



DECISION

Fair Work Act 2009

s.158—Application to vary or revoke a modern award

Aged Care Award 2010

(AM2020/99 and AM2021/63)

Nurses Award 2020

(AM2021/63)

Social, Community, Home Care and Disability Services Industry Award 2010

(AM2021/65)

DEPUTY PRESIDENT ASBURY

DEPUTY PRESIDENT O'NEILL

COMMISSIONER BISSETT

BRISBANE, 21 FEBRUARY 2023

Applications to vary modern awards – work value – Aged Care Award 2010 – Nurses Award 2020 – Social, Community, Home Care and Disability Services Industry Award 2010 – Stage 2 – interim increase – draft determinations published.

Background

[1] This case deals with 3 applications to vary modern awards to increase the minimum wages of aged care sector workers:

- AM2020/99 – an application by the Health Services Union (HSU) and a number of individuals to vary the minimum wages and classifications in the *Aged Care Award 2010* (Aged Care Award)
- AM2021/63 – an application by the Australian Nursing and Midwifery Federation (ANMF) to vary the Aged Care Award and the *Nurses Award 2010*, now the *Nurses Award 2020* (Nurses Award), and
- AM2021/65 – an application by the HSU to vary the *Social, Community, Home Care and Disability Services Award 2010* (SCHADS Award) (the Applications).

[2] On 4 November 2022, a differently constituted Full Bench published a Decision in relation to the Applications (the *Stage 1 decision*).

[3] The Full Bench in the *Stage 1 decision* determined to deal with the Applications in three stages, with the *Stage 1 decision* concluding the first stage of this process. In the *Stage 1*

decision, the Full Bench concluded that the evidence established that the existing minimum wage rates in the Aged Care Award, the Nurses Award and the SCHADS Award (the Awards) do not properly compensate workers engaged in the provision of direct care to aged persons, in either residential facilities or in-home settings, for the value of the work performed. These workers, termed ‘direct aged care workers’, included personal care workers under the Aged Care Award, home care workers who work in aged care under the SCHADS Award, and Registered Nurses, Enrolled Nurses, Assistants in Nursing and Nurse Practitioners who work in aged care under the Nurses Award.

[4] The Full Bench in the *Stage 1 decision* noted the submission by the Joint Employers that an increase in wages for Head Chefs/Cooks is justified for work value reasons and directed the parties to confer in relation to this issue. The Full Bench indicated in relation to Head Chefs/Cooks that if there was agreement upon the quantum of any increase and the classification(s) to which it applies, further consideration would be given to determining an interim increase for those workers.

[5] In the *Stage 1 decision*, the Full Bench decided that an interim increase of 15 per cent to modern award minimum wages applying to direct aged care workers was ‘plainly justified by work value reasons’, pursuant to s.157(2)(b) of the *Fair Work Act 2009* (the Act). The Full Bench also expressed *provisional* views in respect of whether the interim increase is necessary to achieve the modern awards objective and minimum wages objective at ss.134(1) and 284(1) of the Act, respectively.

[6] The Full Bench noted that determination of an interim increase for direct aged care workers would not conclude its consideration of the unions’ claim for a 25 per cent increase for other employees, namely administrative and support aged care employees, nor did it necessarily exhaust the extent of the increase justified by work value reasons in respect of direct aged care workers.

[7] The Full Bench noted that Stage 2 of the proceedings would consider submissions and evidence in relation to:

- the timing and phasing of the interim increase to modern award minimum wages applicable to direct care aged care employees, including the appropriateness and application of the principles canvassed at [974]–[990] in the *Stage 1 decision*;
- whether making the interim increases to modern award minimum wages applicable to direct care aged care workers in these proceedings is necessary to achieve the modern awards objective and the *provisional* views outlined at [1001]–[1072] in the *Stage 1 decision*; and
- whether the interim increases to modern award minimum wages applicable to direct care aged care workers are necessary to achieve the minimum wages objective and the *provisional* views outlined at [1073]–[1083] in the *Stage 1 decision*.¹

[8] This decision concerns Stage 2 of these proceedings.

Stage 2 proceedings

[9] As a result of the resignation of former President, Justice Ross, effective 18 November 2022, the Full Bench in these proceedings was reconstituted. On 23 November 2022, the reconstituted Full Bench issued directions for filing materials in relation to Stage 2.²

[10] In addition to directing parties to file submissions and evidence regarding the matters listed at [7] above, the Full Bench invited the parties to file submissions and evidence regarding any consultation that occurred between them in respect of whether the interim increase should apply to Head Chefs/Cooks and Recreational Activities Officers/Lifestyle Officers under the Aged Care Award.

[11] On 6 December 2022 the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Secure Jobs, Better Pay Act) received Royal Assent. As we observed at that time, a number of amendments to the Act arising from the Secure Jobs, Better Pay Act are relevant to these proceedings.

[12] As a result of these amendments, the directions for filing in relation to Stage 2 were amended to allow parties to file in relation to those matters.³

[13] The matter was listed for hearing before us on 13 February 2023.

Stage 2 decision

[14] What follows is our decision in relation to the issues to be considered during Stage 2 of these proceedings. Further written reasons of the Full Bench will follow.

[15] We confirm our view that the evidence establishes that the relevant existing minimum wage rates in the Awards do not properly compensate direct care workers in either residential or in-home aged care settings, for the value of the work performed. We are satisfied that the requirements of s.157(2) of the Act are met in relation to direct care workers.

[16] We are satisfied that the requirements of s.157(2) of the FW Act are also met in relation to employees engaged and classified as Head Chefs/Chefs/Cooks at levels 4 – 7 or as Food services supervisors engaged and classified at level 7 provided the individual employee is the single most senior food services employee engaged in a facility and to Recreational Activities Officers/Lifestyle Officers at all levels.

[17] We are satisfied that an interim increase of 15 per cent to modern award minimum wages in these proceedings is necessary to achieve the modern awards objective and the minimum wages objective in relation to the following employees:

- direct care workers under the Awards and;
- Head Chefs/Cooks under the Aged Care Award (aged care employee level 4-7 provided the employee is the most senior chef or cook engaged in a facility) and;
- Recreational Activities Officers/Lifestyle Officers under the Aged Care Award.

[18] In making this decision, we have taken into account the object of the FW Act, pursuant to s.3, and the rate of the national minimum wage as currently set in a national minimum wage order, pursuant to s.135(2) of the FW Act.

[19] We have determined that the interim increase will take effect from 30 June 2023. Pursuant to s.166(2) of the FW Act, we are satisfied that it is appropriate to specify this date.

[20] Draft determinations giving effect to the interim increase will be published with this decision. Interested parties are directed to file any comments in relation to the draft determinations no later than **Wednesday 1 March 2023**.



DEPUTY PRESIDENT

Appearances:

Mr M Gibian SC and Mr L Saunders (of counsel) on behalf of the Health Services Union

Mr J McKenna and Mr J Hartley (of counsel) on behalf of the Australian Nursing and Midwifery Federation

Ms L Harrison on behalf of the United Workers Union

Mr G Taylor on behalf of the Australian Workers Union

Mr N Ward on behalf of Aged & Community Care Providers Association Limited and Australian Business Industrial

Mr Y Shariff SC and Mr D Fuller (of counsel) on behalf of the Commonwealth

Hearing details:

Melbourne

2023

13 February.

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¹ [\[2022\] FWCFB 200](#) at [1091].

² [\[2022\] FWCFB 214](#)

³ Amended directions, 6 December 2022.