FAIR WORK COMMISSION
Fair Work Act 2009
s 156 – 4 yearly review of modern awards

IN THE MATTER OF A REVIEW OF THE SUPPORTED EMPLOYMENT SERVICES AWARD 2010
AM2014/286

SUBMISSION OF THE ASSOCIATION OF EMPLOYEES WITH A DISABILITY INC (AED), UNITED WORKERS' UNION AND THE AUSTRALIAN COUNCIL OF TRADE UNIONS (ACTU) IN REPLY

1. The parties to this submission (the **Employee Parties**) need only address a few matters in responding to the outline of submissions of Australian Business Lawyers and Advisors (**ABL**), the NSW Business Chamber and National Disability Services (the **Employer Parties**).

2. The Employer Parties submissions press for the retention of the protected wages position they have enjoyed under the Award. That protection should cease. No issue has been taken with the Full Bench's finding that clause 14.4 of the Award fails to meet FW Act standards. The sub-standard wages that are the corollary of this finding should end. This ought to serve as the premise for the award variation that replaces the clause. Historical wage discrimination should no longer influence minimum wage fixation for any disabled person.

3. The Full Bench should not presume that the wages practices of those who agitate for the retention of their protected position reflect all ADE employment. The Trial Report demonstrates this is not so. So does other evidence called by the Employee Parties. This

evidence demonstrates that there is a mix of award based wage practices, including the SWS. This is an important frame of reference in framing a safety net.

The ABL Submissions about the Supported Employment Sector

4. The foregoing serves as a segue to what the Employer Parties have to say about the "supported employment sector" by reference to extracts from the Full Bench's December Decision.[1] The Employer Parties underline parts of those extracts for emphasis.

5. It is first necessary to reject the suggestion that the Full Bench is to be taken as having expressed concluded views in their December Decision. The December Decision was shaped by the Full Bench's consideration of proposals advanced principally by the AED and the ABL. As put, those proposals were rejected in full or in part. The ABL proposal was rejected in its entirety. No interested party advanced the "preferred approach." This emerged for the first time in the December Decision.

6. A section 156(1) review is not *inter partes*. Subject to considerations of natural justice, it is a review by a statutory body of its own statutory instrument. Accordingly, the Employer Parties suggestion of re-litigation is misconceived and meaningless in this statutory context. Of course, this notwithstanding the Employer Parties themselves now ask the Full Bench to derogate from its "preferred approach" through the approach advanced in Annexure A of their submissions.

7. In paragraph 4, the Employer Parties misstate the Full Bench's observations in their March Decision. Whilst in the December Decision the Full Bench describe the purposes of the trial in a manner that may have suggested that they intended the trial would inform their consideration of changes in overall labour costs (see paragraph [379]), by their March Decision the Bench expressed a more general purpose for the trial.[2] The Full Court in *AED v the Commonwealth* (2021) 283 FCR 561 understood the Full Bench to be saying that they remained open to persuasion. That was the view of the Full Bench's reasons that counsel for the ABI and other of the Employer Parties urged before the Court.[3]

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1 Employer Parties submissions, [7].

2 March Decision, [3].

3 *AED v the Commonwealth* (2021) 283 FCR 561, [119]-[120] (Mortimer and Abraham JJ).

8. For their part, the Employee Parties have proceeded on the basis that the Full Bench has not reached a concluded position as to the merits of including the Grade A and B terms in the Award.

General Findings

9. The general findings referred to by the Employer Parties need to be viewed in context. As has been mentioned, the proceedings leading to the December Decision were shaped by the evidence and submissions framed to support specific proposals. The Full Bench observed in the December Decision that no party sought to press a work value case. The reason why is obvious.

10. The AED proposed an award variation that would dispense with the wage assessment tools in clause 14.4, save for the SWS. The predicate of its proposal was that the Award already contained properly fixed minimum rates of pay which were reflected in the rates prescribed for each of the work grades referred to in clause 14.2 of the Award. The ABI proposal, which was for a new wages tool to be included in the list contained in clause 14.4, sought no alteration to Schedule B or the rates linked to the grades contained therein either.

11. The Trial Report contains information about the supported employment sector and the wages tools used within it. The trial trialled the modified SWS in a sample of ADEs. The Employee Parties and the Employer Parties have called evidence and submissions directed to the "preferred approach" following the Trial Report. In this phase of the review proceeding, it is appropriate that the Full Bench re-visit and update their general conclusions. For that purpose, the underlined parts of the extracts contained in the Employer Parties submissions serve as a handy reference point.

12. Without attempting to be exhaustive, the Full Bench should re-visit:

    (a) The underlined sentences in paragraph [246]. There was (and is) no evidence that ADE employment is to be distinguished from open employment on the basis that the former caters for more severely disabled persons. Nor is there a statutory basis for such a distinction. It is not clear what "more severely" means in this context. A person either meets the eligibility for a DSP (a matter that is not the concern of the FWC), or they do not. If they do then that person is an "employee with a disability" for all purposes. And that is so whether the person is employed by an ADE under the Award or employed by another employer under another award or is subject to the Second Special National Minimum Wage. Further, "more

severely" has no footing in any objective fact. Respectfully, there is not a safe basis for the FWC to conclude that such a distinction exists or that it characterises ADE employment as a whole throughout Australia.

(b) The observations contrasting the general labour market with ADE employment in paragraphs [247]-[248]. Those conclusions are at odds with evidence and inferences available from evidence already before the FWC, the Trial Report and the evidence of witnesses to be called by the Employee Parties. The fact that employees with a disability (i.e. the same cohort subject to the same DSP eligibility criteria) work in open employment as part of the general labour market makes the observation unstable. Even if there was a safe basis to conclude that *all* Australian ADEs are motivated to employ in the manner suggested in [247] of the December Decision, such a motivation does not deny the need for minimum rates of pay in this Award to accord with the modern awards objective and minimum wages objective. Those objectives apply indifferently to all Australian employees.

(c) The proposition in paragraph [249] that the low productivity nature of ADE operations cannot financially be sustained by commercial revenue alone. There is evidence of ADEs who pay full award rates.[4] Five ADEs in the trial sample use the SWS. The first witness statement of Walter Grentzic (at [28]) refers to the financial success of Greenacres. Whilst that success is disputed by Mr Christodoulou, a deterioration in the business position of the employer is not a basis to visit upon workers sub-standard wages for labour.

(d) The conclusion expressed in the underlined words from paragraph [252] of the December Decision. Evidence that there are ADEs using the SWS (whose circumstances are not before the FWC) renders that conclusion unstable as a statement of general fact.

(e) The underlined words from paragraph [253] of the December Decision. The AED has, in its jurisdictional submission, explained the irrelevance of the DSP to the wage setting exercise engaged in by the Full Bench. It invites error to have regard to a welfare measure that has no bearing on the determination of wages for work performed. This was a central finding of the *Nojin* litigation. The welfare measure addresses the consequences of work *in*capacity, not work capacity. The Full Bench risks taking account of an irrelevant consideration on a matter of statutory

[4] First witness statement of Walter Grentzic, [19]; Witness Statement of Sharon Dulac at [9]; Witness statement of Brendan Ford at [6]-[10], [22]-[24]

importance. The Full Bench also risks recognising a distinction that would, in relation to wages for work, disadvantage employees of one kind of employer (ADEs) that is not recognised and is not applied to the same cohort of employees employed by other kinds of employer, whether covered by another award or the Second Special National Minimum Wage. The same reasoning also serves to treat ADE employees less favourably than those in receipt of other kinds of welfare entitlement, such as the aged pension, who also perform work.

