FAIR WORK COMMISSION

DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Health Services Union
(C2013/4216)

Health and welfare services

VICE PRESIDENT HATCHER SYDNEY, 15 MAY 2013

Application for stay of decision [2013] FWC 2182 and determination PR535562 of Vice President Watson at Sydney on 15 April 2013 in matter number AM2012/133.

Introduction

[1] On 15 April 2013, Vice President Watson issued a decision[1] (Decision) and determination[2] (Determination) in which he made a number of variations to the *Health Professionals and Support Services Award 2010* (the Award). The proceedings before his Honour arose out of various applications made by or on behalf of a number of employer organisations under Sch.5 Item 6 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Transitional Act) in the context of the two year review of modern awards which the Fair Work Commission is required to conduct under that provision.

[2] On 6 May 2013, the Health Services Union (HSU) filed an appeal against the Decision and the Determination. Its notice of appeal set out three grounds of appeal as follows:

> "a. The Commission erred, in considering clause 14.2 of the Health Professionals and Support Services Award 2010 ("the Award") in determining to adopt a variation proposed by the employers which was not adapted to remedying the anomaly or technical problem identified by the Commission at paragraph 12 of its reasons.
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> b. The Commission erred in determining that there was a proper basis, consistent with the scope of its task pursuant to Item 6 of Schedule 5 of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 to vary clause 20 the Award to provide for monthly payment of wages;
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> c. The Commission erred, in its consideration of clause 31, in concluding that, because it was not satisfied that a case had been established in the past for a different

[1] [2013] FWC 2182

[2] PR535562

> test to be adopted for this area of employment compared to other areas of employment covered by modern awards, that it was empowered to vary the definition of shiftworker for the purpose of calculating entitlement to annual leave [53]."

[3] The HSU's application also sought a stay of the entirety of the Decision pending the determination of its appeal. The stay application has been allocated to me for determination.

[4] At the hearing of the stay application on 13 May 2013, the following parties appeared:

- L. Doust of counsel with L. Svendsen for the Health Services Union (HSU)
- W. Ash for United Voice
- O. Fagir for Australian Business Industrial (ABI)
- F. Hancock of counsel for the Australian Medical Association (AMA) and with K. Barratt for the Australian Dental Association (ADA)
- S. Forster for the Australian Federation of Employers and Industry (AFEI)
- H. Wallgren for Business SA
- J. Nucifora for the Australian Services Union (ASU)
- P. Frazer for Dr Patrick Sim

[5] At the outset, counsel for the HSU foreshadowed that the HSU would seek leave to amend its notice of appeal to add a fourth ground challenging a further variation to the Award made by Vice President Watson concerning progression through the classification structure for support services staff covered by the Award. Although that foreshadowed additional ground is not formally part of the appeal notice before me, I propose to treat the matters raised by the HSU in connection with that proposed ground as part of its case as to why the Decision should be stayed.

[6] United Voice and the ASU supported the HSU in its stay application. All the employer organisations which appeared at the hearing opposed the stay application.

Applicable Principles and General Approach

[7] There was no dispute between the parties as to the principles applicable to the determination of the HSU's stay application. They are as stated in *Kellow-Falkiner Motors Pty Ltd v Edghill*[3], in which the Full Bench approved the following statement of principle:

> "[5] In determining whether to grant a stay application the Commission must be satisfied that there is an arguable case, with some reasonable prospect of success, in respect of both the question of leave to appeal and the substantive merits of the appeal. In addition, the balance of convenience must weigh in favour of the order subject to appeal being stayed. Each of the two elements referred to must be established before a stay order will be granted.
>
> [6] The Commission approaches applications for stay orders on the basis that, unless otherwise established, the order subject to appeal was regularly made."

[3] Print S4216

[8] As earlier noted, the HSU sought a stay of the Decision in its entirety (which I have taken to include an application for a stay of the entire Determination as well). However, I do not consider that the circumstances of this case lend themselves to dealing with the stay application on a global basis. The variations made by Vice President Watson involved discrete subject matters. The HSU's challenge to those variations did not involve a common theme throughout, but raised a number of separate issues. Further, the variations have given rise to separate considerations going to the balance of convenience. I will therefore deal with the challenged award variations *seriatim* (subject to one exception identified later).

[9] No party at the hearing of the stay application sought to adduce any evidence concerning the extent to which the challenged award variations have been implemented since the date of the Decision and Order and any effects on employers and employees that might have flowed from this. The only factual material before me in this regard is derived from apparently uncontested statements made from the bar table by counsel for the HSU and the AMA/ADA. It is of course open to me to rely upon such material.[4] However, the limited scope of those factual statements and the qualified way in which they were expressed dictates that a cautious approach concerning balance of convenience issues is necessary.

