DECISION

Fair Work Act 2009
s.156—4 yearly review of modern awards

4 yearly review of modern awards – *Supported Employment Services Award 2020*

(AM2014/286)

Social, community, home care and disability services

ACTING PRESIDENT HATCHER
DEPUTY PRESIDENT SAUNDERS
COMMISSIONER CAMBRIDGE

SYDNEY, 21 DECEMBER 2022

4 yearly review of modern awards – Supported Employment Services Award 2020 – finalisation of substantive matters.

Introduction and background

[1] This decision finalises the outstanding substantive issues in the review of the *Supported Employment Services Award 2020* (SES Award) concerning minimum wage rates for employees with a disability.[1] Specifically, this decision deals with the submissions in response to our decision issued on 10 November 2022[2] (*November 2022 decision*) and the draft determination published in conjunction with that decision. We adopt the short titles and acronyms used in the *November 2022 decision* in this decision.

[2] The *November 2022 decision* sought submissions as to the following issues, having regard to the *provisional* views stated in the decision:[3]

(a) Should there be any modifications to the "gateway" requirements for Grades A and B?

(b) What are the appropriate transitional arrangements and what should be the operative date for the variations?

(c) At what frequency should SWS assessment take place?

[1] Throughout this decision the expression "employees with a disability" is used where necessary because this is consistent with the terminology used in the *Fair Work Act 2009* (Cth) and the SES Award. However, we acknowledge that such employees are also commonly referred to as "employees with disability" and "persons with disability".

[2] [2022] FWCFB 203

[3] Ibid at [277]

(d) What is the appropriate definition of "*supported employment services*" for the purpose of the coverage of the SES Award?

(e) Are there any other drafting issues in respect of the draft determination published with the *November 2022 decision*?

[3] Written submissions as to the above issues were filed by:

- Australian Business Industrial, the New South Wales Business Chamber and National Disability Services (ABI/NDS);[4]
- AED Legal Centre, the ACTU, the UWU and the HSU (AEDLC/Unions);[5]
- Our Voice Australia (Our Voice);[6]
- The Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU);[7] and
- The Commonwealth Department of Social Services (DSS).[8]

[4] The submissions raised a further issue, namely whether additional references to classifications in other awards should be added to the classification definitions for Grades 2-5 in clause A.2 of Schedule A in the draft determination.

[5] We conducted a final hearing on 7 December 2022. This was attended by all the above parties and, in addition, Greenacres Disability Services.

[6] We will deal with the above issues identified above, and the submissions made in respect of those issues, *seriatim*.

Should there be any modifications to the "gateway" requirements for Grades A and B?

Submissions

[7] Submissions about this issue were made by the AEDLC/Unions, the DSS and ABI/NDS.

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[4] Submission – Australian Business Industrial, the New South Wales Business Chamber and National Disability Services, 30 November 2022

[5] Submission – AED Legal Centre, the ACTU, the UWU and the HSU, 30 November 2022; Submission - AED Legal Centre, the ACTU, the UWU and the HSU, 9 December 2022

[6] Submission – Our Voice Australia, 30 November 2022

[7] Submission – Construction, Forestry, Maritime, Mining and Energy Union, 30 November 2022; Submission - Construction, Forestry, Maritime, Mining and Energy Union, 6 December 2022

[8] Submission – Department of Social Services, 30 November 2022

[8] The AEDLC/Unions submitted that clause A.1.1(b)(i) in the draft determination should be amended as follows:

> A.1.1 Grades A and B of the classification structure in Schedule A—Classifications apply to any employee with a disability who:
>
> . . .
>
> (b) has been placed in a position by their employer which:
>
> (i) consists of duties and a level of supervision which accommodate the ~~circumstances~~ **effects** of the employee's disability; …
>
> (ii) . . .

[9] In support of this amendment, the AEDLC/Unions submit:

> "4. … Reasonable minds might differ however about the meaning of the words "the circumstances of an employee's disability" in this context. If by referring to "the circumstances" the Full Bench intends to refer to the manifestations of disability that impair and so constrain the work that an employee is, objectively, able to do, the employee parties suggest replacing "circumstances" with "effects" so that the phrase reads, "accommodate the effects of an employee's disability." This change would, it is submitted, express the criterion more objectively and in a way that would focus the accommodation idea on an adapted position that has aligned the duties and level of responsibility with the impact the disability has on the employee's work ability and performance. This change is consistent with the Full Bench's view of an ADE's employment purpose and its intention for the alterations it has made to this criterion."

