



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

AM2024/27

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

**Application by Australian Municipal, Administrative, Clerical and Services Union
(052V)
(AM2024/27)**

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

Sydney

9.45 AM, FRIDAY, 12 JULY 2024

PN1

JUSTICE HATCHER: Good morning, I will take appearances. Mr Robson, you appear for the Australian Services Union?

PN2

MR M ROBSON: May it please the Commission, your Honour.

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JUSTICE HATCHER: Ms de Plater, you appear for the Health Services Union?

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MS L DE PLATER: I do, your Honour, thank you.

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JUSTICE HATCHER: Ms van Gent, you appear for the United Workers' Union?

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MS A VAN GENT: Yes, your Honour, thank you.

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JUSTICE HATCHER: Ms Bhatt, you appear for the Australian Industry Group?

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MS R BHATT: Yes, your Honour.

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JUSTICE HATCHER: And, Ms Rafter, you appear for ABI and Business New South Wales?

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MS A RAFTER: Yes, your Honour.

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JUSTICE HATCHER: Is that all the appearances? Yes, all right. Mr Robson, why shouldn't this matter be joined to the gender undervaluation proceedings?

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MR ROBSON: Well, I suppose, your Honour, we wouldn't disagree with that. We have sought directions asking that the matter be listed for conciliation concurrently, but I suppose we have put it in that way so as not to be premature. If that's the Commission's view we're very happy for that to happen.

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JUSTICE HATCHER: I will come back to the conciliation issue in a second, but that would involve in addition making directions for the filing of evidence and submissions, and listing the matter in the three weeks in December.

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MR ROBSON: Yes.

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JUSTICE HATCHER: Any reason why we shouldn't do that?

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MR ROBSON: Absolutely, your Honour, happy to address that. What we have - I suppose our basic position, your Honour, is that there is already a substantial amount of work that needs to be done to get this award classification structure into a place where it is fit for purpose and meets the modern awards objective. Simply put there is just not enough time within the framework of the directions for the gender undervaluation matter to address all of those issues. What we have put in this application, and it needs to be taken alongside the application by the joint disability unions to deal with the controversy over the classification of disability support workers, is designed to start work on this matter and deal with some substantive issues that can be dealt with, and the time available to us in the gender undervaluation review, but still giving us space to prepare our evidence and deal with substantial work value changes that have occurred since the classification structure was developed, and since the rates of pay for the sector were determined in the equal remuneration order.

PN17

Now, we say this is very sensible, because it deals with some burning issues that are in the sector. The home care schedule B and schedule E dispute is live. It's significant, it affects a significant number of people, and we expect that there is going to be a significant amount of evidence filed on 27 September addressing that point. We hope that there is space for the issues to be narrowed for conciliation, but again we can't be certain of that until we meet with the other parties and discuss it. But it is live and it is something that affects hundreds of workplaces around the country.

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JUSTICE HATCHER: Mr Robson, I thought it was made clear in the annual wage review decision that the gender undervaluation proceedings would include a wholesale review of the classification structure in the SCHADS award, and the establishment of rates which correctly reflect work value.

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MR ROBSON: Yes.

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JUSTICE HATCHER: So it seems to me that your union seems to be determined to on one view disrupt that process and break it up into little bits and pieces. Why should that course be taken?

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MR ROBSON: We don't intend to disrupt the process. What we are trying to do is put our cards on the table. The ASU has been preparing a work value application of this award for some time. It had been our intention to file this application not as soon as we have done now, but some time between August and September this year. What we say is that there are significant issues in the classification structure in this award.

PN22

Going through them there is the family day care classification structure. That was created more than a decade ago and it's never been considered. The work value of that structure has never been properly considered. There's the strangely overlapping schedule B, SACS structure, and schedule C, CA structure, which are paid the same rates of pay under the equal remuneration order, and are largely repetitive.

PN23

We say that there is an obvious alignment between community services work performed under schedule B, schedule C, and the family day care structure. There is the interaction issue between home care and the new classification structure for aged care workers, and that is subject to significant controversy about what exactly is disability home care work, if it even exists.

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The union's application is framed conservatively. It says we don't know if there is any disability home care service. What we do know that there is disability support work that should be covered by schedule B under the SACS structure, and then that comes to the classification structure for schedule B. That's an eight level structure and it covers an industry that is very broad and very diverse.

PN25

We intend to file expert evidence outlining some of the problems associated with this structure and the fact that it is completely unworkable in practice. It is too big, it is vague, it is archaic. It's derived from a Local Government award that was made in 1993; that is, the descriptors are almost completely unchanged in that period of time.

PN26

Now, add to that the award at that structure, and that's CA and SACS as being subject to proceedings that would be considered to be genuine work day proceedings under the modern Fair Work Act, the 2008 SACS pay equity case, which sets a baseline for where work should be classified under that structure, and then there is the Federal equal remuneration order in a decision in 2012 which sets those rates of pay.

