



STATEMENT

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards - *Supported Employment Services Award 2010*

(AM2014/286)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT BOOTH
COMMISSIONER CAMBRIDGE

SYDNEY, 16 APRIL 2018

4 yearly review of modern awards – Supported Employment Services Award 2010.

[1] The *Supported Employment Services Award 2010* (Award) is expressed, in clause 4.1, to cover employers who operate “*supported employment services*” and their employees working in the classifications in Schedule B of the Award, but excluding employees covered by the *Aged Care Award 2010*, the *Health Professionals and Support Services Award 2010* or the *Social, Community, Home Care and Disability Services Industry Award 2010*. The expression “*supported employment services*” is defined in clause 3 to mean “*a service as defined in section 7 of the Disability Services Act 1986 (Cth)*”. Section 7 of the *Disability Services Act 1986* defines “*supported employment services*” as follows:

“*supported employment services*” means services to support the paid employment of persons with disabilities, being persons:

- (a) for whom competitive employment at or above the relevant award wage is unlikely; and
- (b) who, because of their disabilities, need substantial ongoing support to obtain or retain paid employment.

[2] The classification structure in Schedule B of the Award consists of seven grades. The definition in each grade is described in terms of generic skills and tasks, with the addition of specified example or indicative duties. In practical terms, they are capable of encompassing a wide range of work duties.

[3] In substance, the Award may be characterised as covering enterprises (known as Australian Disability Enterprises or “ADEs”) established for the purpose of employing persons with disabilities who are unlikely to be able to obtain employment in the open labour market at award wages or higher and who need substantial ongoing support to obtain and retain paid employment. The employees to whom the Award applies consist overwhelmingly of such disabled persons. It also covers some non-disabled support and administrative staff

employed at such enterprises, but many support staff are employed under one of the three awards identified in the clause 4.1 exclusion.

[4] Grades 1, 2 and 3 are the classifications which are primarily utilised, and the current hourly rates of pay for these classifications prescribed by clause 14.2 of the Award are \$18.29, \$18.81 and \$19.53 respectively. Employees with a disability may be paid less than these prescribed rates pursuant to clause 14.4(a), which provides:

“14.4 Wage assessment—employees with a disability

- (a) An employee with a disability will be paid such percentage of the rate of pay of the relevant grade in clause 14.2 as assessed under an approved wage assessment tool chosen by a supported employment service.”

[5] Clause 14.4(b) sets out a list of approved wage assessment tools which supported employment services are permitted to use for the purpose of clause 14.4(a). The first wage assessment tool in the list is the Supported Wage System (SWS) and, prior to its removal effective from 5 June 2015¹, the second on the list was the Business Services Wage Assessment Tool (BSWAT). Both these tools were developed and their use supported by the Commonwealth Government. Clause 14.4(c) provides that the SWS is set out at Schedule D, which incorporates by reference the *Supported Wage System Handbook*, a publication of the Commonwealth Government. Clauses 14.4(d) and (e) identify documents external to the Award which describe the other wage assessment tools.

[6] On 16 December 2013, the Health Services Union (HSU) and United Voice made a joint application under s 160 of the *Fair Work Act 2009* (the FW Act) for all the wage assessment tools specified in clause 14.4(b) to be removed with the exception of the SWS. This application followed the Federal Court Full Court decision in *Nojin v Commonwealth of Australia*², in which the Court determined (by majority) that the respondent supported employment services had discriminated against the applicants, who were intellectually disabled persons, in breach of s 15 of the *Disability Discrimination Act 1992* by imposing on them a requirement or condition that in order to secure a higher wage the applicants undergo a wage assessment using the BSWAT. The application was referred to a Full Bench for determination, and the Full Bench then referred the application for conciliation before one of its members, Deputy President Booth. Participants in the conciliation process which followed included the HSU, United Voice, the Australian Council of Trade Unions, National Disability Services (NDS), Australian Business Industrial and the NSW Business Chamber (ABI/NSWBC), a number of disability advocacy representatives including the AED Legal Centre, managers from individual ADEs and representatives of parents and carers including Our Voice Australia. The Commonwealth Department of Social Services (DSS) also attended the conciliation conferences as an observer.