[10] The DSS, while generally supporting the "gateway" requirements as constituting a "*qualifier…to guard against the misclassification of employees with a disability*", expressed some concern that clause A.1.1(b) in the draft determination does not adequately protect supported employees from "*inadvertent misclassification and/or deliberate exploitation by some employers*." The DSS submitted that the "gateway" requirements should be modified to include a right for employees to request a review of their classification. To that end, it sought that the following new clause A.1.3 be added:

> A.1.3 An employee (or a person acting on behalf of an employee) who is classified under Grades A or B, may request that their classification be reviewed to determine if they should be classified under Grade B (if applicable) or Grades 1 to 7. In relation to this request:
>
> (a) The request must:
>
> (i) as far as possible, be made in writing;
>
> (ii) if made by the employee themselves, set out (to the extent the employee can do so) why the employee believes they are not currently classified correctly; or

(iii) if made by a person on behalf of the employee, set out why the employee is not currently classified correctly and why they should be classified at a higher Grade.

(b) If the employee cannot make a request in writing, they, or a person on their behalf, may request a meeting with the employer and the employer must, as soon as practicable, conduct such a meeting.

(c) The employer must provide a written response to this request to the employee within 21 days which states:

(i) the result of the employer's review, being whether the employer will or will not re-classify the employee;

(ii) if the employer has decided it will re-classify the employee, what the employee's new classification is; and

(iii) if the employer has decided it will not re-classify the employee, the reasons for the refusal, which must include why Grade A or B continues to apply to the employee's position.

(d) Where requested by the employee or a person on their behalf, the employer must also conduct a meeting with the employee to explain its written response.

[11] The DSS also sought amendments to existing clause 32, *Rights at work for supported employees* to the effect that supported employees would be informed of their right to request reclassification and their nominee, guardian, carer, parent or other family member, advocate or union (as applicable) would be consulted and involved.

[12] ABI/NDS was, broadly speaking, neutral concerning the modification proposed by the AEDLC/Unions, although it submitted that it was "*comfortable*" with the use of the word "*circumstances*" in clause A.1.1(b)(i).[9] It submitted that clause A.1.1(b)(i) should be modified in a different way as follows:[10]

. . .

(i) consists of duties and a level of supervision **and monitoring** which accommodate the circumstances of the employee's disability; …

[13] ABI/NDS submitted that this modification was appropriate because the classifications descriptors for Grades A and B utilise as their defining criteria: duties performed, level of supervision and level of monitoring.

[9] Transcript, 7 December 2022 PNs 2604-2605

[10] Ibid PN 2602

[14] In response to the DSS' proposed modification to clause A.1, ABI/NDS submitted that its intent and purpose could more simply be achieved by amending clause 32.4, and adding a new clause 32.5, as follows:

> 32.5 Employees have the right to request a review of the Grade into which they have been classified by their employer. Where such a request is made, the employer shall discuss the matter with the employee and provide a written response to the enquiry which includes reason for the grade. If the employee is not satisfied with the employer's response, the employee can pursue the matter further in accordance with the dispute resolution process in clause 30.

[15] The AEDLC/Unions and did not oppose ABI/NDS' proposed modification to clause A.1.1(b)(i). In respect of the DSS' proposal, they agreed that there ought to be a process of the kind proposed, but also submitted that it agreed with ABI/NDS that the relevant provision should be located in clause 32. They agreed with the amendment to clause 32.4(d) proposed by ABI/NDS, and proposed that the following new clauses 32.5 and 32.6 be added:

> 32.5 An employee (or their nominee) has the right to request a review of the grade into which the employee has been classified by their employer. Where such a request is made, the employer shall:
>
> (a) meet with the employee (and any nominee) to discuss the review request as soon as practicable after the request is made; and
>
> (b) provide the employee (and any nominee) with a written response to the review request that informs the employee of the employer's decision and its reasons no later than 21 days after the request was made.
>
> 32.6 If the employee is not satisfied with the employer's decision, the employee (or their nominee) may utilise the dispute resolution procedures in clause 31 and may commence the dispute at the step referred to in clause 31.4.