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Now, that's a (indistinct) point, both of them taken together, but since that time there have been substantial changes in the industry. Going through them, disability services is a very - - -

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JUSTICE HATCHER: You don't need to outline them now, Mr Robson, but it seems to me that it's very difficult to deal with these issues on a disaggregated basis, particularly when the potential end point is to wipe away the existing system and to have a single integrated classification structure - - -

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MR ROBSON: Yes.

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JUSTICE HATCHER: - - - which would as it were get around all of - - -

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MR ROBSON: And there's simply not enough time to do it within that time structure. We won't be in a position to file the expert evidence necessary by 27 September. We won't be in a position to file lay witness evidence, and there is a risk if this issue is dealt with too quickly that the issues aren't solved and more issues are created.

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One of the reasons why I am going through the multiple subsectors covered by this award is that there has been substantial change in almost every sector covered by the schedule B classification structure, and the schedule C classification structure.

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The disability sector is completely different from where it was in 2012. Back then it was institutionalised care performed under state-based funding arrangements. Now it's by and large in home care provided under the NDIS, and I think significantly the work being done with aged home care isn't necessarily helpful in this space, because 75 per cent of people covered by the NDIS are people with intellectual social disabilities. The issues are different and the skills are different. It's simply not directly comparable work.

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We have had Royal Commissions into family violence and abuse against people with disability into the mental healthcare system, and in the last decade there has been a significant professionalisation of the sector. Similarly there has been an intensification of work associated with new data driven practices required by funding bodies. Ten years ago the requirement to use technology or to be able to maintain accurate data collection just simply didn't exist.

PN35

Now almost everybody is contributing data that is used or reported back to funding bodies, or used in the preparation of tenders, and that, I think, comes to the next point. All of this takes place in an award structure that covers a broad, broad swathe of occupations that aren't necessarily closely aligned to each other, or fit neatly into an accurate framework. Some subsectors do have minimum qualification requirements; others don't.

PN36

Many subsectors, and this is particularly important in these proceedings, hire people on the basis of their lived experience, and this is a growing and preferred model of service delivery. This is one of the issues for example with the comparison to home care structure, which is very closely connected to an accurate framework and a set of qualifications.

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If we did this we would take a significant proportion of the workforce who have been hired for their experience of being an Aboriginal person, or a person recovering from a mental health crisis, or from drug and alcohol dependency, and

we would cram them into the bottom of the structure. Now, that is an issue that is probably the work value case in of itself as opposed to the rest of the structure.

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So what we are trying to put in front of the Commission is a process that doesn't defeat the intention set out in the annual wage review, but it does allow the issues to be dealt with progressively, efficiently, and in a timeframe that unintended consequences are avoided.

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What we say is possible to do between now and 27 September is firstly to deal with the burning controversy, which is the classification of disability support workers. That is significant, and it is probably the number one issue that any industrial person working in this sector, whether an employer or employee, is dealing with at the moment. The sector is crying out for resolution to our problem. We need to determine that, because it is - - -

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JUSTICE HATCHER: With respect, Mr Robson, I think you're canvassing something which we have already dealt with.

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MR ROBSON: Yes.

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JUSTICE HATCHER: It needs to be clear that the matters identified in the annual wage review are going to be the subject of a hearing in December to completion.

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MR ROBSON: Yes. And this comes to the next point. We also believe that given the extent of the controversy over the classification of work under schedule B and schedule C it's necessary to establish a baseline of what that work is, where that work should be currently classified, and where that sits. We say that there's a (indistinct) point in 2008 and 2012. We are able to set indicative job titles on an interim basis to set that flaw. That's going to be necessary before looking at work value change since 2012, or 2008 when this classification structure was last seriously looked at.

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And then finally we can integrate the equal remuneration order rates of pay into the modern award itself, and that would mean that by the conclusion of that hearing we would have dealt with the rates of pay under the award, and we could be certain, subject to any change since 2012, that rates of pay did address gender-based undervaluation in the award itself.

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We would have a firm basis to build a new classification structure knowing where work it should currently be classified based on the assessments done nearly a decade ago, which allows us to look at change subsequently, and on that basis a new classification structure could be built that takes into account the sector as it is

now, rather than locking it into the sector as it was more than a decade ago. That, we would say, would achieve the purpose set by the Commission in the annual wage review.

PN46

It would mean, however, that there would be an additional phase on top of that which requires looking at work value change in this sector since 2012, and how that would apply in a final unified classification structure.

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JUSTICE HATCHER: All right. Anything else?

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MR ROBSON: No, your Honour.

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JUSTICE HATCHER: All right. Ms de Plater, do you want to add anything?

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MS DE PLATER: Thank you, your Honour. Just to say as far as the HSU's interest in the award is concerned, and putting aside aged care/home care, that's really primarily the disability services sector. So a slightly narrower interest in the award than the ASU. We certainly support the notion that the classification structure is fit for review, and that it will be necessary to assess the work value of those workers in doing so.

PN51

We appreciate there's overlap obviously between this application, the gender undervaluation proceedings and the application that was brought by the joint disability unions to address the classification of disability support workers, and we share the same concerns as the ASU about just being able to achieve all of this in a timeframe that's been set for the gender undervaluation proceedings. So we do support the sequencing I suppose that's been proposed by the ASU to deal with these matters in a fulsome way. Otherwise we're in the Commission's hands.

