attendance when formally released from the obligation to perform professional duties; or
 - e. in respect of which a Junior Medical Officer failed to submit a claim for payment within four weeks after the time was worked in accordance with clause 8.2 of the 2010 Policy Directive, clause 9.2 of the 2015, 2016 or 2017 Policy Directives or 9.3 of the 2019 Policy Directive (as applicable)?

(Defence [17](b), [24](c), [27]; Reply [2])

3. For the purposes of clause 9 of the Awards, where a Junior Medical Officer failed to submit a claim for payment of an alleged instance of unrostered overtime within four weeks after the time was worked in accordance with clause 8.2 of the 2010 Policy Directive, clause 9.2 of the 2015, 2016 or 2017 Policy Directives or 9.3 of the 2019 Policy Directive (as applicable), is the Junior Medical Officer taken:
 - a. not to have been “required by the employer to be in attendance at a hospital” during that instance;
 - b. to have been in attendance during that instance “of his/ her own volition”; or
 - c. to have been “formally released from the obligation” to be in attendance during that instance?

(Defence [24](d)(i); Reply [2])

4. As to the following categories of circumstances in which a Junior Medical Officer performed an alleged instance of unrostered overtime, when the Junior Medical Officer was:
- a. treating a critically ill patient, or a patient whose condition had changed dramatically at the conclusion of the shift, until other adequate medical attention could be arranged;
 - b. treating a patient who required transfer, until the transfer process was completed;
 - c. already working in theatre and the procedure continued past the scheduled end of the shift, until their responsibilities concluded;
 - d. responsible for the admission or discharge of a patient at the completion of their shift, until their responsibilities concluded;
 - e. unable to complete outstanding patient transfer/discharge summaries during their normal rostered hours, or the task was unable to be handed over to another medical officer to finish, until the documentation was completed;
 - f. requested by a superior to attend a late ward round outside of their rostered shift, until their ward round responsibilities concluded;
 - g. attending to ward round responsibilities that extended beyond the length of their rostered shift, until their ward round responsibilities concluded or where it was feasible for this work to be handed over to another medical officer to complete;
 - h. completing mandatory training outside of their rostered shift at the direction of their employer;
 - i. unable to undertake designated clinical handover within the rostered shift, until clinical handover was completed;
 - j. assigned to work in a hospital-based outpatient clinic and the clinic extends beyond the rostered shift, until their clinic duties were completed; or
 - k. preparing for a ward round which commenced at the beginning of their rostered shift;

to what extent are any or all of these circumstances determinative of whether the Junior Medical Officer was, for the purposes of clause 9 of the Awards, “required by the employer to be in attendance at a hospital” during that instance of alleged unrostered overtime?

In particular, if the Junior Medical Officer undertook the alleged unrostered overtime in one of these categories of circumstances, have they been “required by the employer to be in attendance at a hospital” in the absence of contrary evidence demonstrating that he or she attended “of his/ her own volition” or had been “formally released from the obligation to perform professional duties” on that occasion?

(2FASOC [16]-[24]; Defence [24]-[27]; Reply [2](f))

5. For the purposes of clause 9 of the Awards, to what extent are any or all of the following considerations relevant in assessing whether a Junior Medical Officer has been “required by the employer to be in attendance at a hospital”:
- a. the Junior Medical Officer was instructed or requested by a supervisor or superior to attend for work or remain at the hospital to undertake duties;
 - b. the Junior Medical Officer was allocated duties which are unable to be completed within their rostered hours because there was insufficient time to complete the duties and conduct handover;

- c. the Junior Medical Officer attends or remains in attendance at the hospital to complete work he or she was unable to complete during ordinary hours because of other duties;
 - d. the duties required to be performed by the Junior Medical Officer within their ordinary hours required preparation or familiarisation prior to the rostered start of their shift;
 - e. the Junior Medical Officer forms a professional opinion that attending or remaining at the hospital is necessary to provide appropriate treatment or care to a patient for whom they have responsibility;
 - f. there is a common or frequent practice of junior medical officers attending or remaining at the hospital for the purpose of undertaking a particular type or types of duties; or
 - g. work outside of rostered hours is being performed with the actual or constructive knowledge of the hospital or more senior medical officers.
- (2FASOC [16]-[24]; Defence [24]-[27])