Frequency of Payment of Wages

[10] Prior to the Decision and the Determination, the Award provided in clause 20.1 that wages would be paid weekly or fortnightly or, by agreement between the employer and the majority of employees, monthly. The Determination (in paragraph A3) varied clause 20.1 to read as follows:

> "Wages will be paid weekly, fortnightly or monthly.
>
> The employer may change the pay cycle to monthly by giving the affected employees two months written notice."

[11] The Decision dealt with this issue at paragraphs [17]-[22]. Paragraphs [17]-[21] set out the existing award provision and the parties' positions concerning any change to that provision. Vice President Watson's reasons for the variation are set out in paragraph [22] as follows:

> "[22] There are clear operational advantages in enabling employers to move to a single monthly payroll run for all employees by the giving of notice to affected employees. The immediate change will have an impact on employees but thereafter the impact of the change is unlikely to be significant. There has clearly been a change in cash and payment practices across the community leading to increased viability of monthly pay. Because of the savings available to the employers I consider that the change has merit. However, in order to minimise the impact of changes on employees who will need to adjust to the immediate change in particular I consider that two months notice should be required to be given if an employer wishes to move

[4] *R v The Commonwealth Conciliation and Arbitration Commission and Others; Ex Parte The Melbourne and Metropolitan Tramways Board* (1965) 113 CLR 228 at 243; *MM Cables (a division of Metal Manufactures Limited) v Zammit* (1999) Print R7629 at [24]

> unilaterally to monthly pay for its staff. I will make a modified variation to the award to reflect this conclusion."

[12] The gravamen of the HSU's challenge to this variation, as outlined in its submissions, is that Vice President Watson did not take into account the matters he was required to consider under subitem 6(2) of Sch.5 of the Transitional Act. Rather, he granted the variation solely on the basis of the advantage he identified would accrue to employers. Further, the HSU submitted that his Honour reached the conclusions he did in paragraph [22] without the benefit of any evidence whatsoever.

[13] I am satisfied that at least the main element of the HSU's submission is arguable and has some reasonable prospects of success. In the *Modern Award Review 2012* decision, the Full Bench said[5]:

> "[45] Subitem 6(2) provides that the Tribunal must consider two questions when conducting the Review:
>
> > (a) whether modern awards achieve the modern awards objective in s.134 of the Fair Work Act 2009 (the Act); and
> >
> > (b) whether modern awards are operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process.
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> [46] Subitem 6(2) imposes an obligation on the Tribunal when conducting the Review to consider the matters set out in paragraphs (a) and (b). The requirement to consider these matters means that they are "relevant considerations" in the *Peko-Wallsend* sense of matters which the decision-maker is bound to take into account. As Wilcox J said in *Nestle Australia Ltd v Federal Commissioner of Taxation*:
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> > 'To take a matter into account means to evaluate it and give it due weight, having regard to all other relevant factors. A matter is not taken into account by being noticed and erroneously discarded as irrelevant.' "

[14] On a preliminary review of the Decision, it is difficult to identify where, in connection with the change to the frequency of payment of wages, the matters referred to in subitem 6(2) were considered and taken into account. If the HSU's case in this regard was established at the hearing of this appeal, then it would have some reasonable prospects of being granted permission to appeal and having its appeal upheld as to this ground.

[15] As to the balance of convenience, the HSU pointed to the likely hardship that employees under the Award, which included low-paid employees, would face in not receiving any pay for periods of two to three weeks. Counsel for the HSU also stated that the HSU had "preliminary intelligence" that some employers in Tasmania had given the requisite two months' notice to change to monthly pays. In response, the only matter raised by the employer organisations was the possibility that the grant of a stay might affect any employers who had given notice to change the frequency of the payment of wages.

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[5] [2012] FWAFB 5600 at [45]-[46]

[16] I consider that the balance of convenience favours the grant of a stay as to this particular variation. I accept that a movement to monthly pays for low paid employees has a potential to cause them cash-flow difficulties. Any such difficulties which occur prior to the determination of the HSU's appeal will not be remediable (looking backwards) even if the HSU is successful in this aspect of its appeal. On the other hand, the requirement for two months' notice means that no employer will have yet been able to switch any employees to monthly pays. The implementation of any actual change would at least be a month away. Accordingly, the grant of a stay would not require any reversal of actual changes to pay arrangements.

Junior Wage Rates and Classification Progression for Support Services Staff

[17] I will consider these two areas of award variation together because I accept the submission made by counsel for the AMA/ADA that they were interconnected.