13. At the time of the first set of hearings before the Full Bench and now, the evidence of the so-called "deconstructed job" was and remains hypothetical. The idea is difficult to grasp in an employment setting that is said to use only "employees with a disability" to perform the relevant work. By contrast, the Full Bench will be mindful of the evidence of customised jobs in non-ADE open employment. Additional examples of this are contained in the evidence of Mr Grzentic and Ms Duluc.[5] This is concrete evidence of real jobs that exist in the general labour market. In the absence of concrete ADE examples that demonstrate deconstruction from the base of a "whole job" that actually exists in an ADE (as distinct from a job configured by the ADE to enable the work it wants done from time to time to be done by the workforce it has; which any employer might be expected to do) the Full Bench cannot know:

    (a) what a "deconstructed job" (or in the language of proposed clause B.1.1 a "tailored or adjusted position") looks like across the supported employment sector as a whole;

    (b) to what extent such a job or jobs are characteristic of ADE employment generally; or

    (c) the features of such a job when compared with the hypothesised idea of a "whole job."

14. The Trial Report stated that ADE work may change substantially based on contracts, seasons and/or rotating roles.[6] This fits with the evidence of witnesses called by the Employee Parties.[7] The susceptibility to substantial change tells against the deconstruction conception. Indeed, the inescapable inference is that any deconstruction, if it exists at all, is responsive to employer need as opposed to the Full Bench's

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5 Further witness statement of Walter Grzentic, [10]; Further witness statement of Sharon Duluc, [15].

6 Trial Report, page 126.

7 First witness statement of Sharon Duluc, [10]; witness statement of Donald Greer, [10]-[14]; Further witness statement of Donald Greer, [9].

preliminary conception of tailored jobs responsive only to the disability circumstances of an employee with a disability or a class of such an employee. The Bench has no way of knowing the degree to which any deconstruction moves closer or further away from the hypothesised whole job in response to a change in work. There is also the evidence of how disabled employees themselves may demonstrate skill and ability over time. In the Dunoon report referred to by the Full Bench in the December Decision, there is this:

> Moreover, and as also recognised by the Wages Sub-Committee's principles, *people with disabilities commonly improve their ability to perform a job over time. In part, these improvements will come about as individuals develop their skills and competencies, either as a result of on-the-job experience or specific training*. Improved performance may also reflect the introduction of modifications (often quite small ones) to the job and the work setting. The assessment this system needs to be sufficiently dynamic to take account of these changes affecting performance"[8]

15. A practical example of this is the evidence of Rodney Davis. In supported employment Mr Davis was allocated the same kind of work. When he commenced working in open employment at Bunnings his work was limited to plant watering. Through work performance however Mr Davis' demonstrated abilities that led to more tasks as well as more complex tasks.[9]

16. At the lower value range of an award, variations in work demand as well as practical work output explain the classification difficulty reported in the Trial Report, a problem made worse by the inability to precisely frame work distinctions that demonstrate real value differences generally between grades A, B and 2.

17. Turning then to concept of a "whole job."

18. The idea is entirely hypothetical. What constitutes a "whole job" in disability specific employment has no anchor in any fact demonstrated by the Employer Parties. Like any employer, a "job" for an ADE employee consists of work their employer wants done to fulfil contracts it holds and to sell what it produces through labour input.[10] This has significance for the functions the FWC is exercising. The Full Bench will be slow to assume a state of affairs absent established facts probative of the generality of those affairs for the range of employers and their employees the Award covers. The Bench is

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8 Exhibit 16, Annexure F p. 22, of the evidence currently before the Full Bench.

9 Witness statement of Rodney Davis, [5]-[6], [10].

10 See for example, witness statement of Rodney Davis, [9]-[10]; witness statement of Kate Last, [7]; first witness statement of Walter Grzentic, [26]-[30], [33]; first witness statement of Sharon Duluc, [9]-[10]; first witness statement of Robyn Smith, [16]; further witness statement of Donald Greer, [9].

designing a safety net that would establish a ***general*** award standard for all covered employment.

Historical wage fixation

19. Much is made by the Employer Parties of the history summarised in paragraph [314] of the December Decision. However, that history is not determinative. It needs to be viewed against contemporary developments.

20. *First*, the historical prominence achieved by hybrid forms of wage determination for some disabled employees says nothing about their validity now. Open employment does not use a hybrid form of wage determination, albeit the same cohort of employees are involved. The BSWAT was a hybrid tool designed by the Commonwealth. When this tool was considered against criteria prescribed by law, it fell short. The national core or industry competencies the BSWAT stipulated were found to disadvantage those with intellectual disabilities. Moreover, those "competencies" had no relationship with the work the relevant employers wanted done, the performance of that work by employees or the wages payable for that performance. Those "competencies" served only to suppress wages unfairly.

21. A broader theme that emerges from the Full Court's analysis in *Nojin* is the need to view historical wage practices applied to disabled works through a remedial lens. Eliminating disability discrimination requires steps that actively eschew and seek to avoid unfair, disadvantageous, wage practices.

22. A report not referred to by the Full Bench in their historical analysis is the *Review of the Disability Discrimination Act* conducted by the Productivity Commission in 2004. The Commission reviewed the DD Act following the outcome in *Purvis v New South Wales* (2003) 217 CLR 92. An issue in that case was the nature of the equality that the DD Act was directed to achieve. The plurality (Gummow, Hayne and Heydon JJ) rejected the suggestion that it was directed to achieve "substantive equality," concluding instead that the equality the legislation, at that time, was directed towards was purely formal.

23. "Substantive equality" is outcome focused and remedial.[11] The plurality described it at [202] as:

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[11] See the framework for substantive equality described by Sandra Fredman: Report for the Association of Employees with Disability: annexure RM2 to the witness statement of Professor Ron McCallum, p. 4.

> Substantive equality'' directs attention to equality of outcome or to the reduction or elimination of barriers to participation in certain activities. It begins from the premise that ''in order to treat some persons equally, we must treat them differently.

24. In their review, which led to the DD Act being amended, the Productivity Commission stated that "substantive equality was a sound basis for disability discrimination legislation."[12] One form of this, the Commission opined, was an employer duty to make reasonable adjustment.[13] The duty gives effect to the human right to reasonable adjustment so that disabled persons can enjoy or exercise rights on an equal basis with others.[14] This right is intended to be protective of individual human dignity.[15] This cohort of employees enjoy this protection under law, domestic and international. That they do serves is an important frame of reference for the FWC in this review.[16]

25. The FWC's approach to minimum wage determination in respect of this Award should proceed from the standpoint that "employees with a disability" have been subject to anomalous, sub-standard, pay. Correction requires positive action with remediation in mind. Respectfully, the Grade A and B terms would perpetuate the existing anomalous state of wage affairs, starting as it does from a position that ADE wages should broadly remain at their existing level.

26. An incongruous feature of the Grade A and B terms is that the hypothesised tailored or adjusted position (arising from an employer's view of the circumstances of disability) is that it appears, at first blush, as an adjustment that may amount to a "reasonable adjustment." However, this adjustment in fact has the opposite effect of the human right. It would subject affected employees to a base "minimum" wages entitlement with a single valuation for all adjustments and suggests doing so by fixing rates of pay with no discernible relationship to any other award based wages minima, or the National Minimum Wage. It would operate to preserve the sub-standard wages position caused by clause 14.4 of the existing Award. Those affected would not enjoy a minimum wage on an equal basis with others. This is destructive of dignity and of substantive equality.

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12 Productivity Commission, overview pp. XL-XLI. See also *Watts v Australian Postal Corporation* (2014) 222 FCR 220 at [16] citing this section of the Commission's report (Mortimer J). The Commission's report was the basis for amendments intended to overcome in *Purvis* and to give domestic effect to this human right.

