

# Summary of Decision

3 December 2019

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

AM2014/286

[\[2019\] FWCFB 8179](#)

### *Introduction*

[1] As part of the 4 yearly review of modern awards required to be conducted under the *Fair Work Act 2009*, a Full Bench of the Fair Work Commission has conducted a review of the *Supported Employment Services Award 2010* (Award). The Award covers employers operating “supported employment services” and their employees. A “supported employment service” is a service to support the paid employment of persons with disability for whom competitive employment at or above the relevant award wage is unlikely and who, because of their level of disability, need substantial ongoing support to obtain or retain paid employment. Supported employment services are commonly known as Australian Disability Enterprises (ADEs).

### *Minimum wages for disabled employees in supported employment*

[2] The main issue which arose in the review concerned the minimum pay rates prescribed by the Award for disabled persons working in ADEs. The current position is that the Award prescribes seven classifications and minimum pay rates (Grades 1-7) for various types of work. However, the Award permits disabled employees to be paid a percentage of the prescribed minimum rates based on an assessment undertaken using an approved “wage assessment tool”. There are currently 29 wage assessment tools approved for use under the Award. One of these is the Supported Wage System tool (SWS), which operates with the support of the Commonwealth Government. The SWS assesses the productivity of a disabled employee in the performance of their duties as a percentage of the productivity of a non-disabled person performing the same duties, and the employee may then be paid the same percentage of the minimum award rate (with an absolute minimum rate which is, for practical purpose, \$2.50 per hour). The other wage assessment tools have been privately developed by ADEs, and in general terms they assess the relative competency and/or productivity of disabled employees in various ways and similarly result in the employee receiving a percentage of the minimum award rate. ADEs may choose the wage assessment tool to be used at their particular enterprise. Evidence before the Full Bench demonstrated that, under the current system, supported employees earn an average of about \$7.00 per hour.

[3] There were two proposals advanced by interested parties to change the minimum pay rate methodology in the Award for disabled persons:

- (1) The AED Legal Centre proposed that the SWS be the only wage assessment tool approved for use under the Award, and that all the other wage assessment tools be removed.
- (2) Australian Business Industrial and the NSW Business Chamber proposed that a special new five-level classification structure be developed for disabled employees, under which such employees would be paid various percentages of the relevant minimum award wage based on an assessment of the work value of the duties they performed. The lowest percentage payable would be, as under the SWS, 12.5% of the relevant minimum award wage.

[4] In considering these proposals and assessing whether the Award met the modern awards objective and the minimum wages objective prescribed by the *Fair Work Act*, the Full Bench took into account the following fundamental features of employment in ADEs:

- The employment opportunities which the supported employment sector provides to disabled persons is of immense value to Australian society. Disabled persons place great weight upon the companionship, stimulation, independence, learning opportunities and the sense of dignity, achievement and self-worth which supported employment provides them. For the carers and family members of disabled persons employed in ADEs, the support and respite which employment in ADEs provides them, and the positive personal effects such employment has on the disabled person, is regarded as being of huge worth.
- The nature of employment is markedly different in the supported employment sector than in the general labour market. The purpose of ADEs is to provide employment opportunities for disabled persons who have restricted work capacity, typically on a not-for-profit basis. Accordingly, they seek only those business opportunities which will generate jobs capable of being filled by disabled persons, which necessarily limits the types of commercial activity they can engage in. They create or tailor jobs in such a way that they are capable of being performed by a particular person with a particular disability or by persons with a class of disability. This may mean, for example, that a set of work functions which is capable of being performed as a single job by a single person not relevantly affected by disability is broken up into a number of discrete tasks, each of which will be made into a separate job that aligns with the work capacities of a particular disabled person.
- ADEs cannot financially be sustained by commercial revenue alone and are dependent to a large degree upon government funding. Government funding is currently transitioning to payment under the NDIS pricing framework. This restricts the capacity of ADEs to remain viable if there is any significant change in minimum wage levels absent a corresponding adjustment to government funding.
- In considering appropriate minimum wage-setting mechanisms for disabled employees in ADEs, it is necessary to take into account that they are invariably in receipt of the

Disability Support Pension. For a single adult, this amounts to \$933.40 per fortnight (inclusive of the pension supplement and the energy supplement). The pension is subject to an income test whereby, for every dollar earned above \$174 per fortnight, the pension is reduced by 50 cents.

[5] The Full Bench determined that it would not adopt the proposal advanced by the AED Legal Centre. The Full Bench concluded that the SWS was not suitable for use in ADEs in isolation because it assessed wages on the basis of productivity only and did not take into account the relative work value of the duties being performed by the disabled person. This meant, for example, that disabled persons performing different work could be assessed at the same percentage productivity level and thus receive the same wage, even though the work of one was of greater complexity and required greater skill than the work of the other. It also expressed concern that the proposal would raise the labour costs of disabled employees to an extent that the viability of many ADEs would be endangered. However, the Full Bench did note that the SWS did have the virtues of using a transparent and robust methodology and of being financially supported in its operation by the Commonwealth Government.

