IN THE FAIR WORK COMMISSION
AT SYDNEY
AM2014/204

4 YEARLY REVIEW OF MODERN AWARDS – HEALTH PROFESSIONALS AND SUPPORT SERVICES AWARD 2010

REPLY SUBMISSIONS OF HEALTH SERVICES UNION

Background - 3 December Decision

1. On 3 December 2018, the Commission decided (in [2018] FWCFB 7350, at [125]), to defer consideration of the matter whether the List of Common Health Professionals in Schedule C was an indicative list or an exhaustive list.

2. The Commission expressed the preliminary view (at [113]) that it is undesirable to constrain the coverage by reference to an inflexible list of occupations, the names of which and/or work performed may change over time as advances in the health profession occur.

3. The Commission also concluded (at [115]) that the decision of the Full Bench to remove the profession of "Dental Hygienist" from the List in Schedule C should be reconsidered in light of developments in the health profession, in particular, in light of the subsequent recognition of the occupation of Oral Health Therapist, which combines the skills of dental therapists and dental hygienists.

4. The Commission expressed the view that the issue had not been fully argued, nor had the New South Wales *Health Employees Oral Health Therapists (State) Award 2018* been considered, and determined to defer consideration of the matter to allow for interested parties to make submissions and conduct subsequent hearings.

5. Following a directions hearing on 23 August 2019, the Commission determined to proceed to determine the former issue before the latter.

6. Pursuant to the directions issued by the Commission on 17 September 2019, the matter posed for consideration by the Commission is:

whether the List of Common Health Professionals contained in Schedule C of the Award should be indicative or exhaustive.

7. The HSU's response to the questions is as follows:

a. the List of Common Professionals contained in Schedule C of the Award is, when the Award is properly construed, an indicative list;
b. the list should not now be an exhaustive list.

Reply to Submissions of Opposing Parties

8. These submissions are made in response to the following submissions:

a. Submission of Australian Business Industrial and the NSW Business Chamber Ltd dated 14 October 2019 (**ABI Submission**);
b. Submission of Medical Imaging Employment Relations Group dated 14 October 2019 (**MIERG Submission**);
c. Submission of Australian Industry Group dated 18 October 2019 (**AIG Submission**);
d. Submission of Dental Hygienists Association of Australia Ltd dated 14 October 2019 (**DHAA Submission**);
e. Submissions of Australian Dental Prosthetists Association dated 14 October 2019 (**ADPA Submission**);
f. Submissions by the Australian Dental Association and Australian Dental Prosthetists Association dated 14 October 2019 (**ADA Submission**).

9. The above parties are referred to collectively below as the "Opposing Parties".

Overview of HSU Argument

10. The HSU's position may be summarised as follows:

a. on a proper construction, the Award, by clause 4.1, defines its coverage of employees by reference to the classifications listed in clause 15 – Minimum weekly wages for health professional employees;
b. clause 15 refers to the classifications of "Health Professional employee", Levels 1 to 4. The descriptor is a term of general application;
c. accordingly, an employee who is a "Health Professional employee" is covered by the Award;
d. schedule B2 determines the classification level of a Health Professional employee by reference to the qualifications, experience, and level of responsibility exercised by the Health Professional employee in their role;
e. schedule C does not purport to define or constrain coverage; it merely provides a list of common (i.e. numerous) health professionals covered by the Award;
f. because of the limitation in s.163 of the FW Act, the FWC may not effect any variation of the Award to render coverage of employees any more limited than currently, unless it is satisfied that such employees will become covered by another modern award;
g. to amend the list in Schedule C to characterise it as "exhaustive" suggests that Schedule C defines the Award's coverage, when it does not, and the FWC could not, in the present circumstances, diminish the existing coverage;
h. even if the Commission was not persuaded that the list is indicative, it would not, for reasons including those expressed in the 3 December decision, consider that approach to be a desirable one;
i. given the above issues, no step should be taken to vary the Award to make the list exhaustive.

