TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009 1057215

JUSTICE ROSS, PRESIDENT

AM2014/207

s.156 - 4 yearly review of modern awards

Four yearly review of modern awards
(AM2014/207)
Nurses Award 2010

Melbourne

4.04 PM, TUESDAY, 27 AUGUST 2019

PN1

JUSTICE ROSS: Can I have the appearances please in Melbourne?

PN2

MS K WISCHER: Thank you, your Honour. Wischer, initial K, for the ANMF and I have Crute, C-r-u-t-e, initial D, with me also from the ANFM federal office.

PN3

JUSTICE ROSS: Thanks, Ms Wischer. In Sydney?

PN4

MS J FIELD: Field, initial J, for the Aged Care Employers. Leading Aged Services Australia and Aged and Community Services Australia.

PN5

JUSTICE ROSS: Thank you, and in Brisbane?

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MR B FERGUSON: Sorry, Ferguson, initial B, for the Australian Industry Group.

PN7

JUSTICE ROSS: Thanks, Mr Ferguson. In Brisbane?

PN8

MS L HEPWORTH: Hepworth, initial L, and Fisher, initial L, for the Private Hospital Industry Employer Associations.

PN9

JUSTICE ROSS: Right, have I missed anybody? No? So the conference arises out of correspondence received from the ANMF on 13 June this year, which referred to a decision of a majority Full Bench in the Domain Aged Care appeal, which had expressed the view that the weekend penalties for casual employees in the Nurses Award are calculated using a compounding method rather than an accumulative method.

PN10

The ANMF proposed some variation to the exposure draft for this award. I published a statement on 31 July setting out the background and the redraft proposed by the ANMF and inviting reply submissions by Tuesday, 13 August. Submissions were received from the Private Hospital Industry Employer Association and Ai Group, both of whom oppose the ANMF's proposed redrafting of the exposure draft.

PN11

Really the question now is well how are we going to resolve this issue? I think it goes beyond the exposure draft, it's whether the award should be varied to reflect the position put forward by the union or not, and the question that's raised both by the Appeal Bench majority decision and by some of the submissions opposing the union's proposal is that well, one way of dealing with it would be an application by the union under section 160 to resolve an ambiguity in the award. Another

way would be for the union to make an application under section 157 of the Act. I don't think any technical issue arises as to whether this arises in the review or not. There are other avenues for you to pursue the issue you want to pursue.

PN12

What is clear is that the employer interests are opposed to the resolution of the issue in the way that you're putting forward, so we need some sort of arbitral process to sort it out. So really in some ways it's back in your court. I'm not going to vary the exposure draft just on the basis that a party wants it but another party doesn't. There needs to be - Ai Group's put in issue, I think I'm right about this Mr Ferguson, or it might be the Private Hospital Employers that they're not necessarily sure that your solution is an appropriate translation, even if they agree with what you say the award should say. Others suggest that the majority in the Appeal Bench are wrong and we should follow the earlier decision. In the normal course you'd follow the most recent decision, unless you think it's plainly wrong but a party ought not be precluded from arguing that point at some point.

PN13

So how do we sort it? I think probably the easiest way is for the union to give some thought to what sort of application it wants to make so we can have a vehicle for giving everyone an opportunity to be heard about this, and then a decision. I think Ai Group also raises the question about retrospectivity of any decision and the like. I think those matters can all be dealt with by whatever Full Bench is going to be constituted to deal with whatever application you want to make.

PN14

A short version is I don't think there's much I can do, certainly not sitting alone to resolve the issue between the parties. I think we need a proceeding to do that. I think it goes beyond the issue in the exposure draft and it's a matter really that is for the union to consider which way they want to go forward, and whether it's 157, 160 or another process that I've not thought of is really a matter for you. Then all of the employer interests would have an opportunity to respond to whatever you wanted to say in support of whatever application you make.

PN15

Have you got any questions and then I'll go to the employers to see whether they wanted to add anything?

PN16

MS WISCHER: Thank you, your Honour. I think one of the genesis, I suppose, of making this application of putting forward the letter does arise from the Domain Aged Care decision, and my reading of it is that that Full Bench made a very - with reference to the Nurses Award as it currently is - made a very clear finding at a couple of points that 10D(4) is clear and that they find that there is no ambiguity. To that extent - - -

PN17

JUSTICE ROSS: They do refer to an application under section 160 though as being a way forward.

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MS WISCHER: A way forward, yes, your Honour, that's true. But I would like to explore, I suppose, if we say that - if we accept that decision that that clause is clear then my position, I suppose, and I understand that we might need to do more in order to change the exposure draft, but that the exposure draft now does not reflect the current terms of the current award that this Full Bench have said are clear and unambiguous.