Consideration

[16] In respect of the AEDLC/Unions' proposed modification to clause A.1.1(b)(i), it is difficult to identify that the replacement of "*circumstances*" with "*effects*" would cause any change to the clause's meaning. However, we note that both clause D.3.1 of the SES Award and clause D.3.1 in the draft determination refer, in respect of the eligibility criteria for the SWS, to the "*effects of a disability*" on an employee's productive capacity. For the sake of consistency, we will therefore make the modification to clause A.1.1(b)(i) proposed by the AEDLC/Unions. We consider that the modification to the same clause proposed by ABI/NDS to be appropriate, and it will also be made.

[17] While it is clear that any issue about an employee's classification may be raised as a dispute under current clause 31, *Dispute resolution* of the SES Award, we accept in response to the DSS' submission that there would be some value in highlighting the availability of this mechanism for supported employees. However, we consider that the DSS' proposed new clause A.1.3 "over-engineers" the matter, and we agree with ABI/NDS and the AEDLC/Unions that a

variation to clause 32 is the appropriate way to resolve the issue. Having regard to the respective proposals of ABI/NDS and the AEDLC/Unions, we consider that clause 32, *Rights at work for supported employees* (which will become clause 31 once the other proposed variations are operative) should be varied by adding a reference in renumbered clause 31.4 to "*any classification review process conducted in accordance with clause 31.5*" and inserting a new clause 31.5 as follows:

> 31.5 A request may be made by, or on behalf of, a supported employee for a review of the grade into which the employee has been classified by their employer. Where such a request is made, the following procedure shall be followed:
>
> (a) the employer shall meet with the employee to discuss the review request as soon as practicable after the request is made;
>
> (b) the employer shall provide the employee with a written response to the review request that informs the employee of the employer's decision and its reasons no later than 21 days after the request was made;
>
> (c) if the employee is not satisfied with the employer's decision, the employee may utilise the dispute resolution procedures in clause 30 Dispute resolution and may commence the dispute at the step referred to in clause 30.4.

What should be the transitional arrangements?

Submissions

[18] Submissions about this issue were made by Our Voice, ABI/NDS and the AEDLC/Unions.

[19] Our Voice proposes the transitional period be extended from three years to five years. Its submissions in support of this proposal emphasised its concern about the increase in employment costs likely to be associated with the variations to the wage provisions of the SES Award and the effect this might have on the employment of persons with a disability in the supported employment sector. In this respect, Our Voice placed particular emphasis on the announced closure of the Activ ADE in Western Australia and the difficulty which Activ's supported employees were likely to face in obtaining alternative employment.

[20] ABI/NDS submitted that the commencement of the transitional period should be deferred from the 1 May 2023 to 1 July 2023, for four reasons:

> (1) Given the time of year, many employers who will be affected by this matter may not become aware of the outcome until January 2023 and may not be in a position to meaningfully take steps to prepare for the commencement of the changes until mid to late-January 2023.
>
> (2) There continues to be a degree of confusion and uncertainty around the "gateway" requirements for Grades A and B (which are proposed to be the subject of further drafting modification). Employers will likely require a reasonable (but not

extensive) period of time to come to terms with the new classification structure. While employer and industry bodies will be able to assist with guidance material and advice, it is unlikely that employers will commence the transition work until February 2023.

(3) While three months (February to end of April 2023) may be sufficient for smaller ADEs to grade their employees, larger ADEs with hundreds or more than 1,000 supported employees may face considerable challenges in grading all employees by 1 May 2023.

(4) It will be critical that employers properly consult with supported employees and their parents/carers to ensure the transition to the new wages structure is successful. Time and effort will be needed to ensure that employees understand the changes to the Award (including, in many cases, the changes to the way in which employees' wages are determined) and the changes that are likely to occur in relation to their terms and conditions of employment.

[21] ABI/NDS submitted that they do not oppose the *provisional* view concerning the three-year transitional period. In doing so, they noted that they placed reliance on paragraph [266] of the *November 2022 decision*, in which we stated the Commission's readiness to review the transitional provisions should evidence emerge that the new wages structure is endangering the viability of ADEs.