11. In answer to the Submissions of the Opposing parties, the HSU contends that:

    a. nowhere in the Submissions referred to above do any of the employer parties convincingly come to grips with the use of the word “common” in the List in Schedule C;

    b. the proper application of principle in the Award Modernisation process militated in favour of comprehensive, rather than patchy and uncertain, Award coverage, and the Full Bench expressed its intentions in respect of the coverage of health professionals in those terms;

    c. any concern arising in respect of the List at Schedule C may be cured by:

        i. an amendment of the preamble to Schedule B.2 to include the following: *“The List of Common Health Professionals is an indicative list and is not an exhaustive list of all the health professional occupations covered by this Award.”*

    d. any concern arising in respect of any particular occupation group it is contended was not intended to be covered by the Award when made, may be remedied by an appropriate amendment to clause 4 of the Award.

12. The submissions of the opposing parties are dealt with in turn below.

ABI Submission

13. The HSU notes the ABI’s concession, at 2.1 that Schedule C is a non-exhaustive guide.

14. That being the case, it follows, as a consequence of the operation of s.163 of the FW Act, that the Award may not be amended in any way to exclude from

coverage any employee who falls within the ambit of the description "Health Professional employee" in clause 15.

15. Section 163 provides as follows:

> ***Special criteria relating to changing coverage of modern awards***
> *Special rule about reducing coverage*
>
> *(1) The FWC must not make a determination varying a modern award so that certain employers or employees stop being covered by the award unless the FWC is satisfied that they will instead become covered by another modern award (other than the miscellaneous modern award) that is appropriate for them.*
>
> *Special rule about making a modern award*
>
> *(2) The FWC must not make a modern award covering certain employers or employees unless the FWC has considered whether it should, instead, make a determination varying an existing modern award to cover them.*
>
> *Special rule about covering organisations*
>
> *(3) The FWC must not make a modern award, or make a determination varying a modern award, so that an organisation becomes covered by the award, unless the organisation is entitled to represent the industrial interests of one or more employers or employees who are or will be covered by the award.*
>
> *The miscellaneous modern award*
>
> *(4) The **miscellaneous modern award** is the modern award that is expressed to cover employees who are not covered by any other modern award.*

16. At 3.5 and 3.6, ABI contends that regarding the list as indicative could result in health professionals that have not been award covered being covered by the Award. Given ABI appears to accept that coverage is defined by clause 4.1 and clause 15, and that the list in Schedule C is not exhaustive, it is not clear how that result could obtain. The ABI does not, in any event, identify any occupation or profession without a history of coverage, in respect of which it might be contended that coverage would be undesirable.

17. As to the ABI Submission at 4.3 and following, the HSU contends that clarification that the list is not exhaustive will:

    a. make it clear that mere absence from the list does not mean that the award does not cover an employee; and
    b. focus the minds of employers and employees back on the term "health professional employee", a phrase which has sufficiently clarity to be understood by them.

MIERG Submission

18. The MIERG Submission provides no reason or argument in support of its position; it is simply a statement of the MIERG's "view".

19. The Commission would give that view no weight. The MIERG is not an organisation registered under the *Fair Work (Registered Organisations) Act* 2009. It is not clear what sort of entity it is, and it has not otherwise identified whose interests it represents.

AIG Submission

20. The AIG indicated by letter dated 18 October 2019 that it relies on its submissions dated 31 July 2019 and 19 August 2019.

21. The AIG Submission of 31 July 2019, at [14] and following appears to suggest that the Full Bench in the Award Modernisation Process used the word "common" to mean "all", and when it used the word "all" in its decision, it in fact meant "only some". The Commission would not regard the Full Bench as having so proceeded. Its stated intention in issuing the Exposure Draft was to *accommodate **all** health professionals (except doctors and nurses) employed in*

both the health industry and the industry generally (at [78], referred to at [14] of the AIG Submission of 31 July 2019).

22. The AIG submits that it is inappropriate for new occupations to be automatically covered by an award drafted to cover a specified industry or specified occupations. This argument overlooks the fact that the Award, like many others, defines coverage by reference to a general descriptor: "Health Professional employee". The terms of the award as currently expressed are sufficiently wide to comprehend new types of health professional. It is the approach contended by the AIG, amongst others, that seeks to vary or limit the extent of that coverage.

