

FAIR WORK COMMISSION
4 YEARLY REVIEW OF MODERN AWARDS
SUPPORTED EMPLOYMENT SERVICES AWARD 2010

Matter No: AM2014/286

SUBMISSIONS

AUSTRALIAN BUSINESS INDUSTRIAL AND THE NSW BUSINESS CHAMBER

1. INTRODUCTION

1. We act for Australian Business Industrial (**ABI**) and NSW Business Chamber (**NSWBC**) (collectively, **our clients**) in the above proceedings.

2. ISSUE

2.1 We refer to the Decision¹ of the Full Bench of the Fair Work Commission (**Commission**) dated 3 December 2019 (**Decision**) and the proposed determination at Attachment A of the Decision, amending the *Supported Employment Services Award 2010* (**Award**).

2.2 In its Decision, the Commission invited parties to make further submissions in relation to the determination, in particular relating to the proposed:

- (a) rates of pay and classification descriptors for the new Grades A and B;
- (b) classification descriptors for Grades 1-7; and
- (c) implementation timetable.

2.3 We are also instructed to briefly address the Commission's decision to grant the United Workers' Union's claim in respect of superannuation.

2.4 Before addressing the matters above, we would like to note that ABI and NSWBC welcome the Commission's Decision in this matter allowing the ADE sector to move forward with much needed certainty to continue to undertake its essential role in the community.

¹ [2019] FWCFB 8179.

- 2.5 It maybe that the Commission sees benefit in some further guidance on the language used in Grade A and B before the trial or in the alternative the Commission may prefer to wait until the trial has been conducted.
- 2.6 Our submissions are made in this context.
- 2.7 Our clients have received feedback from its members in relation to potential trial implementation issues associated with Grade A and B and we simply provide this to the Commission to assist the Commission further at this time.

3. GRADES A AND B

- 3.1 The inclusion of two new classifications (Grades A and B) applicable only in circumstances where an employer has *created* a role to meet the needs/circumstances of an individual's disability and which does not fall into the Grades 1-7 of the Award classification structure, is a fair and practical approach to achieve a transparent, award-based method of wage setting, while taking into account the work value of those jobs created by employers.
- 3.2 As might be anticipated our clients' members have raised queries about how the proposed classification descriptors should be applied in practice during the trial.
- 3.3 The proposed definition of Grade A is as follows:

B.2 Grade A

Employees at this grade will perform a simple task or tasks consisting of up to three sequential actions under direct supervision and constant monitoring.

- 3.4 The proposed definition of Grade B is as follows

B.3 Grade B

Employees at this grade will perform a simple tasks or tasks consisting of more than three sequential actions, which may involve the use of mechanical or electric equipment or tools, under direct supervision with regular monitoring.

- 3.5 Grade A and B operate with similar concepts of supervision, that being "direct" supervision. However, Grade A requires "constant monitoring" while Grade B "regular monitoring".
- 3.6 These are relatively easy to understand distinguishing features of the Grades.

3.7 Grade B suggests some higher order work task potentially involving the utilisation of mechanical or electrical equipment in distinction to purely manual activity.

3.8 Prior to entering the trial period we raise two issues for consideration.

Would it assist the trial if “sequential action” was defined?

3.9 We note that some guidance is provided by the Commission at paragraph 352 which describes the sorting of cutlery as “one basic, repetitive task” such that the notion of sequential appears to contemplate a series of task that build upon each other rather than simple repetition even through in the case of the cutlery they may involve different cutlery.

3.10 The action in this context is sorting cutlery not a series of sequential actions sorting knives, forks etc into different parts of the tray.

Would it assist the trial to clarify how an employer reconciles a circumstance where “sequential actions” and “monitoring” requirements conflict?

3.11 The second issue is where the supervision elements accord with Grade A but the sequential actions may accord with Grade B.