13 Ibid.

14 *Watts*, [18].

15 *Watts*, [24].

16 Report for Association of Employees with Disability: annexure RM2 to the witness statement of Professor Ron McCallum, pp 5-6.

27. *Second,* applying a work value lens *simplicitor* has limitations when it comes to work at the low end of the award value range and in its application to those who have been subject to historical, sub-standard, wages. Work value does not explain the rate of pay struck for work to which the National Minimum Wage applies. That wage prescribes a wages floor for award free work in employment of any value. The same is true of the Second National Minimum Wage, which is prescribed for the same cohort of disabled employee. So much is consistent with the beneficial purpose of statutory minimum wages instruments, which is "to benefit national system employees by creating regulatory instruments that intervene in the market setting minimum wages to lift the floor of such wages."[17] The preservation and advancement of human dignity of those whose human rights are specifically recognised by international law (and Australia) through the *Convention on the Rights of Persons with Disabilities*[18] is a further, sound, basis to align wages practices for ADE employment with the precepts of the National Minimum Wage and the wage fixation principles enjoyed by other Australian workers enjoy. Those principles remain current.[19]

28. *Third,* the SS Act embraces the SWS as a conditional element of the eligibility that enlivens the defined phrase "employee with a disability," which phrase lies at the heart of section 153(3).

29. *Fourth*, the FW Act unequivocally prohibits discrimination, except to the extent authorised by section 153(3)(b). The same statute calls up by reference the defence to disability based wages discrimination contained in section 47(1)(c) or (d) of the DD Act and makes it available as a defence to section 351(1) discrimination which is otherwise prohibited by the FW Act.

30. *Fifth,* in its *Review of the Disability Discrimination Act*, the Productivity Commission considered discriminatory wages and in doing so had regard to a submission that advocated for supported employment wages to be treated as a "special benefit" within the meaning of section 45(1) of the DD Act as it stood at that time. The Commission was firmly against the idea. The statute was amended to exclude it (section 45(2)), leaving sections 47(1)(c) and (d) as the only defence to wage discrimination based on disability.

31. *Sixth*, this Full Bench has concluded that clause 14.4 of the Award (which authorises wages tools, including hybrid wages tools) falls short of the safety net standards

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17 Annual Wage Review: [2018] FWCFB 3500, [478].

18 Report for Association of Employees with Disability, page 6.

19 *Annual Wage Review Decision* 2021-2022, [108].

prescribed by the FW Act. The hybridised form of wage determination for employees with a disability typically viewed value through the lens of competency as well as productivity. This assimilated employee worth and work value for wage determination purposes. Doing so was, and remains, anomalous in a minimum wage context.

The SWS as a methodology not intended to apply to ADEs

32. The Full Bench's further observation that the SWS was not designed or intended for use in the ADE sector is properly understood in light of several developments.

33. *First*, the Full Bench has now modified the SWS in a manner that takes account of ADE employment and would retain it in the Award for all classifications. The Trial Report shows that the SWS in this modified form could be applied appropriately and consistently.

34. *Second*, statute has intervened. The SS Act embraces the SWS as a conditional element of eligibility. The Act does not dictate where it is applied let alone assume that it is only applied to non-ADE employment. The Act does not exclude its application to ADE employment.

35. An ADE is recognised by the Commonwealth as but one kind of program of employment support for those whose disability has work effects. The focus on what an individual can demonstrate by output is apparent in both support tests utilised by the statute as a condition for eligibility under section 94(1)(c) of the SS Act. The focus is also obvious from the eligibility condition built into the SWS. Moreover, as the AED has also explained in its jurisdictional submission, the alternative work support criterion in section 94(1)(c)(i) of the SS Act, "continuing inability to work," requires the Secretary to be satisfied in each case that at the conclusion of an assessment period an individual applicant for the DSP is prevented solely because of his or her disability from "improving his or her capacity" for work through their participation in a program of support.

Cost Impact on Employer Parties

36. The Employer Parties draw attention to paragraph [357] of the December Decision. This concerns the wage costs increases that arose from the abandonment of the BSWAT in relation to the SWS. Respectfully, the Employees Parties suggest the Full Bench re-visit the observations made in that paragraph.

37. The reasons of the Full Court in *Nojin* demonstrate the adversity and disadvantage that arises from wage discrimination. That the disadvantage ended with the abandonment of the BSWAT explains the increase in wages. The BSWAT unfairly, and as it turns out unlawfully, suppressed them. The Full Bench correctly recognised the Full Court's finding as representing the correction of a wage injustice. However, the Bench deprecated the SWS as inherently biased in favour of an "inappropriate escalation of pay rates in respect of the performance of work of the lowest value." A number of things need to be said about this statement:

    (a) The Full Bench has now modified the SWS for ADEs to avoid perceived unfairness arising from its application in an ADE setting. This needs to be given weight. The Trial Report did not find any inherent bias that affected the accuracy and consistency of the SWS, as modified. Insofar as that report recommends further refinements, those refinements did not expose any fundamental flaw in the design of the Award based SWS.

    (b) Respectfully, it is a misconception to say that the SWS takes no account of the value of the work being assessed. Its function is to assess the individual output of a worker in work demanded by an employer that has already been valued. The two things are distinct. It would misapply the SWS to allow the individualised effects of disability to play a part in the classification of work. Further, the Full Bench's deprecation of the SWS is, respectfully, disharmonious with the use made of it by the Second Special National Minimum Order for the same cohort of employees. Wages enjoyed under that order governs all award free work, whatever its value. Yet those wages are much higher than both Grades A and B.

    (c) Respectfully, it is false to compare an escalation in wage costs arising from the SWS by refence to a base that has relied on wages tools that the Full Bench has found fall below FW Act standards. It is unsurprising that wage escalation is a result. Such escalation is properly viewed as a desirable and appropriate correction to the wage injustice caused by sub-standard wages.

Financial impact

38. The Employer Parties' submissions under the heading "financial impact on ADE's" need to be viewed in context.

39. *First*, as the Employee Parties explain in their position paper, the authors of the trial report qualify their opinions as to the reliability of the financial information provided by

ADEs. This affects the weight the FWC can, and should, give the conclusions drawn from this data.

40. *Second*, the trial examined the impact of the proposed wages structure on a sample of ADEs, including those who used substandard wages tools, like Greenacres. It cannot sensibly be suggested that these employers should now be further immunised from a requirement to pay, what the FWC considers, constitutes the properly valued *minimum* for labour.

41. *Third*, five ADEs who use the SWS formed part of the trial sample. The proposed wages structure were not shown to increase wage costs for those ADEs. This information runs counter to the case put by the Employer Parties.

42. *Fourth*, it is no part of the FWC's statutory task to protect ADE employers, or, more accurately, some of them from the effects of a properly fixed minimum rate for work. Yet that is what the Employer Parties ask. Indeed, they ask for even lower wages through yet another proposal that would preserve the sub-standard position they currently enjoy.

Attachment A to the Employer Parties Submissions

43. Attachment A to the Employer Parties submission is yet another proposal from those its represents that seeks special protection from the FWC.

44. Attachment A proposes that the Award immunise ADE employees entirely from the SWS. The effect would be to deliver a benefit that no other Australian employer enjoys.

45. The new classification proposal would introduce two sub-classifications into each of Grades A and B that increase the skill expected of employees at each sub-grade but for less money that the Full Bench propose.[20] The Employer Parties offer no evidence that justifies the rates of pay they propose. No attempt is made to explain, let alone, justify their proposal against other awards or the National Minimum Wage. The proposal is a bare claim for a grant of legal authority to pay less for their labour. Moreover, abandoning the SWS would further separate ADE employment from the same cohort in open employment, with no apparent justification.

