Fair Work Act 2009
s 156 – 4 yearly review of modern awards

IN THE MATTER OF A REVIEW OF THE SUPPORTED EMPLOYMENT SERVICES AWARD 2010
AM2014/286

POSITION PAPER OF THE ASSOCIATION OF EMPLOYEES WITH A DISABILITY INC (AED), HEALTH SERVICES UNION (HSU), UNITED WORKERS' UNION (UWU) AND THE AUSTRALIAN COUNCIL OF TRADE UNIONS (ACTU)

Introduction

1. This joint position paper is filed pursuant to paragraphs 1(b) and 2 of the directions made by the Full Bench dated 15 February 2022. The position disclosed in this paper is not intended to offer a position in relation to jurisdictional objections that the AED wishes to press. The other employee parties will identify their position in respect of those objections separately.

2. For ease of reference, the parties to this position paper are referred to as the "employee parties."

3. In a statement dated 31 January 2022, the Full Bench summarised the course of proceedings from the date of their decision dated 3 December 2019 (the **December Decision**).[1] Reference was made in [3] to a further decision dated 30 March 2020 which explained that the purpose of the trial foreshadowed in the December Decision:

> [W]as to assist the Commission in determining whether the SES Award should be varied to include the wages structure we indicated we preferred in the principal decision.[2]

4. The trial has now concluded and the report has been published. In their statement, the Full Bench identified in [9] a non-exhaustive list of potential issues arising from the report. The employee parties intend to address issue (2) in [9] of the statement, but principally focus, in this paper, on the "should" question posed in the above extract. Insofar as the preferred wages structure includes the wage classifications labelled grade A and B and ambulatory provisions, the employee parties' position is that the trial report supports a finding that the SES Award should not be varied to give effect to that preference.

5. The wages structure described in the December Decision as the "preferred approach" has essentially two aspects. First, grade A and B would provide for a wage below the National Minimum Wage for a subset of "employee with a disability"[3] identified by criteria contained in proposed clause B.1.1 of Annexure A. Second, an ADE employer could

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1 [2019] FWCFB 8179.
2 [2020) FWCFB 343 at [3].
3 The phrase is defined in section 12 of the FW Act by reference to most but not all the criteria specified by sections 94(1) and 95 of the *Social Security Act* 1994 for eligibility to the Disability Support Pension.

then apply the SWS (in the modified form provided for in SES Award) to determine the paid rate up to what in reality would be a maximum dollar amount per grade.[4]

6. The employee parties' position focuses on the first aspect of the "preferred approach."

The employee parties basic position

7. The overarching position of the employee parties is that:

   (a) The classification structure of the Award should include 7 grades (from 1 – 7).

   (b) Grade A and Grade B (and related provisions) should not be introduced.

   (c) The SWS (in the form contained in the SES Award) should be available to measure productive capacity for "employees with a disability"[5] covered by the SES Award. Indeed, for all practical purposes this is necessary to engage that statutory concept.[6] The trial report generally upheld the reliability of the SWS in its modified ADE form. Insofar as it recommended changes, an assessment is required to determine which, if any, recommendations require textual alterations to the SES Award.

   (d) No existing ADE employee should suffer a reduction in remuneration as a result of any changes arising out of these proceedings.

Supporting Reasons

No case for including grades A and B

8. The Act prescribes a high threshold for inclusion of terms in awards. Prospective terms must be necessary to achieve the modern awards objective in section 134(1) and the minimum wages objective in section 284(1) of the FW Act.[7] Those objectives require the Commission to "ensure"[8] and "establish"[9] a fair (and relevant) safety net pertaining to minimum wages (the **Inclusion Threshold**) by reference to a non-exhaustive list of statutory matters.

9. The trial report does not enable the Full Bench to conclude that the grade A and B classification terms meets the Inclusion Threshold. There are several reasons for this position.

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4 The employee parties recognise however that the "preferred approach" contemplates that the SWS could be available in respect of any covered employee with a disability classified under any of the work classifications in the SWS Award.

5 As defined in section 12 of the *Fair Work Act* 2009

6 Section 94(1)(c)(ii) of the *Social Security Act* 1994. The alternative criterion in subsection (c)(i) requires the Secretary to be satisfied of each element of the more nuanced and complex concept "continuing inability to work" for each employee before there is eligibility, at least for those to whom section 94(1) applies. Section 95(1) applies only to persons who are legally blind.

7 Section 138.

8 Section 134(1).

9 Section 284(1).

10. The report offers no insight into whether the wage outcomes it reports upon correctly reflects the kind of work contemplated for grades A or B (or another grade). No information is available from the report that would enable the Full Bench to discern how the "gateway requirements" in clause B.1.1 of Annexure A were applied or what duties or level of supervision were considered for that purpose. The authors of the trial report state that it was not possible to assess the accuracy of the wage grading process,[10] but nonetheless include in the report observational information from undisclosed ADE staff that suggests wage grading could have been inaccurate and that the work, the subject of trial, could have been classified within multiple classifications, ranging from grade A to grade 2. Further, the wage outcomes reported by the trial itself imply misclassification.

11. For grades A and B, classification is to occur in two steps. First, by matching a particular person to a particular position that has been created for that person. The position is to comprise duties and a level of supervision matched to that employee according to the particular circumstances of their disability. The degree of customisation implicit in the first step logically suggests that productively outcomes would be at or near 100%. However, the authors of the trial report found that, following application of the SWS, less than 10% of the supported employees in the sample achieved 100% and that the average overall productivity outcome was well below this, at 61%. This implies an error in design, or at least significant misclassification of the gateway requirements, the work captured by grades A and B or all three.