[18] Prior to the Decision and the Determination, the Award in clause 14.2 provided for junior rates of pay in support services only, expressed as a percentage of the level 1 rate for support services staff. However, it was the case of the AMA in particular before Vice President Watson that there was considerable confusion as to what work functions juniors could perform, and for what period. It adduced evidence from Olya Valaire, the industrial advisor and solicitor for the AMA, that included the following:

> "6. I have received a number of inquiries from our members in NSW which made apparent that there has been confusion about re-grading their staff from the previous awards to the Health Professionals and Support Services Award especially as to how long employees can be kept at the levels 1 and 2. I estimate that I receive such a query almost every day.
>
> 7. I understand from my discussion with our members that many practices engage workers to perform very basic tasks such as scanning or filing, many of whom are high school students or people with various disabilities. Doctors and practice managers emphasise that the current definition prohibits employers from hiring junior staff as it is not financially viable to keep them employed past 3 months, at which time adult level 2 rates apply.
>
> 8. The feedback I receive from our members is that hiring a junior employee is fruitless as it is more financially attractive for them to engage a more mature person as a level 2 or 3 from the outset who have the ability to perform additional duties. Our members are confident from their previous experience where they employed their staff under the Clerical and Administrative Employees State Award that most junior employees are capable of performing the duties outlined within the definition of level 2 and by limiting junior employees to a level 1 classification it devalues the work they are capable of undertaking and limits on the job training opportunities."

[19] The basis of this perception on the part of AMA members had derived from two features of the Award. The first was clause 13, which relevantly required employees to be classified according to the structure and definitions set out in the classifications definitions set

out in Schedule B of the Award. The second was the requirements specified in Schedule B to the effect that support service employees could only remain in the level 1 classification for three months, and that general clerks/typists could only remain in the level 2 classification until the end of their first year of service. This meant (the AMA submitted before Vice President Watson) that one interpretation of the Award was that juniors could only be employed to perform basic office duties for three months, and thereafter had to be paid at higher classifications on adult rates.

[20] Three variations were made by Vice President Watson relevant to the AMA's case. The first (paragraph A2 of the Determination) was to vary clause 14.2 so that it read as follows:

> **14.2 Juniors in Support Services**
>
> A junior employee may be engaged at any classification level in this award and will be paid the following percentage of the level 1 rate:

Age	% of level 1 rate
Under 17	50
17	60
18	70
19	80
20	90

[21] In the decision, Vice President Watson made it clear that the variation was not intended to change the meaning of the existing provision, but merely to remove ambiguity.[6]

[22] The other two variations altered the classification structure for support services staff in Schedule B to allow employees performing basic duties on an ongoing basis to be kept in Level 1 indefinitely, and for employees performing Level 2 duties on an ongoing basis to be kept in Level 2 indefinitely. The Decision identified the reason for these variations as being a "clarification" intended to substantially resolve "confusion and anomalies arising from the current definitions.[7]

[23] The HSU challenges the variation to junior rates on the basis that the variation did not in truth merely clarify an ambiguous provision, but rather effected a substantive change which was manifestly unreasonable and unjust in that it allowed junior support services staff at a given age to be paid the same rate regardless of the duties they performed and the level of skill which they exercised. As to the changes to the classification structure, the HSU submitted that there was no anomaly which required rectification.

[24] Beyond indicating that these appeal grounds (including the foreshadowed new ground) appear to be arguable, I do not intend to give further consideration to the first element of the *Kellow-Falkiner* test with respect to these variations. That is because I do not consider that the balance of convenience favours the grant of a stay of these variations. As counsel for

[6] Decision at [16].

[7] Decision at [64]

the AMA/ADA submitted, the variations taken together at least make it clear that junior employees may be paid junior rates of pay for a period of more than three months. Having regard to the evidence of Ms Valaire above, there is a real possibility that some medical practices have acted on the variations by engaging, or continuing to engage, junior employees that they might not otherwise have engaged, or continued to engage. The grant of a stay carries with it the potential risk of disrupting such employment. On the other hand, if a stay is not granted but the HSU is successful in this part of its appeal then, to the extent that the variations made by Vice President Watson may have changed the previous effect of the Award, any affected employees can be back-paid. Accordingly, a stay of these variations is refused.

Annual Leave for Shiftworkers

[25] Section 87(1)(b)(i) of the *Fair Work Act* provides that an employee has an entitlement to five weeks of paid annual leave if a modern award applicable to the employee defines or describes the employee as a shiftworker for the purpose of the National Employment Standards. Prior to the variations made in the Decision and the Determination, clause 31.1(b) of the Award provided:

> "(b) For the purposes of the NES a shiftworker is an employee who works for more than four ordinary hours on 10 or more weekends during the year in which their annual leave accrues."