[22] The AEDLC/Unions supported the *provisional view* regarding transitional arrangements in the *November 2022 decision*, but proposed the addition of a term to the transitional schedule as follows:

I.2.3(b) if upon SWS assessment the assessed employee's wage rate is greater than the current rate, the employee shall be paid a sum representing the difference between what would have been payable under the assessed rate during the period between 1 May 2023 and the date the SWS assessment occurs and what was paid to the employee.

[23] They submitted that this additional term would better ensure that employees receive the fair and relevant safety net that the Full Bench has decided should apply in the manner they intend, in that employees will receive all of the benefit of the variations that the Full Bench has decided they should receive according to the transitional arrangement that comes into force on 1 May 2023. The AEDLC/Unions also submitted that the proposed term will give effect to the comprehensive range of minimum wages the Full Bench intends that employees should receive, while not imposing any additional costs on ADEs that do not otherwise arise under the variations the Full Bench has decided upon.

[24] ABI/NDS and Our Voice both opposed the additional term proposed by the AECLC/Unions. ABI/NDS in particular characterised the proposal as an attempt to undermine the *provisional* view prescribing a 3-year transitional period by imposing an additional cost upon employers in the transitional period.

Consideration

[25] In the absence of any opposition to our *provisional* view that the transitional period should be for three years on the part of ABI/NDS, representing employer interests in the proceeding, we do not propose to accede to Our Voice's proposal to extend the transitional period to five years. We accept as legitimate Our Voice's anxiety about the future viability of ADEs in light of the pending closure of Activ in Western Australia, but the limited evidence before us does not satisfy us that the Activ closure has any real connection with the variations to the SES Award which we propose to make.

[26] We see no difficulty in acceding to ABI/NDS' submission that there should be a somewhat later operative date for the commencement of the transitional period. For technical reasons, it is not appropriate that the operative date be 1 July 2023 since this would coincide with the likely operative date of any variations to the SES Award arising from the next Annual Wage Review. We will change the operative date to 30 June 2023. References throughout the determination to 1 May 2023 and 1 May 2026 will be amended to 30 June 2023 and 30 June 2026 respectively. References in tables of rates will be updated to reflect operative dates of 30 June through to 29 June for each transitional year.

[27] The proposal of the AEDLC/Unions for what is, in substance, the backpay of any increase to a supported employee's rate upon being assessed under the SWS to (what will now be) 30 June 2023 is rejected. The effect of this proposal would be that that employers would face a contingent liability for wage increases the quantum of which would remain unknown until such time as the requisite SWS assessments could be undertaken. This would upset the careful balance we sought to achieve in the proposed transitional arrangements and might, in some cases, endanger the viability of ADEs. We also note that the payment of any lump sum amount to a supported employee may have an effect upon their entitlement to the disability support pension, which is obviously a consequence to be avoided.

At what frequency should SWS assessments take place?

Submissions

[28] ABI/NDS supported the *provisional* views concerning the frequency of SWS assessments, including the variation of clause D.7 of the SES Award to reflect review periods of 2 and 5 years respectively.

[29] The AEDLC/Unions submitted that the current award provisions that require a review of the initial SWS assessment following 12 months of job performance and a further automatic review after 3 years' service remain appropriate. They submitted that a post-engagement review that increases the review period from 12 months' service to 2 years' service would postpone the realisation of any increased productivity derived from working experience for a further year, and an employee-initiated review under existing clause D.7.2(c) would not address this concern, as it can only be engaged if there is a job change or a change to the process involved in the work that is undertaken. The AEDLC/Unions submitted, in the alternative, that in respect of concerns about the availability of SWS assessment resources arising as a result of the automatic reviews, it would be preferable to "*suspend the automatic reviews during the transitional period and*

then resume them thereafter or, alternatively, dispense with the 3 yearly automatic review but retain the 12 monthly reviews".

[30] In respect of this alternative position, ABI/NDS adopted an agnostic position. The DSS supported the retention of the automatic SWS review after 12 months but expressed no position as to the following review.