46. Further, the Employer Parties proposal does not engage with power. Whilst proposed clause B.1.1(a) would require that an employee meet the impairment criteria for receipt of a disability support pension, those criteria are some but not all of the criteria for

[20] Further statement of Sharon Duluc, [9]-[14].

eligibility prescribed by section 94(1) of the SS Act. Absent satisfaction of all criteria, award prescription of the kind sought by the ABL would be *ultra vires* for failure to align with the conditions of eligibility that engage the definitional phrase "employee with a disability."

47. In their submissions in chief, the Employee Parties argue, under the heading "clarity," that the proposed work descriptions of Grades A and B are insufficiently distinct when read with Grades 1 and 2, in the sense that they do not clearly differentiate the work. No alternative proposal has emerged that would resolve this problem. This tells in favour of the view that there is in actuality no real, concrete, way of satisfactorily differentiating the kind of work at Grade 2 level and the kind of work at Grade A and B that is stable for all ADE employment at the base level. These submissions apply with greater force to the further gradations of classification proposed by the Employer Parties.

48. The susceptibility of change in work observed in the Trial Report carries the potential for inaccurate classification. The Employer Parties proposal would make this more likely and do so for employees that cannot be assumed to be able to avail themselves of dispute resolution to sort out classification disputes in a particular case as may be assumed for other employees.

Operative Date

49. The Employer Parties propose another 8 years as a transition period. However, the "preferred approach" has been on the cards now since December 2019. It has been trialled. The Employer Parties offer no evidence of any attempt on their part to accommodate any change to their businesses to take account of what has been foreshadowed. This is further evidence of the protected status that they seek to arrogate to themselves on top of the more than 2 years that they've already had. This without a basis in evidence that justifies any such period.

50. It is unacceptable that the correction of sub-standard minimum wages for employees should be delayed as suggested by the Employer Parties. Their proposal should be rejected.

22 July 20222

M. Harding SC

S. Kemppi

IN THE FAIR WORK COMMISSION
AT MELBOURNE

MATTER NO. AM2014/286

IN THE MATTER OF A REVIEW OF THE SUPPORTED EMPLOYMENT SERVICES AWARD 2010
Fair Work Act 2009 s 156 – 4 yearly review of modern awards

WITNESS STATEMENT OF RON MCCALLUM

I, Emeritus Professor Ron McCallum AO, of [redacted] in the State of New South Wales, retired, say as follows:

1. I am an Emeritus Professor of law. The title of Emeritus Professor was conferred by the University of Sydney in early 2011. My qualifications and experience are otherwise recited in the report referred to in paragraph 5 below.

2. I make this statement from my own knowledge.

3. The opinions that I express in the report referred to in paragraph 5 below are my own and are based on observations I have made and studies I have conducted in the course of activities I have engaged in in my professional capacities. Where I have relied on information provided to me, I believe that information to be true.

PROFESSIONAL INVOLVEMENT

4. On or around 19 July 2022 I received a letter from the Association of Employees with Disability requesting that I provide answers to two questions posed in that letter. Annexed to this statement and marked "RM-1" is a true copy of the letter.

5. I provided answers to the questions that had posed in a report headed "Report for the Association of Employees with Disability." Annexed to this statement and marked "RM-2" is a true copy of the report that I provided.

[redacted]

Professor Emeritus Ron McCallum AO

Thursday, 21 July 2022

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DATE 19 July 2022

EMAIL: [redacted]

Professor Ronald McCallum AO
Emeritus Professor
University of Sydney
By email.

Dear Professor McCallum

My name is Kairstien Wilson. I am the Supervising Legal Practitioner of Association of Employees with Disability (**AED**).

Background

On 29 May 2017, a Full Bench of the Fair Work Commission (**FWC**) commenced a review of the *Supported Employment Services Award* (the **Award**). The Award covers Australian employers described in the Award as "supported employment services". These services are defined by section 7 of the *Disability Services Act* 1986 (Cth.) to mean:

> "supported employment services" means services to support the paid employment of persons with disabilities, being persons:
>
> (a) to whom competitive employment at or above the relevant award wage is unlikely; and

Funded by the Australian Government through the Department of Social Services

(b) who, because of their disabilities, need substantial ongoing support to obtain or retain paid employment".

The Award covers employees of these services, including those referred to as "employees with a disability." This phrase is defined in the Award in identical terms to the same phrase in section 12 of the *Fair Work Act* 2009 (the **FW Act**). An employee with a disability is defined to mean:

> **employee with a disability** means a national system employee who qualifies for a disability support pension as set out in sections 94 or 95 of the *Social Security Act 1991* (Cth), or who would be so qualified but for paragraph 94(1)(e) or paragraph 95(1)(c) of that Act

The FWC's review was (and is still being) conducted under section 156(1) of the FW Act.

For the purposes of the review, the Full Bench permitted interested persons (referred to by the Full Bench in their decisions and statements pertaining to the review proceedings as "interested parties" or "parties") to propose changes to the Award and to call evidence and make submissions in support thereof. AED took up that invitation and proposed changes to those terms of the Award that deal with minimum wages for employees with a disability.

Currently, clause 14.2 of the Award prescribes a minimum rate of pay for each work grade defined and described in schedule B to the Award. The grades range from grade 1, which is a training grade, to grade 7. Minimum rates of pay are prescribed for each of these grades. The rates reflect minimum rates of pay prescribed by other awards. The rate of pay for the lowest grade (Grade 1) is the same hourly and weekly wage as the national minimum wage.

Clause 14.4 of the Award permits a supported employment service employer (in the proceedings these employers were referred as Australian Disability Enterprises (**ADE**)) to pay their employees with a disability a percentage of the rate fixed for a grade if it used one of the approved "wages tools" listed in clause 14.4(b) to determine that percentage.

In the review, AED proposed that the FWC delete all but one of the current wages tools. The tool AED contended should be retained is called the Supported Wages System (the **SWS).** The SWS is operated by the Commonwealth. It is the only assessment tool prescribed for use in respect of an "employee with a disability" to determine a percentage of the award base prescribed by other awards and the second special national minimum wage. AED argued, and continues to argue, that retention of the SWS would align the Award with other awards and the national minimum wage.

On 3 December 2019, the Full Bench published a decision: [2019] FWCFB 8179; (2019) 293 IR 1. The Bench accepted AED's proposal in part, finding that clause 14.4 in its current form did not meet the modern awards objective in section 134(1) of the FW Act. However, the Full Bench found fault with the SWS. In this light, the Bench proposed a new methodology to determine minimum wages for employees with a disability covered by the

Award. This methodology has two parts in a section of its decision headed “the preferred approach.”

The first part is classification based. The Full Bench expressed an inclination to include two grades below the existing grade 1: grade A and B. The rate of pay the Bench has proposed for grade A is $7.00 per hour and for grade B $14 per hour (respectively, 34% and 67% of the rate prescribed for grade 2). The $7.00 per hour amount reflects the Bench’s finding that this on average represents the current level of wages in ADE employment.

Grades A and B would only apply to employees with a disability:

(a) who meet the impairment criteria for receipt of a disability support pension; and

(b) who is employed by his or her employer in a position that consists of duties and a level of supervision tailored or adjusted for the circumstances of the employee’s disability, and who doesn’t fall within Grades 1-7.