PN19

JUSTICE ROSS: So an alternate way forward which doesn't require the parties to agree about what it means is you can simply replicate in the exposure draft what the current award says.

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MS WISCHER: Yes, your Honour.

PN21

JUSTICE ROSS: No, well that's - and then you would contend in whatever other proceedings there might be that that provision should be interpreted in this way in accordance with the majority. The employers would take whatever view they want to take. In the normal course, the exposure drafts are not intended to change the legal effect of any award provision, so on the face of it I'll put this to the employers. What is wrong with simply replicating the current award terms, dealing with the casuals and weekend penalties and the like, saying exactly what it says in the award now, putting that in the exposure draft and if anyone thinks there's an ambiguity they can argue that. Or if you want an interpretation you can go up to the Federal Court and get one.

PN22

We're not changing - that would involve the Commission, or me, or whoever's doing the exposure draft making no decision about what it means but simply saying that well, it's just replicating what is in the current award and what it means is a matter that can be - I understand the union's position, relying on the - their interpretation of the majority. The employers take a different view. It defers that issue perhaps for another day but we can't make a final determination about the meaning of an award in any event. That'd be a matter for a court at some point. That would seem to be another way forward. What do the employer parties think about that?

PN23

MS HEPWORTH: Your Honour, it's Hepworth, L, on behalf of the Private Hospital Industry Employer Group. It was identified fairly early on in the modern award process that the clause relating to the casual loading on weekends did introduce some confusion with regards to how it should be calculated. The parties at that time had agreed with Watson's VP interpretation that the penalty was not to apply on the penalty, so therefore it was to be an accumulative situation, not compounding. Because of that the parties came together to clarify what was to occur on weekends, and that clause that is in the exposure draft was agreed to in July 2016, and had the exposure draft been finalised by now we wouldn't be here today, because there wouldn't have been the case that we're referring to with

ANMF v Opal Care. Because the understanding would have been clear with regards to how the casual loading was to apply.

PN24

To go back to what it was previously in the award is to ignore the history that led to the change and the reasons for it, and as we were party, Ms Fisher and myself were party to the original discussions back in 2012 to 2016 which led to the change, such a removal of the outcome of the agreement would be to ignore the history and all the work that had been done during that period.

PN25

JUSTICE ROSS: I understand what you're saying but your proposition would be to ignore the majority decision in a recent Appeal Bench.

PN26

MS HEPWORTH: Yes, it would and my reasoning for that would be because they were referring to the modern award and were not looking at the history that had gone into the exposure draft to clarify how the casual loading was to be worked out. Vice President Watson, the original unions and the employer groups were all familiar with the pre-reform awards and the intent from those awards. The modern award objective was not to increase costs to employers and this -I guess the unintended consequence of the loose drafting of the modern award introduced that confusion which led to the parties coming together to clarify the original intent of how it was to work.

PN27

JUSTICE ROSS: A couple of points in relation to that: 1) It's not a party's exposure draft, it's in the control of the Commission. 2) Any changes to the exposure draft have not affected your legal obligations or rights at all because it doesn't have any legal status. Until the award is varied there is no change to the existing award provision, and the exposure draft was not intended to change substantive legal rights. That's been very clear through the process.

PN28

It seems to me that the union's proposition would defeat - if granted and we varied the exposure draft in the way the union said in its correspondence it defeats your right to run an argument about what is the appropriate provision. Leave aside what the current award means, what should it say? What's the merit argument. Similarly, your proposition defeats the right of the union to now having seen what a Full Bench says, and a Full Bench plainly overrides a single member's view, what a Full Bench has said this clause means.

PN29

I don't intend to proceed in a way that will negate either your rights or the union's rights to have this issue argued. Whatever the history, it ought to be argued as a matter of merit; what should the provision be? That can take into account the history, can take into account the Appeal Bench decision but there has to be a process for dealing with that. Your proposal, much like the union's proposal, would get to an end point that suits your interests but it doesn't allow for the full exposure of the views.

PN30

I don't see - it shouldn't be limited to is it ambiguous what it meant? That's relevant, of course. What it originally meant in the pre-reform and the history is relevant but ultimately it is as a matter of merit, does that turn achieve the modern award objective? That's what the review is about. So one way or another we're going to have that debate. It's really what's the vehicle to have that debate so everyone can be heard in relation to it. Rather than a course of action which means you agreed to it before, albeit without the benefit of a Full Bench's decision on it, and you're stuck with it.

PN31

Well I've heard plenty of employers argue the contrary when they've been in that position and ultimately that's not the way we're going to conduct the review. It's whether the award achieves the modern award objective and whether in that every party has an opportunity to say what they want to say about it. I'm not going to adopt a pre-emptive approach, either the one advocated by the union or the one that you're advocating. So one way or another we'll have a process, it'll be heard and determined.

