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

Submission on jurisdiction of the Association for Employees with a Disability Inc (the AED) in reply

1. The jurisdictional submissions of Australian Business Lawyers and Advisors (**ABL**), the NSW Business Chamber and National Disability Services (the **Employer Parties**) largely fails to address the arguments put by the AED on jurisdiction in its submission in chief.

2. The AED replies under the same headings as those in the Employer Parties submissions.

Is the Preferred Approach Within Jurisdiction?

3. The Employer Parties point in paragraph 6.4 of their submissions to section 139(1)(a) of the FW Act to say, as the AED understands it, that the FWC has jurisdiction to include in a modern award terms about a dollar amount of minimum wage and skill-based classifications. However, this grant of authority is governed by section 136(1) and, notably for this case, subsection (2). It is qualified by section 138.

Is the "preferred approach" prohibited by section 153

4. The Employer Parties submissions under this heading do not grapple with the arguments put by the AED. Instead they invite the FWC to construe section 153(3)(b) *a contextually,* contrary to constructional principle.[1]

5. On this erroneous footing, the Employer Parties assert in paragraph 6.11 that, "Put simply; section 153(3)(b) allows what it simply describes; for the Commission to set minimum right wages for employees with a disability. It goes no further than that." This is the springboard for the dubious constructional proposition that section 153(3)(b) applies "at large." There is little in the way of analysis to justify this otherwise bare assertion. The Employer Parties reliance on rates for junior employees is of no assistance. The subject matter is quite different and in fact demonstrates the problem to which the AED draws attention.

---

[1] No attempt is made to deal with these principles. They are not mentioned.

6. Youth wages are expressed as a percentage of the same properly fixed minima enjoyed by adults. Award relativities are thus preserved for young people in a manner that accords with principle.[2] Moreover, the discriminatory rate is time limited by dint of age – the older the worker, the less discriminatory the wage is compared with the adult rate. Accordingly, the asserted analogy is not analogous at all. Moreover, no attempt is made by the Employer Parties to reconcile their construction with the law that speaks specifically on the subject of disability and disability discrimination.

7. The Employer Parties youth wages submissions expose a further deficiency. Their argument suggests that subsection 153(3)(a) would authorise the FWC to set whatever "minimum wage" it wishes for young people by reference to matters extraneous to age.[3] No authority is cited. Such a construction cannot be correct. Apart from anything else, treating age as merely a threshold for engaging in discrimination at large would sever section 153(3) from its context within section 153 of the FW Act. Section 153(3) is not a portal to visit upon the disadvantaged further disadvantage.

8. The *sotto voce* "concession" in paragraph 6.12 that the ability to set minimum rates for persons with a disability may be conditioned by other provisions in the FW Act begs the question. In a statutory setting that tightly regulates award content, singles out attribute discrimination for specific prohibition and expresses "fairness" as one of the overarching values of the award safety net,[4] the Employer Parties asks the FWC to adopt the unlikely view of section 153(3)(b) as an unencumbered, free standing, grant of statutory authority to discriminate against "employees with a disability" in relation to wages in favour of one category of Australian employer - ADEs. There is no substance to this argument. Nor is there statutory support for the hypothesised ability of the FWC[5] to engage in wage discrimination without regard to the specific disability that enlivens the definitional phrase "employee with a disability." That concept lies at the centre of section 153(3)(b).

9. The Employer Parties' view of section 153(1)(b) as a bare statutory license to discriminate is wrong and exposes a profound misconception of disability.