“Sequential Actions”

3.12 The term “sequential actions” used in the classification descriptions of the proposed Grades A and B, could be defined in Clause 3 of the Award to avoid any confusion about what constitutes a “sequential action”.

3.13 Where the word, “sequential” is readily accepted as meaning “following” and “successive”, the real issue is what would be considered an “action” for the purposes of Grades A and B.

3.14 For example, one definition of “action” could be considered as the physical act of, say, picking an item up such as a fork or a spatula, *and* placing it into packaging, i.e. a pick-and-pack motion.

3.15 Alternatively, the example above could be considered two separate “actions”, e.g. picking up the item could be considered the first “action” and placing it into packaging, the second “action” in the sequence.

3.16 If the observations of the Commission at paragraph 352 of their Decision are the proper meaning of the words adopted by the Commission we do not see this narrow (paragraph

3.15 above) approach as being intended, but potential confusion affirms the value of a definition in the award.

Examples

- (a) At Disability Services Australia, a task such as sorting four types of cutlery (knife, fork, spook, teaspoon) may be interpreted as involving more than three “sequential actions”. Alternatively, the sorting of each of the four types of cutlery may be interpreted as a single “action” for each individual time an item of cutlery sorted, as suggested at paragraph 352 of the Commission’s Decision.

- (b) At Greenacres, supported employees putting together window rollers for the tracks of sliding windows undertake the following “actions” in sequence:
 - (i) picking up the casing and placing it in a wooden apparatus (which assists the employee to put the window roller together);

 - (ii) picking up a round disc and placing the disc on the casing in the wooden apparatus;

 - (iii) picking up a metal rod and placing the rod in the correct location on the round disc;

 - (iv) closing the wooden apparatus (which snaps the three individual components together, and opening the wooden apparatus; and

 - (v) placing the completed window roller in a box with the other finished items.

- (c) Also at Greenacres, supported employees putting together the Nair Hair Removal packs under take the following “actions” in sequence:
 - (i) picking up the wax pot and putting it in the Nair custom packaging box;

 - (ii) picking up two spatulas and putting them in the Nair box (depending on whether the employee picks up one or two spatulas at a time, this would impact on the number of sequential items);

 - (iii) picking up the skin wipe and putting that in the Nair box;

 - (iv) picking up the ‘thank you’ card and putting that in the Nair box; and

- (v) closing the Nair packaging box and putting it with the other completed items.
- (d) At The Flagstaff Group, similar considerations arise where employees are performing very simple tasks, but which require a number of “sequential actions”. For example, assembling and packing pens will include the following “actions”:
- (i) pick up the pen shell;
 - (ii) pick up an ink cartridge and place into the shell;
 - (iii) pick up a nib and screw it onto the pen;
 - (iv) pick up a lid and place a lid on the pen;
 - (v) repeat the above sequential actions five more times;
 - (vi) pick up six pens and place in the packaging box; and
 - (vii) place packed box on the conveyor line.

3.17 You will see from the examples provided above, where an “action” includes a pick-and-pack sequence, relatively simple tasks could be said to involve more than three “sequential actions”.

3.18 Alternatively, where an “action” is interpreted as the picking motion being considered as one “action”, and the packing motion separately considered as a second “action” then a relatively simple task could be argued to be over five “sequential actions” and more likely around seven to ten “sequential actions”.

3.19 In terms of assisting employers to have clarity (during the trial) in understanding what “sequential action” is intended to mean, we submit a definition of the phrase “sequential action” in the context of Grades A and B, could be inserted into the Award for the purposes of the trial.

3.20 Further specific examples could be provided underneath Grades A and B in order to assist employers to understand the intended coverage of each of these Grades in relation to “sequential actions” during the trial.