Consideration

[31] The time and frequency of SWS assessments arises in two contexts: first, during the transitional period and, second, on an ongoing basis following the full implementation of the new wages structure. The former is dealt with in clause I.2.2 of the draft determination and the latter in clause D.7. Clause I.2.2 (read with clause I.2.1) provides that an employee to whom Schedule D applies who has not previously been the subject of an SWS assessment must be the subject of an initial assessment before 1 May 2026, but need not thereafter be the subject of a further assessment for 3 years unless clause D.7.3 applies. Clause D.7.1 requires a review of an employee's SWS assessment after 2 years' service (instead of the current 12 months: clause D.7.2(a)), clause D.7.2 requires a further review within 5 years' service (instead of the current 3 years: clause D.7.2(b)), and clause D.7.3 (which is in the same terms as current clause D.7.2(c)) requires a review at the initiative of the employer or employee where the employee's job or job processes have changed, subject to certain limitations.

[32] We do not propose to alter the requirement contained in clause I.2.2 of the draft determination that, in respect of supported employees not previously SWS-assessed, they need be assessed only once in the transitional period and then not for a further period of three years. However, we consider that there is merit in the AEDLC/Unions' proposal, in respect of the ongoing requirements to operate after the transitional period, to restore the requirement for an automatic review after 12 months' service and to abolish the requirement for another automatic review as contained in current clause D.7.2(b) and proposed clause D.7.2. We accept that a change in a supported employee's productivity is most likely to occur in the first 12 months of performing a particular job, whereas the purpose of a further automatic review after the first is not readily explicable. The right to request a review because of changed circumstances will remain. Accordingly, clause D.7.1 of the draft determination will be amended to refer to 12 months' service rather than 2 years' service, clause D.7.2 will be deleted, and clause D.7.3 will be renumbered as clause D.7.2. The cross-reference in clause I.2.2 to clause D.7.3 will be changed to clause D.7.2.

What is the appropriate definition of "supported employment services" for the purposes of the coverage of the SES Award?

[33] No party opposed our *provisional* view that the statutory definition of "*supported employment services*" in s 7 of the *Disability Services Act 1986* (Cth) should be used as the definition of the same expression in clause 4.3 of the SES Award for the purpose of delimiting the scope of coverage of the award. However, ABI/NDS, the AEDLC/Unions and the DSS all submitted that the text of that definition should be placed directly into clause 4.3 rather than being incorporated by reference, as is done in the draft determination. We will accede to this joint position, and the draft determination will be amended accordingly.

Are there any other drafting issues in respect of the draft determination published with the *November 2022 decision*?

[34] Both the DSS and ABI/NDS noted a typographical error in the draft determination at clause 15.3(b). The reference to *Supported Employment Services Award 2010* is incorrect and will be amended to *Supported Employment Services Award 2020*. ABI/NDS also noted a cross-referencing error at clause D.5.6 of the draft determination, and submitted that the correct clause reference is clause 30. We agree this cross-reference is incorrect and will be amended.

[35] It is noted that the draft determination published on 10 November 2022 set out the transitional arrangements at Schedule I of the SES Award. On 14 November 2022, the SES Award was varied to delete Schedule H—Part-day Public Holidays.[11] Due to this deletion, it is appropriate to amend references to Schedule I within the determination to now reference Schedule H.

[36] ABI/NDS submit that a new provision should be inserted into clause 15.4 of the SES Award to give operative effect to the transitional provisions in now redesignated Schedule H and clarify how Schedule H interrelates with clauses 15.1 and 15.2. They propose a new clause 15.4(b) as follows:

> 15.4 Wage assessment—employees with a disability
>
> (a) …
>
> (b) Schedule H of this Award sets out the transitional arrangements that apply for employees who have not been the subject of a SWS assessment prior to 1 May 2023.

[37] We accept that a reference to the transitional provisions should be inserted into clause 15. We will add a new clause 15.5 (renumbering the currently proposed 15.5—Higher duties clause as clause 15.6):

> 15.5 Schedule H—Transitional Arrangements applies to the following employees:
>
> (a) employees classified in accordance with clause 15.1 and Schedule A—Classifications as Grade A or Grade B; and
>
> (b) employees assessed under the Supported Wage System in accordance with Schedule D—Supported Wage System.

[38] Finally, ABI/NDS also raised an issue concerning the drafting of clause D.3.1 in the draft determination, which describes the application of Schedule D, *Supported Wage System*. Clause D.3.1 is currently drafted as follows:

[11] PR747454

D.3.1 This schedule applies to employees with a disability who are unable to perform at the required productive capacity because of the effects of a disability.