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MS HEPWORTH: Understood thanks, your Honour.

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JUSTICE ROSS: The fact that you may have reached an agreement is not binding on me, or the Commission, or anybody else. It's a fact that you can raise in your submissions but it's not - these are common rule awards, they're not interparty proceedings, they're not in settlement of an industrial dispute, so whilst it's relevant, it's not binding and determinative.

PN34

MS HEPWORTH: Thank you.

PN35

JUSTICE ROSS: In Sydney?

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MR FERGUSON: Mr Ferguson, your Honour.

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JUSTICE ROSS: Yes.

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MR FERGUSON: I think you succinctly summarised some of our points. We had a view respectfully that - - -

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JUSTICE ROSS: I can't hear you, Mr Ferguson, you might just need to speak - - -

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MR FERGUSON: Sorry. We had a view respectfully that the Full Bench's decision in that matter was wrong.

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JUSTICE ROSS: Yes.

PN42

MR FERGUSON: We obviously disagreed with the interpretation. We rather gathered, given the positions adopted by the parties that we were going to be on a process where we'd be at loggerheads, there'd be some sort of arbitral process to determine a way forward. We've proposed in that context that one option might be for the Commission either of its own notion, in the context of the review, to utilise section 160 to vary the award to remove an ambiguity or an uncertainty. I hear what you're saying today and we would probably just give thought to whether we'd want to be the moving party to drive that process if it weren't - - -

PN43

JUSTICE ROSS: Yes, can I just raise an element of caution about the ambiguity point, Mr Ferguson.

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MR FERGUSON: Yes.

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JUSTICE ROSS: This is for each side in this debate. That might end up with a result that's an unhappy one for one side or the other. In the normal course you would vary an ambiguity from the time it arises. If a Full Bench is against you and finds that the majority was correct and then retrospectively varies the award, that might have significant cost implications. Similarly for the union, that might preclude an argument that you might want to take about whether there was an accrued entitlement to certain benefits on a particular construction of the award.

PN46

I think you need to give some thought to whether you are, for example, there would be no difficulty if this was the position that the parties were put in, in either a party making an application under 157 or asking the Commission of its own motion to review this particular provision in this award under 157, and then inviting a merit argument that can canvass all of the issues that each of you have raised. The award history, the agreement, the Appeal Bench decision, the proper construction of the current provision and merit considerations that, for example, irrespective of what the proper construction is, if you want to say well that might be what it is interpreted as but we don't think that's fair, therefore we would contend for a particular - another construction. From the employer perspective, we don't think the compounding penalties is a fair outcome in the context of the modern award objective, therefore the Commission as a matter of merit should adopt a cumulative approach.

PN47

There are a number of arguments you can run in a 157 that you're not going to be able to run in a 160.

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MR FERGUSON: Yes.

PN49

JUSTICE ROSS: I think - and look, from my perspective, I'm more interested in well, what's the best process to allow people to canvass any argument they want to put and allow the matter to be determined on the basis of all of that material. I think each of you need to think carefully about the process and how that might limit your argument, so I think you should give that some thought.

PN50

MR FERGUSON: I hear what you say. I note we'd stopped short of saying that we were intent on pursuing the 160 application ourselves.

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JUSTICE ROSS: Yes, you did, yes.

PN52

MR FERGUSON: We would give thought to what not pursing that and dealing with it in that other way, on a merit based argument, might mean in terms of cutting off future avenues to have the current situation addressed retrospectively, but we'd want to give some thought to that.

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JUSTICE ROSS: Yes.

PN54

MR FERGUSON: That's why we take that slightly more cautious approach, but we had rather gathered given the position of the parties that we were perhaps going to end up in a 160 type argument anyway.

PN55

JUSTICE ROSS: Yes.

PN56

MR FERGUSON: The only thing I'll say in relation to your Honour's proposition in relation to the exposure draft and amending it to reflect the current provisions of the award, I would assume that there might be multiple provisions that need to be amended.

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JUSTICE ROSS: Yes.

PN58

MR FERGUSON: To maintain the status quo, if you were, because of the interaction between clauses. Then there'd obviously also need to be a decision to, you know, not revisit the table or to revisit the tables at the back and not include those. We'd just need to think through all of that so we weren't harming anyone's position.

PN59

JUSTICE ROSS: Yes. No, I agree Mr Ferguson. I think - look and also frankly, I don't think fixing the exposure draft is the issue here.

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MR FERGUSON: No, no.