---

2 See for instance Special National Minimum Wage 3: clause 8.3 of the National Minimum Wage Order 2021.

3 Employer Parties submissions, paragraph 6.15.

4 Viewing fairness from both sides: *Annual Wage Review Decision* 2021-2022, [18].

5 Employer Parties submissions, paragraph 6.19.

Setting or Varying

10. The reference to "varying modern award minimum wages" in section 156(3) must be read in context. The surrounding provisions demonstrate that in relation to a review under the former 156(1), the FWC was (and for this review, is) only permitted to take the actions referred to in section 156(2)(b). The only relevant form of action is the action described in subsection (i): a determination that varies the Award. The provision enables the FWC to give effect to its review by variation of any pre-existing term. In this setting, "varying" has its ordinary meaning as a verb that describes the action of changing or altering something in form, appearance, character or degree or to cause something to be different.[6] The word does not take on a different complexion when it appears in sub-section 156(3) in relation to a change that following review alters the minimum wages terms of an extant award. Nor does the surrounding text of the defined term "varying" in section 284(4) produce that effect. If a "review" causes the FWC to change existing modern award wages for the pre-existing work of a pre-existing work classification, the change is a variation. That is the point the Full Bench made in *4 Yearly review of modern awards – Pastoral Award 2010* [2015] FWCFB 8810 at [44] (which the Employer Parties mention at paragraph 6.23-6.26 of their submissions).

11. The "preferred approach" foreshadows a re-valuing of existing work. The re-valuation would result in a downward change to the existing level of entitlement for "employees with a disability" who meet the gateway requirements of proposed clause B.1.1. The Employer Parties accept, correctly, that "the minimum rates of pay to be paid to employees to whom the award applies are set out in clause 14.2, but subject to the "wage assessment" in clause 14.4 of the Award."[7] The current text of clause 14.4 views those rates as the wages base or reference point for working out what must be paid. The changes foreshadowed by Annexure A to the March Decision would replace clause 14.2 with another clause in respect of the same work.

12. The effect of accepting the Employer Parties' contention that section 156(3) of the FW Act has no application to the "preferred approach" would be to bypass an important statutory protection affecting its jurisdiction.[8] The FWC should not take this step absent express words. To conclude otherwise would be to adopt the unlikely view that Parliament intended that an award change to minimum wages, to be effectuated through the exercise of the variation power following review, could not be made unless specific

---

6 Macquarie Dictionary, online edition, meanings 1 and 2.

7 Employer Parties submissions, paragraph 2.4.

8 Employer Parties submissions, paragraph 6.28.

stated criteria were met, but there was another kind of award change on the same subject left unregulated.

13. Assuming however that the Employer Parties are correct about the non-application of section 156(3) (which they are not), they are right to say that work value remains relevant. That relevance though is through the protection conferred by the settled meaning of minimum wages.[9] There has been no derogation from the settled meaning or the method of giving effect to it. To the contrary: *Annual Wage Review Decision* 2021-2022, [108].

Jurisdictional status of the SWS

14. The jurisdictional attack on the SWS under this heading is hard to fathom. The SWS is an aspect of the eligibility requirement of the defined phrase "employees with a disability." This defined phrase is the hinge on which section 153(3)(b) turns. It is for this cohort of disabled persons, and only this cohort, that the provision grants a limited immunity from the prohibition in section 153(1).[10] It would be an odd construction indeed if the FWC were jurisdictionally prohibited from differentiating for this cohort by reference to an eligibility criterion that is a source of that differentiation.

Sections 136 and 153 the FW Act not misconstrued

15. Under this heading, the Employer Parties engage in a re-characterisation of the AED jurisdictional case. It is necessary to observe:

    (a) That, contrary to the assertions in paragraph 7.3, it is not correct that the "findings" contained in the Full Bench's provisional preference for the "preferred approach" are unchallenged. Likewise, the so-called recognition of the reality referred to in paragraph 7.4 is contentious. The central point made by the AED is that the Grade A and B terms are ultra vires in any event for the reasons it gives.

    (b) It is not correct to say, as the Employer Parties do in paragraph 7.7 by reference to [377] of the December Decision, that the Full Bench has rejected the contentions posited by the AED. The AED had no prior notice of the "preferred approach" until it was revealed in the December Decision.

---

9 This is described by the AED in paragraphs [44]-[50] of its jurisdictional submissions in chief.

10 Notably, the Employer Parties don't suggest that, but for section 153(3)(b), section 153(1) prevents the FWC from including the Grade A and B terms in the Award.

16. There is no lack of precision in the discrimination posited by the AED,[11] contrary to paragraphs 7.8-7.10 of the Employer Parties submissions. The argument is a straw man.