Clauses 6 and 11 of the Awards

6. For the purposes of clauses 6 and 11 of the Awards, are Junior Medical Officers entitled to be paid for all time worked at the rate of:
- a. time and one-half (150%) for the first two hours worked in excess of 80 hours in a fortnight;
 - b. double time (200%) for all hours worked after the first two hours worked in excess of 80 hours in a fortnight; and
 - c. double time (200%) for all overtime performed on a Sunday?
- (2FASOC [7]-[9]; Defence [17]-[18])
7. For the purposes of clauses 6 and 11 of the Awards, are Junior Medical Officers entitled to be paid at overtime rates for all time worked in excess of 10 hours in any one shift, irrespective of the total number of hours worked in the respective fortnight. (2FASOC [8]; Defence [17]-[18])
8. Where a Junior Medical Officer was not employed for the whole of a pay period, in determining whether that Junior Medical Officer worked overtime within clause 11(i) of the Awards, does clause 6(vi) require the Junior Medical Officer's maximum hours under clause 6(i) to be pro rated for that pay period? (2FASOC [2](c)(i), [7]; Defence [5](a1), [17](b1))

Clause 10 of the Awards

9. For the purposes of clause 10 of the Awards, and having regard to clause 2.2 of the Ministry of Health Circular No. 83/250:
- a. does "Day Shift – Monday to Friday" mean any shift between 8:00 am and 6:00 pm on a weekday?
 - b. does "Shift Other than Day Shifts – Monday to Friday" mean any shift that either:
 - i. commences before 8:00 am or finishes after 6:00 pm on a weekday; or
 - ii. occurs on a weekend?

- c. if the answers to (a) and/ or (b) are “no”, what is the proper interpretation of the expressions “Day Shift – Monday to Friday” and “Shift Other than Day Shifts – Monday to Friday”?
(2FASOC [11], [13]; Defence [20]-[21])
10. In light of the answers to question 9 above, does clause 10 of the Awards require the defendant to pay Junior Medical Officers for:
- a. any meal break occurring during a shift between 8:00 am and 6:00pm on a weekday, in which the Junior Medical Officer was required to work; and/ or
 - b. any meal break taken during any shift that either:
 - i. commenced before 8:00 am or finished after 6:00 pm on a weekday; or
 - ii. occurred on a weekend?
- (2FASOC [9A]-[14], [28]-[29A]; Defence [18A]-[22], [30]-[31A])

Superannuation

If the answer to question 10 is yes or yes in part:

11. Pursuant to s 8(1) of the *Aware Super Act 1992* (NSW), is the defendant obliged to pay superannuation contributions in respect of Junior Medical Officers’ Meal Break Times?
(2FASOC [42DA]; Defence [42DA])
12. Pursuant to the *Superannuation Guarantee (Administration) Act 1992* (Cth), is the defendant obliged to take one of the following alternative steps:
- a. pay superannuation contributions in respect of Junior Medical Officers’ Meal Break Times; or
 - b. pay superannuation guarantee charge on the amount of the superannuation contribution that was not paid under (a)?
- (2FASOC [4AA], [4AB], [42C], [42E]; Defence [14B], [14C], [42C], [42E])
13. Is there utility in making the declaration contained in prayer 7 of the 2FASOC concerning whether the “ordinary time earnings” of Junior Medical Officers for the purposes of s 23 of the *Superannuation Guarantee (Administration) Act 1992* (Cth) includes unpaid earnings payable with respect to meal breaks?
(2FASOC [42G]; Defence [42G])