[7] During this conciliation process, agreement was reached between all the participating parties that, in the light of the *Nojin* decision, the BSWAT should be removed from the list of

¹ PR568011

² [2012] FCAFC 192, 208 FCR 1, 298 ALR 410

wage assessment tools in clause 14.4(b) of the Award. A consent order varying the Award was made by Deputy President Booth on 5 June 2015 to give effect to this agreed position.³

[8] On 15 October 2015 Deputy President Booth issued a Statement⁴ which gave a progress report as to the conciliation process. It reported that the parties had agreed that their shared objectives in connection with the Award were as follows:

- “a) A fair, equitable and non-discriminatory wage outcome to contribute to a living income for employees in supported employment;
- b) Continued opportunity for employment in supported employment settings to build and maintain the self-esteem and sense of purpose of employees;
- c) Sustainable employment opportunities in viable ADEs; and
- d) To provide security and confidence to employees, parents and carers for the future.”

[9] While the conciliation process was underway, the 4 yearly review of the Award required to be conducted under s 156 of the FW Act (Award Review) was commenced. Deputy President Booth conducted a number of conferences in relation to the Award Review in the period from 22 August 2016 to 29 May 2017. The same parties who were involved in the conciliation process in relation to the application made by the HSU and United Voice participated in the conference process for the Award Review. On 5 May 2017 the HSU and United Voice discontinued their s 160 application on the basis that they would pursue their outstanding claims in the Award Review.

[10] One of the matters considered in the Award Review conference process conducted by Deputy President Booth was modification of the SWS. With the support of the DSS, field work was conducted in furtherance of this issue. Ultimately it was agreed that variations to the provisions governing the operation of the SWS in ADEs contained in Schedule D to the Award and to the SWS Handbook should be made.

[11] On 29 May 2017, the President, Justice Ross, constituted this Full Bench to deal with outstanding matters in the Award Review. The presiding member, Vice President Hatcher, issued directions for the determination of the contested matters in the Award Review, and a hearing before us was listed for 5-9 and 12-16 February 2018.

[12] On 10 October 2017 we issued a decision⁵ varying Schedule D to the Award to give effect to the agreement reached between the participating parties about this. The variation will take effect on 1 July 2018.⁶ The critical change effected by the variation is that, in using the SWS to determine the productive capacity of a particular disabled employee, the assessor will assign a 50% weighting to the data collected by the assessor pursuant to the SWS and a 50% weighting to workplace data collected by the employer concerning the employee’s productive capacity (except where there is a disparity greater than 20% between the overall productivity

³ PR568011

⁴ [2015] FWC 7134

⁵ [2017] FWCFB 5073

⁶ PR597498

percentage calculated from the workplace data and the overall productivity percentage calculated from the data collected by the assessor, in which case the productive capacity of the employee is to be determined solely on the basis of the data collected by the assessor). This change was intended to ensure that the data collected by the assessor during the limited period during which the assessor was able to assess the employee was supplemented by data collected by the employer over a longer period of time. It was envisaged that such data would be able to provide a more comprehensive picture of the employee's performance, including by capturing any periods during which the employee was non-productive.

[13] The claims that were pursued at the hearing may be summarised as follows:

- (1) The AED Legal Centre applied for all the wage assessment tools except the SWS to be removed from clause 14.4(b) of the Award, so that employers would be required to use the SWS.
- (2) ABI/NSWBC applied for a new classification structure to be placed into the Award as an alternative for employers which did not wish to utilise a wage assessment tool. This proposed classification structure, which was said to be based on an assessment of the work value of disabled employees, contains a training and assessment level, and then four levels A-D each with four sub-levels. The pay rates for each sub-level are expressed as a percentage of the current rate for the Grade 2 classification in clause 14.2 of the Award. The lowest percentage (for the training and assessment level) is 12.5%, and the highest (for Level D, sublevel D4) is 100%.
- (3) United Voice applied for a variation to clause 19.5 of the Award, which currently provides that where an employee with a disability is being paid less than \$450 per month, the superannuation contributions for such employees will be 3% of the ordinary time earnings or \$6.00 per week, whichever is the greater. The variation sought is that for such employees, the contributions levels should be increased to 9.5% or \$15 per week, whichever is the greater.
- (4) Our Voice Australia sought the inclusion in the Award of a new provision entitled "*Rights at Work for Supported Employees*", which required employers to take all reasonable steps to provide employees with information concerning their workplace rights, including as to the right to union representation, how to seek information and assistance from the Fair Work Ombudsman, the provision of information to the employee's nominee, carer, parent/family member, advocate or union and their capacity to be involved in and consulted about matters that may be prejudicial to the employee's interests.