[26] By Paragraph A4 of the Determination, this was altered to read:

> "(b) For the purpose of the NES a shiftworker is an employee who is regularly rostered to work Sundays and public holidays."

[27] The main effect of the variation is to reduce the entitlement of employees who regularly work Saturdays but not Sundays or public holidays from five weeks of annual leave under s.87(1)(b)(i) to four weeks. This presumably only affects future accruals of annual leave; no party suggested that the variation would have any effect on past accruals.

[28] This variation was responsive to a case mounted by the ADA and supported by a number of witnesses that dental practices were making a conscious decision not to open on Saturdays because of the cost of additional leave they would incur as a result of the operation of clause 31.1(b). This was, the ADA submitted, contrary to the modern awards objective. Vice President Watson upheld the ADA's case for the following stated reasons:[8]

> "[51] I note that the definition of shiftworker in clause 31.1(b) in this Award is different to the common definition in modern awards and that it did not arise from a detailed consideration of alternative formulations and detailed arguments by the parties during the award modernisation process. Nor is it apparent that the wording reflected the pre-existing instruments applying to dental practices.

[8] Decision at [51]-[53]

> [52] The evidence of restrictions on operating hours of dental practices arising from the new obligations created by the clause is a matter of concern. It shows that the Award provision is impacting on the viability of operating on Saturdays despite the business desire and client wishes to access those services at those times.
>
> [53] In my view the notion of an extra week of annual leave provided in the NES is intended to be a benefit provided to employees who generally satisfy a common test, although a case may exist for varying that test with respect to particular areas of employment. I am not satisfied that a case has been established in the past or in the present case for a different test to be adopted for this area of employment compared to other areas of employment covered by other modern awards. I will therefore make an order substituting the definition to that sought by the employers in the annual leave clause which is a common shiftworker definition in modern awards for the purposes of the extra weeks leave under the NES. There is no need to amend the definition of shiftworker for other purposes of the Award in clause 3.1."

[29] The HSU's challenge to this variation as outlined by its counsel made three main points:

(1) The definition of a shiftworker in clause 31.1(b) of the Award had already been changed by Vice President Watson in 2010 in his decision in *Health Professionals and Support Services Award 2010* to correct a problem identified in the Award as it was first made. There was no cogent reason to again vary the Award.

(2) The decision does indicate that the matters required to be considered under subitem 6(2) of Sch.5 of the Transitional Act were taken into account.

(3) The reasoning in paragraph [53] involved a reversal of the onus away from the applicants for the variations towards those who sought to retain the existing provision.

[30] Again it is not necessary for me to analyse the merits of these submissions beyond stating that they appear to be arguable because I am not satisfied that the balance of convenience favours the grant of a stay. Without a stay, the prospective annual leave accruals of regular Saturday workers will be affected, but that will only occur to a minor degree prior to the hearing and determination of the HSU's appeal. Any prejudice is entirely theoretical unless leave is actually taken, and even then the prejudice could only be minimal. If the HSU's appeal is successful on this point, employees will have their annual leave accrual balances adjusted to reflect that result. Against this, counsel for the AMA/ADA stated that the ADA was aware of at least one large dental practice which had begun rostering employees on Saturdays in order to take advantage of the variation to clause 31.1(b). It is of course possible, having regard to the case which the ADA ran, that other dental practices have begun opening on Saturdays and rostering employees for that purpose as a result of the variation. The grant of a stay would be likely to disrupt this. The HSU submitted that dental practices constituted only a small part of the coverage of the Award, and I accept that is likely to be the case, but that does not remove the difficulty. No party advanced any proposal for the grant of a partial stay which excluded dental practices, and accordingly I have insufficient assistance to be able

to construct an order to that effect. In any event, for the reasons stated, the balance of convenience overall has not been demonstrated to be in favour of a stay with respect to the variation concerning annual leave for shiftworkers.

Conclusion

[31] Paragraph A3 of the Determination is stayed pending the hearing and determination of the HSU's appeal or until further order of the Commission. The HSU's application for a stay is otherwise dismissed.

VICE PRESIDENT

Appearances:

L. Doust of counsel with *L. Svendsen* for the Health Services Union (HSU)
W. Ash for United Voice
O. Fagir for Australian Business Industrial (ABI)
F. Hancock of counsel for the Australian Medical Association (AMA) with *K. Barratt* for the Australian Dental Association (ADA)
S. Forster for the Australian Federation of Employers and Industry (AFEI)
H. Wallgren for Business SA
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