Estoppel

14. As a matter of law, can the doctrine of estoppel by conduct operate to curtail or extinguish Junior Medical Officers’ entitlements under the Awards to be paid for time worked, and/ or to bring a claim for underpayment in respect of that time?
(Defence [51]-[57]; Reply [4](p))
15. If the answer to question 14 is “yes”: where Junior Medical Officers engaged in Allegedly Disentitling Conduct, having regard to the answers to question 16 and any other relevant matters:
- a. did the Junior Medical Officers induce the defendant to assume, and did the defendant assume, that:

- i. in the relevant instances of unrostered overtime, the Junior Medical Officers were not or were not “required by the employer to be in attendance at a hospital” within clause 9 of the Awards;
- ii. in the relevant instances of unrostered overtime, the Junior Medical Officers attended the hospital “of [their] own volition” within clause 9 or the Awards; or
- iii. the hours that the Junior Medical Officers worked or were required by the defendant to work were only those specified in their timesheets plus any unrostered overtime they claimed within four weeks or during the term of the Junior Medical Officers’ respective employment contracts?

(Defence [51])

- b. were the Junior Medical Officers under a duty to correct any mistaken assumption that the defendant had as described in question 15(a)?

(Defence [52])

- c. did the Allegedly Disentitling Conduct amount to a representation by Junior Medical Officers that:

- i. in the relevant instances of unrostered overtime, the Junior Medical Officers were not or were not “required by the employer to be in attendance at a hospital” within clause 9 of the Awards;
- ii. in the relevant instances of unrostered overtime, the Junior Medical Officers attended the hospital “of his/ her own volition” within the meaning of clause 9 of the Awards; or
- iii. the hours that the Junior Medical Officers worked or were required by the defendant to work were only those specified in his or her timesheets plus any unrostered overtime he or she claimed within four weeks or during the term of the Junior Medical Officer’s employment contract?

(Defence [53])

- d. did the defendant act in reliance upon any mistaken assumption described in question 15(a) and 15(c)?

(Defence [54])

- e. did the Junior Medical Officers know that the defendant would, or intend for the defendant to, act in reliance upon any mistaken assumption described in question 15(a) and 15(c)?

(Defence [54A])

- f. was it reasonable for the defendant to make and rely upon any mistaken assumption described in question 15(a) and 15(c)?

(Defence [55])

- g. would the defendant suffer a detriment if the Junior Medical Officers were permitted to assert to the contrary of any mistaken assumption described in question 15(a) and 15(c)?

(Defence [56]; Reply [4](i))

- h. are the Junior Medical Officers estopped from asserting that:

- i. in the relevant instances of unrostered overtime, they were or were “required by the employer to be in attendance at a hospital” within the meaning of clause 9 of the Awards;
- ii. in the relevant instances of unrostered overtime, they did not attend the hospital “of [their] own volition” within the meaning of clause 9 of the Awards; or
- iii. the hours that they worked or were required by the defendant to work were not only those specified in their timesheets plus any unrostered overtime they claimed within four weeks or during the term of their respective employment contracts?

(Defence [1](c)(ii), [24](d)(ii), [57])

16. Further to question 15:

- a. Did the defendant have actual or constructive knowledge that Junior Medical Officers were working unrostered overtime without being paid for that time, or without making claims for that time?

(Reply [4](j))

- b. Having regard to the answer to question 2, were clauses 8.1 – 8.2 of the 2010 Policy Directive, clauses 9.1 – 9.2 of the 2015, 2016 and 2017 Policy Directives and 9.1 – 9.3 of the 2019 Policy Directive misleading?

(Reply [2](i))

- c. Did the defendant fail to keep adequate records of hours worked by Junior Medical Officers that would permit it to investigate or verify claims for unrostered overtime?

(Defence [56](aa))

- d. Did the defendant obtain a benefit when Junior Medical Officers worked unrostered overtime?

(Reply [4](i))

17. With respect to questions 1 – 16 inclusive, are the answers common to (a) all Group Members; (b) some Group Members and, if so, which ones, or (c) no Group Members?