[39] ABI/NDS expressed a concern that the clause might be construed as referring to a supported employee's actual productive capacity, and sought that the drafting be clarified to avoid such a construction being available. Accordingly, we will amend clause D.3.1 to read as follows:

D.3.1 This schedule applies to employees with a disability who are unable to perform at the required productive capacity for their classification because of the effects of a disability.

Other matters

[40] Both ABI/NDS and the CFMMEU submitted that references to additional award classifications should be included in the classification definitions for Grades 2-5 in clause A.2 of Schedule A. ABI/NDS submitted that, because the existing classifications definitions make reference to the work functions of catering, timberwork, horticulture and related activities, and cleaning, references to classifications in the following awards should be added:

- *Hospitality Industry (General) Award 2020*;
- *Timber Industry Award 2020* (General Timber Stream);
- *Cleaning Services Award 2020*; and
- *Horticulture Award 2020*.

[41] The CFMMEU agreed that reference to the classifications in the *Timber Industry Award 2020* should be added, but submitted that this should not be confined to the General Timber Stream, since it is aware of ADEs employing supported employees who would fall within the Wood and Timber Furniture Stream of that award. ABI/NDS did not oppose this, and the AEDLC/Unions supported the inclusion of all the proposed additional classifications references.

[42] As proposed, we will include the following additional classification references:

A.2.4 Grade 2

- *Hospitality Industry (General) Award 2020*: Level 1
- *Timber Industry Award 2020*: General Timber Stream Level 2; Wood and Timber Furniture Stream Level 2
- *Horticulture Award 2020*: Level 2

A.2.5 Grade 3

- *Hospitality Industry (General) Award 2020*: Level 2

- *Timber Industry Award 2020*: General Timber Stream Level 3; Wood and Timber Furniture Stream Level 3
- *Cleaning Services Award 2020*: Cleaning Services Employee Level 1
- *Horticulture Award 2020*: Level 3

A.2.6 Grade 4

- *Hospitality Industry (General) Award 2020*: Level 3
- *Timber Industry Award 2020*: General Timber Stream Level 4; Wood and Timber Furniture Stream Level 4
- *Cleaning Services Award 2020*: Cleaning Services Employee Level 2
- *Horticulture Award 2020*: Level 4

A.2.7 Grade 5

- *Hospitality Industry (General) Award 2020*: Level 4
- *Timber Industry Award 2020*: General Timber Stream Level 5; Wood and Timber Furniture Stream Level 5
- *Cleaning Services Award 2020*: Cleaning Services Employee Level 3
- *Horticulture Award 2020*: Level 5

[43] Finally, ABI/NDS made the following submission:

> "…Schedule I.2.2 [now Schedule H.1.2] imposes an obligation on employers to have employees 'subject to an initial SWS wage assessment before 1 May 2026'. We note that this may not necessarily be wholly within the power of employers, given that they will be reliant on the Department of Social Services providing the assessors to undertake the assessments. This gives rise to a concern that employers might ultimately be found to be in breach of the Award if, for reasons outside their control and through no fault of their own, the Department does not facilitate an initial SWS assessment by the deadline. At this point, we do not seek any amendment to this aspect of the Draft Determination, but we wish to raise the issue and foreshadow that an application might need to be made in the future if it appears that certain SWS assessments may not be done by the relevant deadline. In that regard, our clients look forward to further details from the Department regarding the practical and logistical issues relating to how SWS assessments will occur and what steps employers should be taking to facilitate this process (noting that many ADEs have not previously had any experience with SWS assessments)."

[44] In response to this submission, it is sufficient to note that the approach foreshadowed in paragraph [266] of the *November 2022 decision* will equally apply if it becomes apparent that the transitional provisions will not be workable because of a lack of access to SWS assessors. We also observe that, in light of the observations made in paragraph [255] of the *November 2022 decision*, the DSS has not expressed any concern about the workability of the transitional provisions insofar as they concern SWS assessments.

Conclusions regarding requirements of the FW Act

[45] The SES Award will be varied, effective from 30 June 2023, in terms of the draft determination published on 10 November 2022 as modified by this decision.