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JUSTICE HATCHER: Ms van Gent?

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MS VAN GENT: Your Honour, I think my comments would largely echo those of Ms de Plater. So we also allege that there is an overlap between the application that's been brought by the ASU and the gender undervaluation matters, but we do have concerns in relation to the capacity for those issues to be dealt with in a fulsome manner in the timetable that's been set, and so we support the scheduling that's been proposed by the ASU. Thank you.

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JUSTICE HATCHER: I am not sure there's any scheduling proposed, but anyway. Ms Bhatt, what's the Ai Group's position?

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MS BHATT: Yes, your Honour. I think what has emerged from the application that's been filed most recently by the ASU and the comments made by Mr Robson today, coupled with the previous application that's been filed concerning the definition of the home care and SACS streams, is the sheer breadth of issues that the unions seek to ventilate through the gender undervaluation proceedings and all these other proceedings.

PN56

We too have concerns about whether they can properly be dealt with to finality within the timetable that has been contemplated for the gender undervaluation proceedings. I think it's also clear, particularly from the comments that have been made by Mr Robson today, that there will be a substantial degree of overlap between the issues that need to be considered and dealt with in a context of this application and the gender undervaluation matter, but in my submission also between the previous application filed by the ASU concerning the definition of the SACS stream and the gender undervaluation proceedings and these proceedings.

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So if it is to be the case that the timetable for the gender undervaluation matter is not applied to this particular application, the most recent application, which we say would be the appropriate course, the same course should be adopted in relation to the other application that's been filed by the ASU. I simply can't fathom, frankly, how these matters can be dealt with separately.

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JUSTICE HATCHER: Yes, all right. In respect of that position then where does that leave us in terms of direction and hearing dates?

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MS BHATT: Well, I think, your Honour, the answer to that might turn in part on when the unions say that they would be in a position to file their material concerning all three of those matters. I think once we hear that we might be in a position to provide the Commission with an indication as to how long we might need, but given the preliminary information provided by Mr Robson today about the kind of evidence that would be led I would envisage that we would ask for at least two or three months to file our material.

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JUSTICE HATCHER: All right. Ms Rafter?

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MS RAFTER: Thank you, your Honour. We just make a few points in response to that and in response to the ASU's submissions today. There is of course an obvious overlap between the ASU's latest application and the priority awards work value proceedings, and so we very much think there is some sense in keeping them together and hearing them alongside each other.

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We do take some issue with the suggestion that the proceedings are a gender undervaluation review. They are very much work value proceedings that

contemplate the breadth of classification issues raised on the application, and many of the submissions that were ventilated today as well, and so they can be dealt with in the scope of issues canvassed in the final list published by the Commission. So we do think that is the most efficient course, to be dealt with together just due to that overlap.

PN63

And further as the Commission is undertaking that wholesale review of classifications in the SCHADS award it does make sense that all that evidence, particularly with also the crisis accommodation employees, is dealt with together, and that should enable all the parties to make more fulsome proposals with regards to the classification structures and any changes with regards to the minimum wages structures as well. So there really does seem to be some sense in keeping it together.

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To turn to the phases proposed by the ASU we do think the Commission has already dealt with and determined the appropriate course as to the disability application, so we consider that is resolved, it's being heard with the priority awards work value proceedings.

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As to the possibility of making interim orders with regards to indicative job titles we would just like to state that that variation is not without consequence and just cannot be simply adopted by reference to the Queensland State Award and its history. We would want the opportunity to of course consult with our membership about that impact, put on evidence and submissions, but I will leave it at that.

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Finally, as to the extent that it's suggested that the issues about classification structures must be resolved separately or prior to the priority award value proceedings, we just submit that each sector of course is going to have its own unique set of issues and circumstances, and the issues flagged do appear to fall comfortably within the scope of the issues identified by the Commission. People have been classified into the existing structure for the last 14 years.

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So if we don't adopt the ASU's preferred course of action it shouldn't create any insurmountable challenges at the moment. For all those reasons we think the ASU application should be heard together with the priority awards work value proceedings, and to the extent possible not disrupting the timetable. And for that reason we submit that the preliminary conferences for the SCHADS award in particular will be very important in the SCHADS award to just ventilate all these issues, and that might be a time to return to issues about scope after we've had the opportunity to really discuss the different issues with all the interested parties, and those are our submissions.

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JUSTICE HATCHER: All right. Thank you. Well, look, first of all I am going to join this application with matters AM2024/21 and AM2024/25. That will

involve this application being subject of the conference before O'Neill DP, which I think is on 25 July. The applicants are directed by 22 July to file a document outlining, to the extent they haven't done so in their application already, their principal contentions and a summary of the outcome they seek to achieve.

PN69

I will confer with the expert panel as to further directions, but the parties should proceed on the assumption that the directions and the hearing dates will line up with the gender undervaluation proceedings. All right, if there's nothing further we will now adjourn.

ADJOURNED INDEFINITELY

[10.08 AM]