The second part of the methodology would make the SWS available (in a form that the Full Bench specifically for use in ADEs) to assess the productivity of an individual employee who had been classified by their employer in one of the Award wage grades. The SWS would be available to assess work of any classification, including work in grades A and B.

In paragraph 379 of their 3 December 2019 decision, the Full Bench foreshadowed a trial of its “preferred approach.” This trial occurred in 2021 and a report was prepared. The FWC has now decided to embark on the final stage of the review. To that end, it has invited further submissions and evidence.

All the materials utilised in the review, including the submissions of the parties are publicly available on a FWC website. The link is https://www.fwc.gov.au/hearings-decisions/major-cases/4-yearly-review/awards-under-review/supported-employment-services.

For ease of reference, I have attached the Full Bench’s 3 December 2019 decision. The specific proposed award variations are set out on pages 140-141 of the decision.

The FWC’s statutory authority

The FWC has power under section 139(1)(a) of the FW Act to include wage terms in awards, including for “employees with a disability.” However, this authority is subject to the permissions and prohibitions in section 136(1) and (2). By section 136(2)(a), an award must not contain terms that would contravene subdivision D of Division 3 of Part 2-3 of the FW Act.

Section 153(1) of the FW Act is situated in subdivision D. This section prohibits award terms that “discriminate against” an employee “because of, or for reasons that include,”

relevantly, “physical or mental disability.” However, section 153(3)(b) immunises this prohibition to the extent of its terms. The section states:

> A term of a modern award does not discriminate against an employee merely because it provides for minimum wages for:
>
> .....
>
> (b) All employees with a disability, or a class of employees with a disability.

In explaining why their “preferred approach” would, if adopted, meet the modern awards objective as well as the minimum awards objective, the Full Bench also stated in paragraph [377] of their 3 December 2019 decision that, “We are satisfied that the variations would not involve any contravention of section 153(1), having regard to section 153(3)(b) [of the FW Act].”

AED disagrees with this statement and for the purposes of the final phrase of this review has provided submissions to the Full Bench that explain AED’s view of the Full Bench’s jurisdiction as well as separate submissions (which join with the ACTU and the United Workers Union) to argue against adoption of the grade A and B classification elements of the “preferred approach.” We mention this for completeness and to enable you to understand the context of this request. You should of course form your own view of the questions we pose below and do so regardless of the position adopted by any other party, including AED.

International instruments

Article 27 of the *Convention on the Rights of Persons with Disabilities* says:

> 1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:
>
> ……

(b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;

……..

(i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;

……..

Pursuant to the *Vocational Rehabilitation and Employment Convention* 1983 (No 159), the ILO has made a recommendation called the *Vocational Rehabilitation and Employment (Disabled Persons) Recommendation* 1983 (No 168).

Article 9 of Part II of the *Vocational, Rehabilitation and Employment Recommendation* states:

> Special positive measures aimed at effective equality of opportunity and treatment between disabled workers and other workers should not be regarded as discriminating against other workers.

Article 10 of Part II of the Recommendation states:

> Measures should be taken to promote employment opportunities for disabled persons which conform to the employment and salary standards applicable to workers generally.

Questions

Having regard to the *Convention on the Rights of Persons with Disabilities,* the *Vocational Rehabilitation and Employment Convention* 1983 (No 159) and the *Vocational Rehabilitation and Employment (Disabled Persons) Recommendation* 1983 (No 168):

1. To what extent, if any, do the above instruments give effect to the principle of substantive equality in connection with minimum rates of pay for employees with a disability, whatever their level of disability.

2. In circumstances where section 153(3)(b) of the FW Act confers an immunity from the prohibition in section 153(1) in respect of discriminatory modern award terms:

(i) How should the FWC give effect, if at all, to Article 27(1)(b) that entitles any disabled worker to "just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value."

(ii) How should the FWC give effect, if at all, to the reasonable accommodation human right recognised by Art. 27(1)(b)(i).

(iii) To what extent, if at all, do Articles 9 and 10 of the *Vocational, Rehabilitation and Employment Recommendation* assist in fixing minimum wages for employees with a disability in circumstances where discriminatory minimum wages are excused by section 153(3)(b).

I would be grateful if you could provide your responses to the above questions in the form of a written document. We intend to provide that document to the FWC and the other parties evidence of the opinions you express. The FWC is likely to place your response on its website for this review, subject to any redactions that you request to protect your privacy.

Please include in that document those aspects of your academic and professional background that you consider qualify you to provide the answers you give to the above questions. In this regard, whilst there is no FWC rule or practice note that governs the subject of expert evidence, for completeness I draw your attention to the Federal Court's practice note on that subject. It may be viewed at https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-expt.

We are obliged to provide materials to the FWC by 22 July 2022. If you are unable to meet that time please let me know so that we can take such further steps as may be necessary.

If you have any queries in relation to the above, please email us at aedlegal@aed.org.au or leave a voicemail message on (03) 9639 4333 with some convenient times for us to return your call.

Yours sincerely

Kairsty Wilson
CEO/Principal Legal Practitioner
AED Legal Centre

Report For Association Of Employees With Disability

Emeritus Professor Ron McCallum AO

Personal Background

I have been an academic labour relations and employment lawyer for all of my adult life, and I have also practised in this field. My current title is that of an Emeritus Professor which was conferred upon me by the University Senate of Sydney after my retirement in December 2010.

In 1993, I was appointed as the Blake Dawson Waldron Professor in Industrial Law in the Faculty of Law, University of Sydney. As I have been totally blind since my birth, I was the first totally blind person to be appointed to a full professorship in any field at any Australian or New Zealand university.

From July 2002 to September 2007, I served a five year term as Dean of Law, University of Sydney.

In the 2006 Queen's Birthday honors list (12 June 2006), I received the designation of Officer in the Order of Australia for my "services to tertiary education, for industrial relations advice to governments, for assistance to visually impaired persons and for social justice".

Membership of the CRPD Committee

In November 2008, as Australia's candidate, I was elected at the United Nations in New York as an inaugural member of the United Nations Committee on the Rights of Persons with Disabilities (CRPD Committee).

The primary function of the CRPD Committee is to monitor the implementation of the United Nations Convention on the Rights of Persons with Disabilities[1] (CRPD) in ratifying countries.[2]

[1] United Nations General Assembly, *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, United Nations, Treaty Series vol.999 p.3 (entered into force 3 May 2008)

[2] For analysis of the CRPD, see:

- Rosemary Kayess and Phillip French 'Out Of Darkness Into Light: Introducing The Convention On The Rights Of Persons With Disabilities' (2008) vol.8(1) *Human Rights Law Review*, p.1
- Marianne Schulze, *A Handbook on the Human Rights of Persons with Disabilities: Understanding the Convention on the Rights of Persons with Disabilities*, Handicap international , 3rd ed, 2010
- Valentina Della Fina, Rachele Cera and Giuseppe Palmisano (Eds), *The United Nations Convention On The Rights Of Persons With Disabilities*, Springer International Publishing, 2017,
- Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (Eds) *The UN Convention on the Rights Of Persons With Disabilities: A Commentary*, Oxford University Press, 2018
- Coomara Pyaneandee, *International Disability Law: A Practical Approach To The United Nations Convention On The Rights Of Persons With Disabilities*, Routledge, 2019

From February 2010 to April 2013, I served as Chair of the CRPD Committee, and from April 2013 to the end of my mandate in December 2014, I served as one of its Vice-Chairs. From July 2011 to June 2012, I served as the Chair of the meetings of the Chairs of the United Nations human rights treaty committees.

The Two Questions

You have requested me to answer two questions which explore the Fair Work Commission's Full Bench[3] proposed new classifications in the Supported Employment Services Award which cover persons with disabilities who satisfy threshold criteria. These classifications are referred to as Grades A and B.