[46] In the *November 2022 decision*, we set out our conclusions as to how the variations we then proposed would satisfy the applicable requirements of the FW Act. However, since that decision, the FW Act has been extensively amended by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*. Relevantly, amendments to the statutory object of the FW Act in s 3, the modern awards objective in s 134(1) and the minimum wages objective in s 284(1) have taken effect. It is accordingly necessary to re-state our conclusions by reference to the provisions of the FW Act which are currently in effect. This will necessarily involve a degree of repetition of the conclusions stated in paragraphs [268]-[271] of the *November 2022 decision*.

[47] We are satisfied for the purpose of s 138 of the FW Act that the variations to the SES Award which will be made as a result of the decision of the Full Bench on 3 December 2019[12] (*December 2019 decision*), the *November 2022 decision* and this decision are necessary to achieve the modern awards objective in s 134(1) and the minimum wages objective in s 284(1). In paragraphs [342] and [343] of the *December 2019 decision*, the Full Bench found that the provisions of the SES Award relating to the setting of minimum wages for employees with a disability do not meet either the modern awards objective or the minimum wages objective, and are not fair. No party in the most recent stage of the proceedings sought to revisit this finding. For the reasons identified in the *December 2019 decision*, we make the same findings in relation to ss 134(1) and 284(1) in their current form.

[48] In relation to the modern awards objective, we consider the variations to the SES Award which will be made will ensure that the SES Award, together with the NES, constitutes a fair and relevant safety net for ADE employees with a disability as well as all other employees covered by the SES Award. We repeat and adopt for the purpose of that finding the reasoning and conclusions in paragraphs [367]-[376] of the *December 2019 decision*, which set out the design principles of the preferred approach to which the variations we will make will give effect. Those parts of the *December 2019 decision* are demonstrative of the fairness and relevance of the variations. In respect of the mandatory considerations in s 134(1), we have taken these matters into account in the following way (using the paragraph designations in the subsection):

(a) Employees with a disability under the SES Award are "*low paid*" (in accordance with the established meaning of that expression). Insofar as the wages component of their overall income is concerned, the variations will either maintain or improve (and in some cases significantly improve) employees' wages. However, in assessing the effect on employees' relative living standards and needs, regard must be had to the likely tapering of employees' DSP entitlement in some cases where wage increases are significant. Nevertheless, the overall income of employees will either improve or stay the same, and this weighs in favour of the variations.

[12] [2019] FWCFB 8179, 293 IR 1

(aa) The variations will not improve or diminish access to secure work "*across the economy*" in a literal sense, but may at least maintain and possibly improve access to secure work for persons with a disability in the ADE sector by placing minimum wages in the sector on a legally sustainable, non-discriminatory and stable footing within the framework of the FW Act in a context where the legal status of the existing wage assessment tools remains in question following the decision in *Nojin*[13] (as explained in paragraphs [315]-[364] of the *December 2019 decision*). This consideration there weighs marginally in favour of the variations.

(ab) The variations have no implications for gender equality, so this is a neutral consideration.

(b) There is no basis to make a positive finding that the variations will encourage collective bargaining, and therefore this consideration weighs against the variations to a minor degree.

(c) This consideration is a particularly important one for employees with a disability in ADEs since social inclusion through participation in the workforce is the fundamental purpose, and not just the effect, of their employment. The increase in labour costs projected by the Report requires the tempering of the conclusion stated in respect of s 134(1)(c) in paragraph [377] of the *December 2019 decision*. However, certain modifications made to the preferred approach in the *November 2022 decision* are likely to reduce the cost of the variations. More fundamentally, as earlier stated, the variations will place the payment of minimum wages by ADEs to supported employees on a legally sustainable, non-discriminatory and stable footing. In the long term, we consider that this will support and promote the participation of persons with disability in the workforce and serve the purpose of promoting social inclusion.

(d) To the extent that the variations will implement a minimum wages system which is consistent across the ADE sector and accords with the requirements of the FW Act, it may to some degree promote flexible modern work practices and the efficient and productive performance of work. This weighs in favour of the variations to a minor degree.

(da) These matters are not relevant and therefore have neutral weight.