[14] During the hearing we conducted inspections of a number of ADEs in Sydney and Wollongong, received witness statements and heard evidence from a large number of witnesses, including expert witnesses, and were assisted by extensive written and oral submissions from the parties. We will in due course, subject to what we state below, issue a full decision stating our findings as to the evidence and our final conclusions as to the matter. However because we do not propose to grant any of the claims relating to wages and wage assessment in the form proposed by the respective claimant organisations but rather consider it likely that it will be necessary to vary the Award in terms not proposed by any party, we consider that the proper course is to state a number of provisional conclusions we have

reached and to give the parties an opportunity to consider them, confer and, if necessary, advance further submissions concerning them.

[15] The provisional conclusions we have reached are as follows:

- (1) Supported employment covered by the Award has a valuable and socially significant role in providing employment to primarily intellectually disabled persons for whom, at current or foreseeable levels of government support, the achievement and maintenance of open employment would not be viable. ADEs are able to employ disabled persons by adjusting their daily job tasks to suit their abilities, in circumstances where an equivalent open employment job role may not be able to be completed by a single ADE employee.⁷
- (2) The determination of wages for supported employees by the use of the wage assessment tools currently prescribed in clause 14.4 of the Award does not meet the modern awards objective because:
 - they produce different wage outcomes for persons performing equivalent tasks at equivalent levels of competency;
 - in substance they permit employers to establish their own classification structure and pay rates rather than apply pay rates properly derived from the Award; and
 - may in some cases contravene the *Disability Discrimination Act 1992* for reasons similar to those found in the *Nojin* decision in relation to the BSWAT assessment tool.
- (3) The SWS does not, by itself and in its current form, represent an appropriate method of determining the wage rates for supported employees in ADEs because it:
 - does not take into account the proper range of work value considerations used to assess award wage rates, namely the nature of the work, the level of skill and responsibility involved in doing the work and the conditions under which the work is done (which, in the context of supported employment, would include the complexity of the task(s) performed, the range of tasks performed, and the level of support required in order for the task(s) to be performed);
 - may not adequately measure non-productive time at work on the part of supported employees; and
 - does not provide a sufficiently objective and relevant means of identifying the performance benchmark by which any SWS assessment is conducted.

⁷ See Exhibit 33, Attachment A, - DSS Discussion Paper, *Ensuring a strong future for supported employment*, December 2017, at p.16

We emphasise that we express no conclusion about the operation of the SWS in the context of open employment.

- (4) The modified SWS to be introduced into the Award effective from 1 July 2018, by consent and in the context of the current arrangements which allow an employer to choose from a range of wage assessment tools, does not adequately address the second problem identified above, and does not address at all the first and third problems.
- (5) The existing classification structure in Schedule B of the Award, in relation to which the wage assessment tools are intended to operate, is also inadequate and unlikely to meet the modern awards objective. This is principally because it has not been structured with the specific circumstances of supported employment in mind, has not been drafted in a way which clearly identifies the work tasks and skills required of a fully competent employee at each grade, and may on one view be read as entitling supported employees in ADEs who perform only disaggregated parts of a single job to the full classification rate.
- (6) The classification structure proposed by ABI/NSWBC, although we accept it was advanced in a somewhat embryotic form, is not appropriate for adoption or further development because it requires the formation of excessively subjective judgments on the part of the employer in classifying employees and focusses upon the individual characteristics of the employee to be classified rather than the nature and value of the work to be performed and the degree of support required to be provided by the employer.
- (7) We consider that the use of all the existing wage assessment tools should be phased out over a period of time. They should be replaced by a redesigned classification structure for Grades 1-3 of the Award which sets the full award wage rates together with a single prescribed method for the adjustment of the award wage rates for supported employees. This new wage assessment mechanism should meet the objectives of fairness, equality, objectivity, independence and sustainability, and be non-discriminatory.
- (8) The new classification structure should, at each grade, generally describe the range of tasks which a fully competent employee would have the capacity to perform to the reasonable output and quality standard required by the employer in a given industry or occupational area of work. At Grade 2, this would involve a simple and repetitive range of tasks performed under a normal industry-standard level of supervision, and Grade 3 would involve a range of somewhat more complex tasks.
- (9) The new wage assessment mechanism would be a hybrid model involving two elements:
 - (a) An assessment of the “size” of the job actually assigned to the supported employee compared to a job which would attract the full Award rate of pay at Grade 1, 2 or 3. This would involve a work value assessment with particular focus on the range of tasks required to be performed compared to the relevant Award classification, the