“Use of mechanical or electrical equipment or tools”

- 3.21 We support the submissions of the National Disability Service in relation to the “use of mechanical or electrical equipment or tools” and agree that further refining this definition to make it clear that the employee is required to be actively operating the mechanical or electrical equipment or tool, would assist during the trial to avoid an interpretation where the employee is performing a task that supports the use (i.e. by another employee, or in the context of a production line) of the mechanical or electrical equipment or tool.
- 3.22 For example, The Flagstaff Group have provided an example whereby a supported employee may place two corners of a pillow case into the clips of an automatic/mechanical folder, however they do not actually operate the folding machine.
- 3.23 It may be possible to argue that the employee is performing a simple tasks or tasks, which may involve the use of mechanical or electric equipment or tools, although they are not themselves operating that machinery.
- 3.24 With respect, this appears to be an anomalous outcome and one in which restricting the definition to the employee *operating* the mechanical or electrical equipment or tool, would overcome.
- 3.25 Further clarification may also be required regarding the “use” (or “operation”) of mechanical or electrical equipment or tools in instances where a piece of equipment has been modified or restricted to ensure a supported employee can safely use the machinery to the best of their ability.
- 3.26 We are instructed that the modification of equipment by ADEs (which is relatively common in the industry) could give rise to a situation where another supported employee may be able to operate the machinery at its full capacity but is assessed under the same conditions as an employee who may be operating the equipment at, say, 25 to 50 per cent of its capacity.
- 3.27 For example, at Disability Services Australia, cutlery flow wrapping machines have had multiple functions be restricted for some supported employees to enable them to safely operate the machine at a basic “stop-start” capacity. However, other supported employees are able to safely operate the machine at its full capacity. Under such circumstances it may be appropriate to consider, for the purposes of the Grade B classification description, the differences in complexity between two circumstances where a piece of equipment is being “used” or “operated” by both employees, but at significantly different levels.

4. CLASSIFICATION DESCRIPTORS FOR GRADES 1-7

- 4.1 In relation to the classification descriptions for Grades 1 to 7 of the Award, our clients' members are supportive of the amended classification descriptions contained in the determination at Attachment A of the Decision.
- 4.2 We note that the reference to modern awards in the Grades appear to omit certain modern awards, the performance work under which is very common in supported employment, including:
- (a) retail work;
 - (b) café and other hospitality work; and
 - (c) clerical and administrative work.
- 4.3 Accordingly, we submit that the following Awards and relevant classifications be added to the modern award lists in each of the Grades (from Grade 2 to 5) in the Award:
- (a) *General Retail Industry Award 2010*;
 - (b) *Restaurant Industry Award 2010*;
 - (c) *Hospitality Industry (General) Award 2010*;
 - (d) *Fast Food Industry Award 2010*; and
 - (e) *Clerks-Private Sector Award 2010*.

5. IMPLEMENTATION TIMETABLE

- 5.1 In relation to the implementation timetable, we are instructed to raise the following two matters with the Commission:
- (a) The Flagstaff Group and Disability Services Australia are willing to be included as potential operations for the proposed trial of the new wages structure; and
 - (b) our clients support the submissions of National Disability Services in relation to the proposed implementation trial, in particular that it run from 1 May 2020 to 31 July 2020, so as to ensure the implementation of the new wages structure is not rushed and feedback from parties can be properly considered.

6. SUPERANNUATION

- 6.1 While our clients' are supportive of the Commission's decision to move supported employees in ADEs earning less than \$450.00 per month to the standard contribution rate of 9.5% or \$15.00 per week, our clients' suggest that a modified implementation is considered in light of the already substantial changes the ADE sector will be experiencing over the next few years, and the fact that the change to employer superannuation contributions will involve a currently unfunded wage increase.
- 6.2 In order to assist in the management of the impact of the increase, we ask the Commission to consider that the increase be phased in as follows:
- (a) first increase to either the standard contribution rate of 9.5% or \$10.00 per week (whichever is greater) from 1 July 2020; then
 - (b) increase to either the standard contribution rate of 9.5% or \$15.00 per week (whichever is greater) from 1 July 2021.

On behalf of Australian Business Industrial and NSW Business Chamber Ltd



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