From July 2019 to August 2021, I was a senior advisor to the Royal Commission Into Violence, Abuse, Neglect And Exploitation Of People With Disability. I conducted research which built upon my existing knowledge of employment and discrimination law. Some of my research was conducted with Ms Fiona Graney and I acknowledge her fine work.

Question 1

> Having regard to the Convention On The Rights Of Persons With Disabilities, The Vocational Rehabilitation And Employment (Disabled Persons) Convention 1983 No 159 and The Vocational Rehabilitation And Employment (Disabled Persons) Recommendation 1983 No 168:
>
> Question 1 asks "To what extent, if any, do the above human rights instruments give effect to the principle of substantive equality in connection with minimum rates of pay for employees with a disability, whatever their level of disability."

The *Disability Discrimination Act 1992*[4] *(DDA) Proscribes discrimination on the ground of disability* in work[5]; education[6]; in regard to access to premises[7]; with respect to goods, services and facilities[8]; accommodation[9] and land[10]; in relation to clubs and unincorporated

[3] [2019] FWCFB 8179
[4] *Disability Discrimination Act 1992*
[5] *Disability Discrimination Act 1992* (Cth), Pt 2 Div 1.
[6] *Disability Discrimination Act 1992* (Cth), s 22.
[7] *Disability Discrimination Act 1992* (Cth), s 23
[8] *Disability Discrimination Act 1992* (Cth), s 24.
[9] *Disability Discrimination Act 1992* (Cth), s 25.
[10] *Disability Discrimination Act 1992* (Cth), s 26.

associations[11]; sport[12]; and concerning the administration of Commonwealth laws and programs.[13]

When the *DDA* was enacted in 1992, its primary concern was to ensure formal equality for persons with disability. In other words, the objective was for persons with disability to be treated the same as persons without disability. According to the precept of formal equality, the attribute of disability should not be used to justify less favourable treatment of people with disability compared with people without disability.

This approach of formal equality was exemplified by section 5(1) of the *DDA* as originally enacted. Section 5(1) stated that disability discrimination occurred where a person with disability, was treated less favourably than a person without the disability, where the circumstances were the same or were not materially different.[14] The essence of the provision was to compare the treatment accorded to a person with disability with the treatment that would be accorded to a person without disability, in order to determine whether the person with disability had been treated less favourably. As the *DDA* then stood, there was no duty placed upon an alleged discriminator to make reasonable adjustments for the person with disability before making the comparison.

The objects of the *DDA*, which have remained unchanged since 1992, also highlight formal equality by ensuring:

> … as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community.[15]

In my view, the concept of formal equality has not greatly assisted most persons with disabilities. In large part, this is because in its purest aspect formal equality fails to accommodate the differences brought about by the physical, sensory and cognitive differences which are the essence of disability. Over the last three decades, much academic and practical work has been undertaken on the concept of equality as a tool for combatting discrimination.[16]

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[11] *Disability Discrimination Act 1992* (Cth), s 27.

[12] *Disability Discrimination Act 1992* (Cth), s 28.

[13] *Disability Discrimination Act 1992* (Cth), s 29.

[14] As it originally stood, section 5(1) of the *Disability Discrimination Act 1992* (Cth) was as follows: 'For the purposes of this Act, a person ('discriminator') discriminates against another person ('aggrieved person') on the ground of a disability of the aggrieved person if, because of the aggrieved person's disability, the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person without the disability.'

[15] *Disability Discrimination Act 1992* (Cth), s 3(b).

[16] For commentary on equality see: Sandra Fredman, 'Discrimination Law' in *Clarendon Law Series*, 2nd edn, Oxford University Press, 2012 and Hugh Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66 *The Modern Law Review,* 16.

Commentators have pointed out that formal equality, of itself, often does not assist persons with disability who usually require different treatment in the form of reasonable adjustments to ensure that they have the same opportunities as persons without disability.[17]

The approach of Sandra Fredman marks a useful starting point to analyse the appropriate elements of equality to underpin the *DDA*.[18] As Fredman points out, the scope and meaning of substantive equality remains elusive.[19] Does formal equality mean equality of results, or equality of opportunity? For Fredman, substantive equality can best be understood through the lens of a four dimensional framework. She writes:

> Firstly, the right to substantive equality should aim to redress disadvantage. Second, it should counter prejudice, stigma, stereotyping, humiliation and violence based on a protected characteristic. Third, it should enhance voice and participation, countering both political and social exclusion. Finally, it should accommodate difference and achieve structural change.[20]

To put this framework in simpler terms, substantive equality needs to redress disadvantage; to combat prejudice, stereotyping and violence; to enhance social inclusion and participation; and to respect and accommodate differences.

In my view, while the DDA does contain some aspects of substantive equality, such as the duty to make reasonable adjustments, its provisions do not fully embrace substantive equality.

The International Labour Organisation (ILO) has sought to improve the pay and conditions of workers. However, it was not until 1983 that the ILO expressly turned its attention to workers with disabilities when it enacted its Convention titled 'Vocational Rehabilitation and Employment (Disabled Persons) Convention' (VHEDPC).[21] This should be read together with the VHEDPC's accompanying recommendation No.168 of 1983.[22] The United Nations designated 1981 as the International Year of Persons with Disabilities. In part, this designation

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[17] For further information about reasonable adjustments, see *Clarendon Law Series*, 2nd edn, Oxford University Press, 2012, chapter 7.

[18] Sandra Fredman, 'Substantive Equality Revisited' (2016)14 (3*) International Journal of Constitutional Law*, 712. This article has given rise to subsequent articles where Catharine MacKinnan has engaged in a lively debate with Sandra Fredman . See: Catharine A MacKinnan, 'Substantive Equality Revisited: A Reply To Sandra Fredman', (2016) 14 (3) *International Journal of Constitutional Law*, 739.

[19] Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 (3), *International Journal of Constitutional Law*, 712

[20] Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 (3), *International Journal of Constitutional Law*, 712, p 727.

[21] International Labour Organisation, *Vocational Rehabilitation and Employment (Disabled Persons) Convention*, Convention No.159 1983.

[22] International Labour Organisation, *Recommendation No.168*, 1983.

led the ILO to pass the VHEPDC. While its language to our present ears is somewhat old fashioned, the VHEPDC does prohibit discrimination in employment of persons with disabilities.

The most forthright and therefore the most interesting document of the ILO concerning persons with disabilities is the ILO Code of Practice 'Managing Disability in The Workplace' which was finalised and unanimously adopted at a meeting of experts in Geneva in 2001.[23] Like the CRPD, the Code of Practice adopts the social model of disability. It aims to assist employers in initiating strategies to manage disability-related issues in workplaces. It explicitly recognises the business case for employing workers with disabilities.

It is clear that the focus of the VHEPDC is upon formal equality which is promoted by its prohibitions on discrimination.

The most important human rights instrument is the Convention on the Rights of Persons with Disabilities (**CRPD**) which Australia has ratified. Under Australian law, the ratification of the CRPD does not mean that its provisions become part of our domestic law automatically.[24] Of course, Australia's ratification of the CRPD may, and often does, influence the curial interpretation of legislative provisions and/or common law rules.[25]

Article 27 of the CRPD protects and enhances the right of persons with disabilities to undertake remunerative work. The CRPD is a United Nations human rights treaty which has at its core the human rights and inherent dignity of persons with disabilities and was influenced by the social model.[26] The social model of disability is expressed in the definition of "persons with a disability" in Article 1 of the CRPD. This says:

> Those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

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[23] International Labour Organisation, ILO Code of Practice: Managing Disability In The workplace, (International Labour Office, Geneva, 2002.