complexity of those tasks and the skills required to perform them, and the degree of support necessary to allow the employee to perform those tasks. This might involve, for example, an actual job assigned to a supported employee being “sized” in increments of 20%, 40%, 60%, 80% and 100% of a job to which an Award classification in Grades 1-3 would apply.

- (b) Once the job was properly “sized”, a modified SWS-type assessment would be carried out to determine the output of the supported employee in discharging that job compared to the output of a person without that employee’s disability performing the same job. This assessment would have to take into account any non-productive periods on the part of the supported employee and provide for an objective and consistent method of benchmark-setting.

The result would be, for example, that if the job was “sized” at 60% of a full Award classification job, and if the supported employee could perform that job at an output level of 50% compared to another person who can perform to the employer’s reasonable expectation of output, the wage rate would be 30% of the Award classification minimum rate of pay. A minimum of 12.5% of the full award hourly rate would continue to apply.

- (10) The interested industry parties and the Commonwealth will be given an opportunity to participate in a conferral process conducted by a member of this Full Bench in order to design a new classification structure and wage assessment mechanism consistent with the above conclusions. This conferral process will include consideration of:
- the length of the phase-out period for the existing wage assessment tools;
 - the establishment of objective criteria for the “sizing” of jobs performed by supported employees;
 - how the SWS might be modified, or an analogous mechanism established, for the measurement of the output of a supported employee in a particular job; and
 - transitional arrangements concerning existing wage rates and transitional time periods for ADEs with a demonstrated economic incapacity to pay.
- (11) We consider it highly desirable that both elements of the new wage assessment mechanism be supported by the provision by the Commonwealth of trained and independent assessors. We therefore consider that the close involvement of the Commonwealth in the design of the detail of the new wage assessment mechanism would be in the public interest.
- (12) The new wage assessment mechanism should be trialled early in the phase-out period to determine its wage cost impact and to identify any other difficulties before the Commission approves its inclusion in the Award.

- (13) If a broad consensus about the design of the new wage assessment mechanism cannot be reached within a reasonable timeframe, then this will be determined by us.

[16] A report-back hearing concerning the above provisional conclusions will be listed after the parties have had a reasonable opportunity to consider the contents of this Statement. We will state our conclusions concerning United Voice's claim for increased superannuation contributions and Our Voice Australia's claim for a "*Rights at Work for Supported Employees*" clause in our final decision.



VICE PRESIDENT

Appearances:

M. Harding of counsel and *K. Wilson*, solicitor
N. Ward, solicitor and *S. Zevari*, solicitor on behalf of the ABI/NSWBC
C. Christodoulou on behalf of Greenacres Disability Services
R. Leibhaber and *L. Svendson* on behalf of the HSU.
A. Thomsson, *R. Freeland* and *S. Mulders-Jones* on behalf of the Commonwealth (DSS).
S. Bull on behalf of United Voice
J. Zadel, solicitor on behalf of Civic Disability Services
M. Stroppiana, on behalf of the Endeavour Foundation
K. Langford and *P. Musso* on behalf of the NDS.
M. Walsh on behalf of Our Voice Australia

Hearing details:

2018.
Sydney:
5-9 and 12-16 February.

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