(f) The variations are likely to increase the cost of employing employees with a disability although, as found in paragraph [240] of the *November 2022 decision*, the cost of such employees is only a small proportion of the total employment cost for ADEs. The introduction of the SWS across the board will ensure that employees with a disability are paid in accordance with their productivity but the variations are otherwise likely to have a neutral effect on overall productivity. The regulatory burden will increase for employers in the short term because of the necessity to establish internal structures to implement the new wages structure, but in the longer term it is likely to reduce the regulatory burden as ADEs are

[13] *Nojin v Commonwealth of Australia* [2012] FCAFC 192, 208 FCR 1

relieved of the necessity to administer their own wage assessment tools. Overall, this consideration weighs against the variations.

(g) The variations, once properly implemented, will serve to ensure a relatively simple, comprehensible, stable and sustainable modern award wages structure for the ADE sector, and this weighs in favour of the variations being made. No issue of overlap of modern awards arises.

(h) We do not consider that the variations will have any implications for, or discernible effect upon the national economy, and this is accordingly a neutral consideration.

[49] In relation to the minimum wages objective, we consider that the variations will establish a safety net of fair minimum wages for employees with a disability. In respect of the fairness of the minimum wages safety net to be established, we again rely upon the reasoning and conclusions in paragraphs [367]-[376] of the *December 2019 decision*, which demonstrate the variations will appropriately remunerate employees for the work value of the jobs they perform and for their productivity in the performance of their work. As to the mandatory considerations in s 284(1) of the FW Act, for paragraphs (a), (aa), (b) and (c), we repeat respectively our conclusions in respect of paragraphs (h), (ab), (c) and (a) of s 134(1). In relation to s 284(1)(e), the variations will, for the first time, establish a truly comprehensive range of fair minimum wages for employees with a disability covered by the SES Award by replacing the range of wage assessment tools currently permitted by clause 18 with classifications which cover the full range of jobs performed in ADEs accompanied by properly-set minimum wages and the capacity to apply the SWS to assess impaired productivity caused by disability. As to the fairness of the wage rates to be established, we rely upon the reasons already stated.

[50] To the extent that the variations will involve a variation to modern award minimum wages within the meaning of s 135(1), we are satisfied pursuant to s 157(2)(a) (and, to the extent applicable, former s 156(3)) that the variations are justified by work value reasons. As explained in paragraphs [369] and [371]-[373] of the *December 2019 decision*, the new Grades A and B and the modifications to Grades 1-7 are intended to "provide a classification structure which accommodates in a comprehensive way the jobs which the evidence shows actually exist in the ADE sector and properly reflects their work value".[14] The descriptor for each classification is drafted in a way which bases the application of the classification upon the nature of the work and the level of skill and responsibility involved in doing the work at that level. The wage rates set for Grades A and B are, we consider, appropriate for the nature of the work and the skills and responsibilities required at those levels. In reaching this conclusion, we have taken into account the relative work value of those grades compared to Grade 2, the existing wage rates for work of that nature paid by ADEs, and the findings in the Report. We are also satisfied pursuant to s 157(2)(b), for the reasons already stated, that it is necessary to make the variations outside the system of annual wage reviews in order to achieve the modern awards objective. In relation to s 135(2), we have taken into account the current quantum of the National Minimum Wage in setting the wage rates for Grades A and B in the way discussed in paragraph [371] of the *December 2019 decision*.

[14] [2019] FWCFB 8179, 293 IR 1 at [373]

[51] A final determination varying the SES Award to give effect to the *December 2019 decision*, the *November 2022 decision* and this decision will be published in conjunction with this decision.

ACTING PRESIDENT

Appearances:

N Ward for Australian Business Industrial and the NSW Business Chamber.

K Langford for National Disability Services.

M Carter for Our Voice Australia.

E Gruschka for the Commonwealth Department of Social Services.

V Wiles for the Construction, Forestry, Mining, Maritime and Energy Union.

C Christodoulou for Greenacres Disability Services.

M Harding SC for the AED Legal Centre, the United Workers Union and the Health Services Union and with *S Kemppi* for the Australian Council of Trade Unions.

Hearing details:

2022
Sydney, with video link using Microsoft Teams:
December 7.

Printed by authority of the Commonwealth Government Printer

<MA000103 PR749150>