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JUSTICE ROSS: It's trying to work out what should the award say. I should also say there's nothing to preclude a party applying under both 157 and 160.

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MR FERGUSON: That's what I was thinking.

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JUSTICE ROSS: Yes. That gives you the option of retrospectivity if that's, you know, seen to be appropriate. I think it's got a level of complexity and from my perspective I don't want to adopt a course that's going to preclude a party from putting the range of submissions they want to put. So I'm not attracted to resolving this through some decision about the exposure draft. I don't think that's a proper arbitral process.

PN64

MR FERGUSON: No.

PN65

JUSTICE ROSS: Exposure draft process to date has been largely administrative with some Full Benches determining technical and drafting issues. This is a much more significant issue for the parties in practice and there ought to be a proceeding on foot that allows you to run all of the things that you've been alluding to this afternoon.

PN66

Nor do I want to, you know, pin anyone down now about well, is it the money or the box? Is it 160, what do you want to do? I'll get the transcript of the conference provided to each of you. You can take what advice you wish. I'll have a short mention probably in three or four weeks and I'd encourage the employer parties to discuss the matter amongst themselves as well, and hopefully reach a common view about how they wish to proceed. Similarly the union can take whatever advice it wants to and give some thought to the implications. Then we'll come back and you can let me know how you want to deal with it. But all I wanted to do at the moment is confine your options a bit. I don't think there's going to be a quick way home is the short version. I don't think me amending the exposure draft is the right thing to do, given the contest and the issues raised. So we need a process, it's really I think giving some thought to what that might be.

PN67

I'd also encourage you to have discussions between the groups. It may be that you agree, for argument's sake, that the Commission brings it on of its own motion under sections X and Y and the parties are at liberty to argue all of these issues. So you make it very clear that this is what you're going to canvass so that it's clear upfront that you're not going to be bumping into technical problems where a party's going to jump up and say no, you can't argue that in this case. Everyone will be clear about what they're going to be advancing and there's been some indication of that now from the employer perspective. They want to rely on the award history, the Vice President's decision, the subsequent agreement and that

was the basis on which parties were going forward. They also want to contend that the majority in the appeal decision were incorrect in their construction of the provision, and no doubt they want to also argue issues around the modern award objective and the merit.

PN68

Similarly from the union's perspective it's got a different way which is looking at the timing, the majority decision was correct, should be followed and applied, and as a matter of merit should be applied as well. Not only are they right on construction, they're right on merit. It's the converse of the employer argument. So it's really trying to find a way of allowing you to run the case you want to run and hopefully getting an answer that provides clarity for everybody. All right? Any other questions? Any other issues anyone wants to raise? Yes, Ms Wischer.

PN69

MS WISCHER: Thank you, your Honour. Just as I suppose a hypothetical and possibly an unlikely one, but if no party made an application what would then occur with the exposure draft?

PN70

JUSTICE ROSS: Well, it would in the normal course and I'll be part of a Bench issuing a statement or a decision shortly dealing with how we're going to translate the exposure drafts in three tranches into award variations, and that provides for a process of final comment et cetera. I don't think the Nurses Award is in tranche one, probably a later tranche but really that process is about this sequence. That in February we published the exposure drafts, there were comments on some, we'll resolve those through a process, and then those exposure drafts have been updated for subsequent Full Bench decisions dealing with NES inconsistences, standard clauses and the like.

PN71

It's really an exercise of updating the exposure draft to reflect the decisions that have occurred since February and then converting it into a variation determination. It doesn't mean the review's necessarily complete for that award but we've got a chunk of that out of the way, because we've updated all the wage rates for the Annual Wage Review decision.

PN72

I'm not sure that is necessarily going to provide you with the avenue to raise the issue that you want to raise and the exposure draft would be the exposure draft that's currently published. Because I wouldn't be touching that in relation to this issue, because whichever way you go you would have to express a view and that's not something I'd want to do without argument.

PN73

MS WISCHER: No. Thank you, your Honour.

PN74

JUSTICE ROSS: Anybody else?

PN75

MR FERGUSON: No, thank you.

PN76

JUSTICE ROSS: Well, have a think about it. I'll get the transcript and my Associate will make sure each of you get it and we'll come back in about four weeks and just see where you're up to at that stage. Thanks very much. I'm sorry there's no answer that's necessarily going to be satisfactory for anyone at this stage but it does have a level of complexity and I want to make sure that your right to run the argument you wish is protected and given an opportunity. Thanks, I'll adjourn.

PN77

MR FERGUSON: Thank you, your Honour.

PN78

MS WISCHER: Thank you, your Honour.

PN79

MS HEPWORTH: Thank you, your Honour.

ADJOURNED INDEFINITELY **[4.31 PM]**