[24] *Minister For Immigration and Ethnic Affairs* v *Teo* (1995) 128 ALR 353, 361.

[25] *Dietrich v The Queen* (1992) 177 CLR 292, 305 per Mason CJ and McHugh J. See further:

- *Nicholson* v *Knaggs* [2009] VSC 64 Vickery J
- *Patrick's Case* [2011] VSC 327 Bell J
- For further details: Lisa Waddington, 'Australia', in Lisa Waddington and Anna Lawson (Eds), *The UN Convention On The Rights Of Persons With Disabilities In Practice: A Comparative Analysis Of The Role of Courts (International Law And Domestic Legal Orders)*, Oxford University Press, 2018, ch.3.

[26] Theresia Degener, 'A Human Rights Model of Disability', in Peter Blanck and Eilionoir Flynn (Eds), Routledge Handbook of Disability Law and Human Rights, Routledge, 2017, ch.3

Article 27 of the CRPD is a lengthy provision, however, from its opening words its essence is plain. It obliges governments to prevent discrimination in employment and also to make places of work inclusive and fully accessible to persons with disabilities.[27] As Dr Marianne Schulze put it, 'Employment for persons with disabilities is essentially a non-discrimination and an accessibility issue.'[28]

Article 27 requires ratifying countries to implement programs to facilitate the undertaking of work in the open labour market by persons with disabilities. It obliges governments to 'safeguard and promote the realisation of the right to work'[29], and recognises that the right to work is a fundamental right and one which is to be enjoyed by persons with disabilities on an equal basis with others. Full enjoyment of the right to work includes the right to the opportunity to gain a living by work freely chosen or accepted in the labour market, and to a work environment that is open, inclusive and accessible to persons with disabilities. Article 27 requires freedom of access to the open labour market, as well as just and favourable conditions of work. Recognised forms of work include self-employment whilst education and vocational training are promoted as paths towards full employment. Article 27(1) stresses the importance of legislative frameworks in protecting the right to work. It specifically refers to legislation as a means of taking "appropriate steps", and sets out in subparagraphs (a) to (k), a non-exhaustive series of steps that countries should take. Legislation is essential to many of these steps.

Article 27(1)(b) requires ratifying countries to take steps to "Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances."

Article 27(1)(a) which must be read together with Article 5, specifically requires the provision of reasonable accommodation in the workplace. This is because while Article 27(1)(a) prohibits discrimination on the grounds of disability in all forms of employment, Article 5(2) to (4) not

[27] For commentaries on article 27, see Coomara Pyaneandee, *International Disability Law: A Practical Approach To The United Nations Convention on The Rights of Persons with Disabilities*, (London, Routledge, 2018), Ch.10; and Maria Ventegodt Liisberg, *Article 27 Work And Employment in* Valentina Dela Fina, Rachele Cera and Giuseppe Palmisano (Eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, (Switzerland, Springer International Publishing, 2016), Ch.31.

[28] Marianne Schulze, *A Handbook on the Rights of Persons with Disabilities: Understanding the Convention on the Rights of Persons with Disabilities*, (Handicapped International, 3rd ed, 2010), p.150.

[29] Article 27(1) CRPD.

only prohibit all forms of discrimination, but permit the implementation of reasonable accommodation measures to promote equality and to eliminate discrimination.

Article 5 paragraph 2 prohibits discrimination by providing that ratifying countries must:

> … [P]rohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.[30]

The term 'discrimination on the basis of disability' is defined expansively in Article 2 as meaning:

> Any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[31]

Article 5(3) says that to promote equality and to eliminate discrimination, countries must ensure that reasonable accommodation is provided. 'Reasonable accommodation' is a term of art defined in Article 2 as meaning:

> Necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.[32]

In its General Comment No. 6 on Equality and Non-Discrimination of April 2018, the CRPD Committee explains the two elements of reasonable accommodation in the following words:

> The duty to provide reasonable accommodation in accordance with articles 2 and 5 of the Convention can be broken down into two constituent parts. The first part imposes a positive legal obligation to provide a reasonable accommodation which is a modification or adjustment that is necessary and appropriate where it is required in a particular case to ensure that a person with a disability can enjoy or exercise her or his rights. The second part of this duty ensures that those required accommodations do not impose a disproportionate or undue burden on the duty bearer.[33]

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[30] United Nations General Assembly, *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, United Nations, Treaty Series vol.999 p.3 (entered into force 3 May 2008) Art 5(2).
[31] United Nations General Assembly, *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, United Nations, Treaty Series vol.999 p.3 (entered into force 3 May 2008) art 2
[32] United Nations General Assembly, *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, United Nations, Treaty Series vol.999 p.3 (entered into force 3 May 2008) art 2
[33] The Committee on the Rights of Persons with Disabilities, *General Comment No.6 on equality and non-discrimination*, 19th sess , UN Doc CRPD/C/GC/6, (6 April 2018) [25].

Finally, article 5(4) makes it clear that 'specific measures which are necessary to accelerate or achieve de facto equality' for persons with disabilities do not constitute discrimination.

Reasonable accommodation measures are essential if persons with disabilities are to obtain employment in the open labour market.

In 2018, the CRPD Committee publicised its General comment No. 6 titled 'On Equality and Non-Discrimination'.[34] The General comment examined how reasonable accommodation measures promote equality and eliminate discrimination and discussed how the prohibition of discrimination in Article 5 operates in tandem with Article 27. The General comment recommends that countries prohibit discrimination in employment; ensures reasonable accommodation; and facilitates the transition from segregated work environments to the open labour market.[35] The General Comment further recommends that nations should ensure that in segregated employment environments '… [P]ersons with disabilities are paid no less than the minimum wage and do not lose the benefit of disability allowances when they start work'.[36]

The concept of reasonable accommodation in the CRPD is important to substantive equality but has limits that arise from its definition. Under that definition, reasonable accommodation means that modifications and adjustments will only be compliant where they do not impose a disproportionate or undue burden. In the field of employment, where workplace measures do impose a burden which is either undue or disproportionate, an employer will not be required to undertake them because they will go beyond what 'reasonable accommodation' requires.

An illustrative decision from the CRPD Committee makes this point. In *Jungelin v Sweden,*[37] Ms Jungelin is visually impaired and, in 2006, she applied for a position with the Swedish Social Insurance Agency as an assessor/investigator of sickness benefit and sickness compensation applications. The agency refused her application because, after investigation, the agency took the view that its computer systems could not be adapted either for braille or synthetic speech outputs. Many of the paper documents were handwritten, and these would have to be read to Ms Jungelin.

The Swedish Equality Ombudsman took the agency to the Swedish labour court, arguing that it had discriminated against Ms Jungelin by failing to accord to her reasonable support and

[34] CRPD/C/GC/6, General Comment No.6 on Equality and Non-Discrimination, April 2018.
[35] Ibid. [67].
[36] Ibid. [67(c)].
[37] *Jungelin* v *Sweden* CRPD/C/12'D/5/2011, October 2014.

adaptation measures. The Labour Court unanimously dismissed the application. The judges held that the suggested adaptation and support measures of altering the computer systems, and employing a person to read the handwritten documents were, in all of the circumstances, not reasonable.[38]

In dismissing the complaint, the CRPD Committee held that the assessment by the Swedish Labour Court was thorough and objective, and that it was open to the Court to find that the suggested support and adaptation measures would constitute an undue burden for the agency.[39]

This decision shows that the duty of reasonable accommodation as expressed in the CRPD is not absolute. Employers are only required to make accommodations if, and to the extent, that those accommodations are reasonable.