17. The "discrimination" referred to in sections 153(1) and (3) is not limited to the meanings derived from other statutes.[12] The FW Act utilises the phrase "discrimination against." The phrase is the subject of authority. It connotes the making of distinctions that engenders adversity. The Employer Parties do not engage with this. Instead they assume a construction based on an argument not put by the AED. That is not to say that "discrimination against" excludes the defined forms expressed in anti-discrimination law. [13] And insofar as it is necessary to demonstrate the existence of a distinction by reference to a comparator, the AED has done so.[14] Rather, it is to say that the FW Act expresses the discrimination concept in a particular way.

18. A wages distinction based on disability is at the very centre of the "preferred approach." It would be surprising if it were otherwise. It is unquestionably the case that the Grade A and B terms would establish a lower base level of award entitlement than other award covered employees or indeed award free employees with a disability employed by a non-ADE employer. The adversity from this source alone is undeniable. The AED identifies others. The Employer Parties do not seriously grapple with any of them.

19. Turning next to the Employer Parties second and third arguments under this heading.

20. The second argument in paragraphs 7.11 and 7.12 appears to evoke the ghost of a long discarded view that inferior wages for disabled employees, including those employed by an ADE, constitutes a "special benefit." That pathway is closed.

21. Otherwise, the jurisdictional significance of submissions which seek to draw something from the association with the DSP is obscure. So what, one may rhetorically ask. The pension itself has no bearing on power. The association is of no moment in any event. Viewing section 153(3)(b) as authorising the FWC to fix minimum wages for the productive capacity of an employee results in the ADE employer only paying for the

---

11 See paragraph 7.9 of the Employer Parties submissions and the paragraphs that immediately follow.

12 The concepts of direct or indirect discrimination do not limit the ordinary meaning of "discrimination:" *IW v City of Perth* (1997) 191 CLR 1, 14 (Brennan CJ and McHugh J). See also *Commissioner for Police v Mohamed* [2009] NSWCA 432; 262 ALR 519 at [23] (Basten JA) citing Brennan CJ and McHugh J *IW v City of Perth* (Spigelman CJ agreeing at [1]). An example of a statute that does incorporate by reference the meanings of direct and indirect discrimination used in an anti-discrimination law (the *Equal Opportunity Act* 2010) is section 8(3) of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic).

13 See paragraph [8] of the AED submissions and footnote 9 of those submissions. In relation to the phrase "discrimination against" in an industrial statute see *ABCC v McConnell Dowell* (2012) 203 FCR 345, [10], [26] (Buchanan J); [49], [69], [74] (Flick J); [109] (Katzmann J).

14 See paragraphs [20], [49]-[51], [59] of the AED jurisdictional submissions in chief.

labour the employer absorbs through work performance. The SWS facilitates this. The DSP on the other hand is a welfare measure that addresses the residual *in*capacity. It has nothing to do with work or the wages position addressed by the modern awards objective and minimum wages objective.

22. The third argument in paragraphs 7.13 through to 7.17 of the Employer Parties submissions has several limbs. Each may comfortably be rejected for the reasons that follow.

23. *First*, the word "merely" in section 153(3) limits each of the three forms of "discrimination against" addressed by subsections (a), (b) and (c), but in doing so takes its colour from its subject matter. The subject matter is denoted by each form: age, disability, and training arrangement employees.

24. *Second*, the notion that all the Award classifications (Grades A, B and 1-7) would apply in an undifferentiated way (apart perhaps from the work of each) is false. Unlike Grades 1 to 7, Grades A and B are only available once an ADE employer has created work for the worker due to its view of that person's disability.

25. *Third*, the point the Employer Parties seek to make in paragraph 7.14 when they say that the "preferred approach" cannot be disaggregated into individualised classifications is opaque.