[6] The Full Bench also determined not to adopt the proposal advanced by Australian Business Industrial and the NSW Business Chamber. It was considered to be conceptually sound in that it took into account both the work value of the job being performed and the level of the employee's productivity. However the proposed classification descriptors focused excessively on the personal characteristics of the individual employee rather than the value of their work, and it required employers to make a series of discretionary and subjective assessments concerning the capacities and behavioural characteristics of individual employees, resulting in a system which lacks objectivity, transparency, simplicity and enforceability.

[7] The Full Bench did however consider that the current minimum wage methodology in the Award needed to be changed in order to meet the modern awards and minimum wages objectives in the *Fair Work Act*. It considered that the existing system permitting a variety of different wage assessment tools to be used at the employer's discretion meant that many ADEs were permitted, in practice, to set their own minimum wages for supported employees rather than have them determined objectively pursuant to the provisions of a modern award. In this respect, disabled employees were treated differently to non-disabled employees both within the Award itself and more generally. The variety of available wage assessment tools available also meant that disabled employees performing work that was the same or of the same work value across different enterprises were permitted to be paid different minimum rates of pay. In this respect, disabled employees were again treated differently to non-disabled employees, who are always entitled to the same minimum wage rate for the same work or for work of the same work value, regardless of the employer for whom the work is performed.

[8] The Full Bench also considered that some of the wage assessment tools might, in their application, result in disabled employees having an entitlement to a minimum wage rate which was less than that applying to a non-disabled employee under the Award for the same work or work of the same value. Some of them might also contravene the *Disability Discrimination Act*

1992. The wage assessment tools were also found generally to be complex, contained in documents external to the Award, and lacking transparency and enforceability. The Full Bench concluded that all the existing wage assessment tools, other than the SWS, should be removed from the Award and phased out in their operation.

[9] The Full Bench determined that there should be a new wage fixing methodology for disabled employees which took into account the value of the work they performed and their productivity level. It concluded that the issue of the work value of jobs that are created or tailored for the purpose of providing work which is within the capabilities of disabled persons should be dealt with by the direct, simple and traditional means of establishing new award classifications and pay rates applicable to such jobs. For this purpose, it has determined that there should be two new classification levels (Grades A and B) for positions of this nature which have provisionally been assigned pay rates of \$7.00 per hour and \$14.00 per hour respectively. These classifications will only be applicable where the employer has created a position consisting of tasks and a level of supervision that has been tailored or adjusted to meet the circumstances of the employee's disability and which does not fall into Grades 1-7 of the classification structure. The classifications descriptors for Grades 1-7 will also be modified so that they are properly expressed in terms of work value.

[10] Disabled employees classified in any grade (Grades A and B or 1-7) may be paid a percentage of the specified rate for the classification based upon an assessment of their productivity as compared to that of a relevantly non-disabled person. The only wage assessment tool which may be used for that purpose will be the SWS (which will be modified in a number of respects). This will be subject to an absolute minimum rate of \$3.50 per hour.

[11] After further consultation, the new system will be the subject of a trial for a period of three months in 2020. The Full Bench looks forward to advice from the Commonwealth Government concerning its willingness to provide financial support for the conduct of the trial. Once the results of the trial have been released and after further consultation, the Full Bench will make a final determination concerning the new system before the end of 2020. It is envisaged that the new system will commence operation on 1 January 2022, thus allowing time for ADEs to transition to the new arrangements.

#### *Superannuation*

[12] The Award currently provides that, for disabled employees being paid less than \$450.00 per month, their superannuation contributions will be either 3% of their ordinary time earnings or \$6.00 per week whichever is the greater. The United Workers' Union applied for this to be changed so that such employees receive superannuation contributions of 9.5% or \$15.00 per week, whichever is the greater. The Full Bench has decided to grant this claim, since the existing provision results in no appreciable retirement benefits for disabled persons once fees for administration and required insurance products are taken into account. This will take effect on 1 October 2020, subject to further consultations with interested parties.

#### *Rights at work for supported employees*

[13] Our Voice Australia, an advocacy group for the families of disabled persons, proposed that the award be varied to include a new provision requiring employers to take all reasonable

steps to provide supported employees with information they need to exercise their employment rights, and to provide the opportunity for supported employees to have their nominee, guardian, carer, and/or parent/family member to be involved and or consulted in employment matters that may be prejudicial to the supported employee's interests. The Full Bench has decided to grant this claim in a slightly modified form, since it considered that disabled employees in ADEs are a vulnerable group for whom such protection is necessary. The new provision will take effect on 1 March 2020, subject to further consultation.

● *This statement is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission's reasons.*

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