12. Further, the wages outcomes imply that the work was not adjusted, or not adjustable, to a degree that resulted in it meeting the descriptors for grades A and B. Indeed, the authors of the trial report concede that the work may not have been representative. A limitation reported by the authors was the possibility the sample of ADEs and employees, and it must follow the work the subject of valuation, was unrepresentative.[11] This is matter of potential significance. Beyond recording the possibility though, the authors offer no insight into the degree of likelihood.

13. Both implications stand in the way of a conclusion that variation of "minima" below the National Minimum Wage by the addition of grades A and B can be justified on work value grounds or that it should be accepted that "minimum wages" for the affected cohort of "employees with a disability" should be determined on a basis that is different and less beneficial than other Australian employees. This is bolstered by the finding in the trial report that 25% of sampled employees would be paid less under the "preferred approach," but for the Full Bench's commitment not to reduce existing wages for existing employees.

14. There are least four consequences of the foregoing:

    (a) The Full Bench cannot know how the "preferred approach" was applied or whether it was applied as intended;

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10 Trial report, 109.

11 Trial report, 39.

(b) The Full Bench cannot know whether the "preferred approach" operates fairly or relevantly to determine a minimum wage for supported employees in relation to work that would be or could be covered by the grades A or B.

(c) The aforementioned probably alter the basis for the conclusions contained in [377] of the December Decision as to the matters referred to in subsections 134(1)(a), (c), (f) and (g) of the FW Act, and the corresponding matters in section 284(1)(a) to (d).

(d) The Full Bench's ability to evaluate the trial outcomes for the purposes of determining whether the grade A and B terms meet the Inclusion Threshold is materially impaired, probably fatally.[12]

15. Additionally, the trial report contains information that precludes the Full Bench from concluding, to the requisite standard, that the wage outcomes it discloses align with the equal remuneration principle referred to in section 134(1)(e) of the FW Act.

16. The trial report outcomes shown in table A9,[13] whilst presented at a high level, show that the wage outcomes for women were worse than men.[14] It is true that men dominated the supported employee sample (by about double), albeit that dominance was not proportionately uniform throughout each of the classifications.[15] The dominance of men in the sample is not necessarily dispositive though because grades A and B (unlike the other award classifications) rely on matching particular duties to employees with particular disabilities. This has the potential to obscure the effects of wage differences between men and women, which, in turn, makes satisfaction of the equal remuneration principle difficult. At present, the available information from the trial report indicates the existence of wage disparity that may violate the equal remuneration principle.

The impact and relevance of overall wages costs

17. The Full Bench gave great weight in the December Decision to the viability effects of overall labour costs, citing this factor as foremost in their consideration,[16] and singling out overall labour costs in [379] of that decision as the focus of the trial.

18. The employee parties consider that, in deciding how to approach the determination of minimum wages for disabled employees covered by the SES Award, the Full Bench assigned disproportionate weight to the impact on ADE employers of increases in their employees' "minimum" wages. The trial report does not afford a sound basis for the Bench to maintain this conclusion.

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12 A factor bearing on fairness and relevance in this context is the inability of the Commission to safely assume that a grade A or B classified employee aggrieved by their employer's classification decisions can avail themselves of industrial processes and procedures, such as dispute resolution, to resolve a dispute. The trial report supports this proposition: Trial report, 44. Indeed, it states that very few supported employees had been informed of grades A and B by ADE staff, but were interested in their overall wage outcome.

13 Trial report, 155.

14 Trial report, 63.

15 For instance, many more men than women were classified at grade 2 and above.

16 At [246].

19. The limitations identified in the trial report pertaining to the financial modelling undermines the Bench's ability to make definitive impact findings. At least for the modelling, the basis for the general "level of confidence" expressed by the authors is opaque. The authors concede the possibility that the ADE sample was unrepresentative (but, as has been observed, offer no explanation of the likelihood of this potential); accept that NDIS pricing could be positive **or** negative; express unspecified "concerns" about the quality of the financial data provided by sampled ADEs; state that no ADE provided comparable wage data, which rendered a comparison between existing and trial wage grades impossible; and implicitly accept the possibly of mis-classification.[17]

20. Tellingly, the consultants who conducted the financial viability assessment expressly characterise their findings as estimates and state that those estimates, "should be interpreted with caution given the assumptions that had to be made in the modelling and the potential influence of other factors on wage outcome."[18]

The quantum of grades A and B

21. It follows from the position advanced so far that the employee parties' consider that there is no utility in further considering the quantum of the dollar amounts for grades A and B. The sub-National Minimum Wage elements of the "preferred approach" should be abandoned by the Full Bench.

22. In any event, the trial report does not offer a basis upon which the Full Bench could conclude, for one or more of the work value reasons referred to in section 156(4),[19] that any particular value is justified for grades A or B outside the normal parameters that apply to the determination of award minimum rates, including for those classified in grades 1 to 7 of the SES Award.

Other considerations

23. The Full Bench will be mindful that ADE employers have continued to enjoy the benefit of wages tools found by the Full Bench, over two years ago, not to comply with the wage standards prescribed by the FW Act. This is an undesirable state of affairs.

16 March 2022

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17 Trial, 39-40.

18 Balmoral report, 10.

19 In the form preserved by operation of clause 26 of Schedule 1 of the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures)* Act 2018.