26. It is true that Grades 1 to 7 do not turn on the disability of an employee because those classifications only concern themselves with work alone and by doing so maintain a proper separation between work and worker. The worker only comes into view later when work (as classified) is performed. In contrast, for Grades A and B the work of the adjusted (disability specific) position is directly linked to the work described for the grades. Both are informed by the employer's view of it considers to be the "circumstances of the disability." Yet the Employer Parties assert in paragraph 7.9 that the productive capacity of a particular employee informs the tailoring of the job. The assertion simply does not stand up to scrutiny because the tailored job, said to be informed by individual productive capacity, sounds in a single dollar valuation for the work of every "tailored" job in Grade A and the work of every "tailored" job in Grade B. The argument is counter intuitive, and frankly illogical.

27. The Employer Parties misconception is further evident in paragraph 7.15 of their submissions.

28. The paid minimum rate (to use an incongruous expression) for those classified at Grades 1 to 7 operates from a base of properly fixed minima. It is from this base that the SWS operates to ascertain the proportion payable for what the worker has demonstrated he or she can produce and that the employer has absorbed through work performance. Grades A and B would however establish a disability specific base. This is evident from the rates of pay that have been proposed and the gateway requirements. In relation to the latter, whilst at first blush clause B.1.1 appears to be singular (as applying to an individual worker and his or her "circumstances of disability"), the Full Bench appears to have contemplated the possibility that an "adjusted" or "tailored" position could hinge on the label applied to a person with a given kind of eligible disability. That possibility is contemplated by the Full Bench's reference in [248] of the December Decision to a class of disability. Additionally, on one view the "position" is open to be tailored or adjusted by reference to specified "competencies" thought to reflect the circumstances of a person's disability, leaving the way open for re-inclusion of objectionable elements of the wages tools found to have resulted in sub-standard minima. It is antithetical to traditional notions of work value to associate classification with the personal characteristics of a worker.

29. On the question of the proper construction of the phrase, "class of employees with a disability," the AED's submissions demonstrate how that phrase is to be construed. The broader effect of the AED's argument is missed by the Employer Parties. The approach pressed by the AED would harmonise the Award with other awards and the Second Special National Minimum Wage. The result would be one system of minimum wages adjusted for all employees with a disability that for this cohort establishes a wage range on same basis as other employees.

30. *Fourth*, the argument pressed in paragraph 7.17 of the Employer Parties submissions does not answer paragraph 40 of the AED submission. In that paragraph the AED explains how the word "merely" is to be understood when construed harmoniously with other employee protections conferred by the FW Act and the existing state of the law. The protective context is missed entirely by the ABL. Indeed, no attempt is made by the Employer Parties to explain how beneficial legislation prohibiting discrimination against those with disability should simply be put to one side in construing section 153(3). The omission is all the more telling given that section 153(3)(b) is directed to minimum wage fixation by the FWC - itself an employee benefit that comes about through the intervention of beneficial legislation.

31. The construction of "merely" proffered by the AED is consistent with and would promote Australia's compliance with its obligations under the *Convention on the Rights of Persons with Disabilities*.[15] This strongly favours adoption of the beneficial construction of section 153(3)(b) that the AED contends for.

32. *Fifth*, the submission in paragraph 7.19 that if implemented Grades A and B would intrinsically be tied to the productive capacity of the class of employees engaged by ADE's for whom specific jobs have been tailored has no substance. The contention is baseless.

Conclusion

33. The Award is not a true industry award. When regard is had to the classification descriptors, ADE employments afford work that is the same or similar as work regulated by other awards. The alignments recognised by the Full Bench now make those links obvious. What makes this Award distinctive is the ability ADE employers have enjoyed, by reason of clause 14.4 of the Award, to engage in disability based wage discrimination. The AED recognises that the modifications made to the SWS in this Award now also affords a further distinction.

34. The Full Bench has found that clause 14.4 of the Award does not meet the modern awards objective. On the jurisdictional analysis proffered by the AED, clause 14.4 would not be supported by section 153(3)(b) of the FW Act either, save for the SWS. The availability of the SWS as a jurisdictionally sustainable disability based wages methodology that the FWC is able to shape, as it has done, to take account of ADE employments enables the FWC to establish the Award as part of an award safety net that contains properly fixed minimum rates.

22 July 2022

M. Harding SC

---

[15] Report for Association of Employees with Disability; Attachment RM2 to the statement of Professor McCallum.