23. The suggestion at [21] of the AIG Submissions that the Award would likely fail to meet the requirements of s143(2) if the list is regarded as indicative is a bold one. It would follow that many modern awards with coverage defined by reference to classifications, and descriptors analogous to "Health Professional employee" are not compliant with the *Fair Work Act* 2009.

24. The suggestion at [34] that it would be impractical and confusing to require those not engaged in the health industry to understand whether their employee is a "health professional" is fanciful. The concept is really not that hard to grasp, particularly for a cohort of persons otherwise expected to master the details of workers compensation, superannuation, occupational health and safety obligations and Pay as You Go taxation. Some employers have been known to consult industry bodies for assistance when a difficult question arises.

25. The AIG's submission at [36] about the difficulty of discerning whether a role is sufficiently similar to award-covered health professionals is entirely theoretical. The AIG proffers no concrete example of a health professional role about which there could be the sort of crippling uncertainty that it deplores.

26. The AIG's Submission at [54] and following is based on the fallacy that the meaning of a term of general application, such as "Health Professional employee" is limited by the facts that existed at the time the term came into effect. That approach is not appropriate for a document intended to have continuing effect. As set out above, because coverage under the Award is conditioned on

being a “Health Professional employee”; no variation is required to cover new iterations of that classification, nor is the Award effectively varied by it having application in those circumstances.

DHAA Submission

27. In its Submission, the DHAA falls back on the argument (at [30] of its Submission), that award variations may be sought pursuant to s.157 of the FW Act where occupational nomenclature changes.

28. The HSU contends that if the Award is given its proper meaning, namely, that it covers “Health Professional employees”, no such applications are necessary.

ADA and ADPA Submission

29. With the exception of a three page submission by the ADPA signed by Jeremy Irvine, CEO, the ADA and ADPA have filed the same submissions in this matter. Where we refer to the ADA and ADA Submission below we refer to the submission of both the ADA and ADPA.

30. It appears to be suggested, at [21] and following, that a number of registered health professional occupations were deliberately omitted from the list in Schedule C. That is correct. In its decision on 23 January 2009 circulating the Exposure Draft[1], the Full Bench made it clear it was not purporting to include doctors or nurses. Nurses (along with midwives) were dealt with in the *Nurses Award* (another exposure draft circulated at the same time), and doctors were covered (to the extent intended by the Fair Work Commission) by the *Medical Practitioners Award* (also in an exposure draft then circulated).

31. The Full Bench later made the *Ambulance and Patient Transport Industry Award 2010* on 4 December 2009 (covering workers in that industry). The former ambulance awards were dealt with outside of other health awards as part of a group characterised as “health and welfare services (residual)”[2]. Equally, the *Aboriginal Community Controlled Health Services Award* 2010 emerged from a

[1] [2009] AIRCFB 50 at [78]
[2] [2009] AIRCFB 641 at [3]

process of modernisation which focussed specifically on Indigenous organisations and services, both in health and other areas. Indigenous health services were characterised by the Full Bench as *notably different from what might be called mainstream health services*, such that *a ready comparison with the HPSS Award is not easily made*[3].

32. The exceptions cited by the ADA, and the readily identifiable basis on which they were established as exception, only go to prove the general rule. Nothing about the fact that specific provision was made in respect of some occupational groups for identifiable reasons, belies either:
    a. the breadth of the term "Health Professional employee"; or
    b. the clear intent of the Award Modernisation Full Bench as expressed in its reasons at the time of publication of the exposure draft.

33. The observation at [29], that no list of common support services employees appears in the award does not advance the ADA's argument. Indicative lists appear at the end of each classification level in Schedule B. The only difference in approach for the two types of employee is that for health professionals the indicative occupations appear in a single list. The difference is not productive of any relevant distinction.

34. At [33], the ADA cite a passage from the Full Bench decision in [2009] AIRCFB 865 at [126], where, in circulating the draft Aboriginal Community Controlled Health Services Award 2010, the Full Bench said:

    We have not <u>to date</u> made any award for dentists and the lack of any significant award coverage for the profession leads us to the conclusion that dentists should not be included in the draft award.

35. Given the limited reasons circulated at the time of publication of the exposure draft of the Health Professionals and Support Staff Award, the use of the qualifier "to date", and what the Full Bench knows of the complexities of the award modernisation process, the Full Bench as presently constituted would be hesitant

[3] [2009] AIRCFB 945 at [95]ff

to construe the Award by reference to the passage cited. The Commission had indeed not, at that point, made an award specifically for dentists. Further, the Full Bench claimed, in the same paragraph, that the Medical Practitioners Award *comprehensively* covered doctors, when, as the *Gourabi* decision shows, that is not correct. The vicissitudes of the Award modernisation process provide an unsatisfactory basis for the application of the sorts of principles usually applied to statutory construction. A statement after the fact in respect of a different matter is not a proper basis to construe Schedule C in a way which is contrary to the statement made by the Full Bench at the time it was published (that about covering all health professionals). Further, the later statement is equally consistent with drafting error, or a misunderstanding about the effect of the Award, at a time when that drafting was under ongoing consideration and shortly to be subject to review for anomalies.

36. The fact that the *Medical Practitioners Award* 2010 does not cover every doctor does not detract from the fact that the Commission intended, by the publication of the exposure drafts of the four awards in early 2009, to deal with medical practitioners in a separate instrument to other health professionals. However, in this matter, the tail should not wag the dog; the approach of the Commission to the notable exceptions should not be regarded as dictating the approach to the construction of terms of general application in the Award.

37. So far as the ADA rely on the decision of the Full Bench to remove dental hygienists from the Award[4], it is notable that the application was not the subject of detailed argument, nor detailed reasons. It is difficult to see how that decision could inform a construction of the Award.

38. In short, the identification of inconsistencies in the Award Modernisation Process should not distract the Full Bench from the task of applying the proper principles of construction to the Award.

[4] [2009] AIRCFB 948

39. So far as the ADA refers to the Modern Awards Objective at [56] and following, in the consideration of those factors, the HSU contends that s.163 of the FW Act limits the exercise of the Commission's power.

40. So far as the considerations in s.134(a) are, or become, relevant, the HSU contends, in response to the ADA Submissions at [57], that in the exercise of its functions, particularly in respect of the scope of the coverage clause, the FWC should have regard to the circumstances of all of the employees and employers capable of being affected by its decision. In particular

    a. employees at Health Professional Employee Level 1, Pay Points 1 and 2, who are affected by the issues before the Commission, arguably fall below the threshhold of two-third of median wages, and are therefore "low paid". Any retreat of award coverage in respect of those employees would be a retrograde step[5];
    b. the establishment and maintenance of award minimum standards covering employees creates an incentive to bargain. The position of the HSU, contending for broader coverage, is likely to be more conducive to bargaining across the sector;
    c. the establishment of minimum rates of pay is likely to aid the attraction and retention of employees, and thereby promote workforce participation and social inclusion;
    d. so far as it is asserted by the ADA that award coverage would discourage flexible modern work practices and the efficient and productive performance of work that currently exists, it is not clear how that argument is, or could be, made out;
    da. if, as asserted, dentists are not generally working excessive hours, then this factor is neutral in the Commission's consideration;
    e. the principle of equal remuneration for work of equal or comparable value does not arise;
    f. there is no cogent evidence of any adverse impact on business by the exercise of modern award powers;

[5] [2019] FWCFB 6067 at [44] – [45]

g. the approach contended above would ensure a simple, easy to understand, stable and sustainable award;
h. the issue of award coverage is unlikely to impact employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

41. The HSU notes that the FWC has determined not, in this process, to deal with the question of whether Dental Hygienists and Oral Therapists are covered by the award.

42. The HSU reserves its rights to respond to the ADA and ADPA Submissions, and deal with its witness statements, so far as they touch on that second question, at the appropriate stage.

ADPA Submission

43. The ADPA Submission contends that:

    a. the ADPA has always considered dental prosthetists to be award free; and

    b. its members do not wish to be award covered.

44. Neither matter is relevant to the question of construction of the Award.

45. If dental prosthetists are indeed currently covered by the Award on its proper construction, any amendment to remove them from the Award would contravene s.163 of the FW Act.

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