As was noted above, Sandra Fredman regards substantive equality as an illusive concept. The CRPD goes beyond formal equality by requiring the use of reasonable accommodation and of 'specific measures which are necessary to accelerate or achieve de facto equality' for persons with disabilities. Reasonable minds may differ, but at the very least the CRPD comes close to requiring a standard of substantive equality in its operation.

Question 2

Question 2 asks, "In circumstances where section 153(3)(b) of the FW Act confers an immunity from the prohibition in section 153(1) in respect of discriminatory modern award terms:

(i) how should the FWC give effect, if at all, to that aspect of the human right recognised in Art 27(1)(b) that entitles any disabled worker to "just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value."

(ii) how should the FWC give effect, if at all to the reasonable accommodation human right recognised by Art. 27(1)(b)(i).

To what extent, if any, do Articles 9 and 10 of the *Vocational, Rehabilitation and Employment Recommendation* assist in fixing minimum wages for employees with a disability in circumstances where discriminatory minimum wages are excused by section 153(3)(b)."

[38] Ms Jungelin was refused employment in 2006. Over the last 13 years, computer-based adaptive technologies have greatly improved.

[39] Six of the eighteen members of the CRPD Committee were in dissent. Ron McCallum was part of the majority.

There are statutory exceptions in both the DDA and the *Fair Work Act 2009*[40] *(FW Act) concerning the payment of rates of wages to persons with disabilities who are eligible to receive the Disability Support Pension under federal social security law.*[41]

The statutory exemption in the DDA is set out in section 47(1)(c) and (d). It is easiest to reproduce section 47(1)(c) and (d) as follows:

> "Section 47(1) This Part does not render unlawful anything done by a person in direct compliance with:
>
> …
>
> (c) An instrument (an ***industrial instrument***) that is:
>
> (i) A fair work instrument (within the meaning of the *Fair Work Act 2009*); or
>
> (ii) a transitional instrument or Division 2B State instrument (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*);
>
> to the extent to which the industrial instrument has specific provisions relating to the payment of rates of salary or wages to persons, in circumstances in which:
>
> (iii) if the persons were not in receipt of the salary or wages, they would be eligible for a disability support pension; and
>
> (iv) the salary or wages are determined by reference to the capacity of the person; or
>
> (d) an order, award or determination of a court or tribunal having power to fix minimum wages, to the extent to which the order, award or determination has specific provisions relating to the payment of rates of salary or wages to persons, in circumstances in which:
>
> (i) if the persons were not in receipt of the salary or wages, they would be eligible for a disability support pension; and
>
> (ii) the salary or wages payable to each person are determined by reference to the capacity of that person."

At the present time,[42] section 47(1)(c) protects full compliance with fair work instruments which are broadly defined to cover modern awards, enterprise agreements, workplace determinations and orders from the Fair Work Commission.[43] However, the relevant fair work instruments are limited to those which contain specific provisions relating to the payment of

[40] *Fair Work Act 2009 (Cth)*

[41] *Social Security Act 1991* (Cth) s 94

[42] We shall not discuss transitional and State instruments which operated during the transition to the full Fair Work Act regime. See DDA s 47(1)(c)(ii)

[43] *Fair Work Act 2009* (Cth) s 12 definition of "Fair work instrument."

rates of salary or wages to persons who would be eligible to receive a Disability Support Pension,[44] and the rates of the salaries or wages are determined by reference to the person's capacity.[45]

Section 47(1)(d) exempts awards, determinations or orders from tribunals which can fix minimum wages, but they are limited to those which contain specific provisions relating to the payment of rates of salary or wages to persons who would be eligible to receive a Disability Support Pension, and the rates of the salaries or wages are determined by reference to the person's capacity.

The relevant statutory exemption in the FW Act is set forth in section 153(3)(b). However it must be read with the prohibition of discrimination in section 153(1). These provisions relevantly provide as follows:

> **"Section 153 Terms that are discriminatory**
>
> *Discriminatory terms must not be included*
>
> (1) A modern award must not include terms that discriminate against an employee because of, or for reasons including, the employee's … physical or mental disability …
>
> *Certain terms are not discriminatory*
>
> …
>
> (3) A term of a modern award does not discriminate against an employee merely because it provides for minimum wages for:
>
> …
>
> (b) all employees with a disability, or a class of employees with a disability …

Section 12 of the FW Act contains a dictionary which defines an employee with a disability as meaning "a national system employee who is qualified for a disability support pension as set out in section 94 or 95 of the *Social Security Act 1991*, or who would be so qualified but for paragraph 94(1)(e) or 95(1)(c) of that Act. "

In my view, in order to give meaning to section 153(1) and (3)(b) of the FW Act, it is essential to read these provisions with the definition of employee with a disability and with section

[44] DDA s 47(4) makes it clear that the expression "Disability Support Pension" means a Disability Support Pension which is granted under the *Social Security Act 1991* (Cth)

[45] The relevant provisions in the *Fair Work Act 2009* (Cth) are s 139(1)(a), s 153(3)(b) and s 195(3)(b)

47(1)(c) and (d) of the DDA. Section 153(1) of the FW Act proscribes discrimination against persons with mental or physical disabilities in the determination of their wages and salaries. While section 153(3)(b) of the FW Act appears to exempt from the proscription of discrimination the setting of minimum wages for "…all employees with a disability, or a class of employees with a disability…", in the light of the definition of employee with a disability and also section 47(1) of the DDA it is suggested that the above phrase should be interpreted to confine its operation to cover only persons with disability who are qualified to receive the Disability Support Pension, and whose minimum wage is determined by reference to the capacity of that person.

Given Australia's ratification of the CRPD, it is further suggested that the exempting discretion in section 153(3)(b) be exercised in conformance with the precepts of the CRPD. In particular, the proscription in Article 27(1)(b) of the CRPD to ensure just and favourable conditions of work. Furthermore, this discretion should only be exercised where reasonable accommodations and specific measures have been exhausted.

It will be recalled that in 1983 the ILO enacted its Convention titled 'Vocational Rehabilitation and Employment (Disabled Persons) Convention' which I refer to as the VHEDPC.[46] This should be read together with the VHEDPC's accompanying recommendation No.168 of 1983.[47]

Articles 9 and 10 of this Recommendation provide:

> Article 9 - Special measures aimed at effective equality of opportunity and treatment between disabled workers and other workers should not be regarded as discriminating against other workers.
>
> Article 10 - Measures should be taken to promote employment opportunities for disabled persons which conform to the employment and salary standards applicable to workers generally."

Recommendations are not binding upon signatories to ILO conventions. Yet, they are thoroughly designed documents to promote best practices. Articles 9 and 10 of the VHEDPC

[46] International Labour Organisation, *Vocational Rehabilitation and Employment (Disabled Persons) Convention*, Convention No.159 1983.
[47] International Labour Organisation, *Recommendation No.168*, 1983.

Recommendation re-enforce the precepts of the CRPD in confining the exercise of the section 153(3)(b) discretion.

Ron McCallum AO

Emeritus Professor and former Dean of Law University of Sydney

Thursday 21 July 2022

IN THE FAIR WORK COMMISSION
AT MELBOURNE

MATTER NO. AM2014/286

IN THE MATTER OF A REVIEW OF THE SUPPORTED EMPLOYMENT SERVICES AWARD 2010

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

SUPPLEMENTARY WITNESS STATEMENT OF BRENDAN FORD

I, Brendan Ford of NQ Employment, Site Operations Manager, state as follows:

Introduction

1. I am a Site Operations Manager for NQ Employment.

2. NQ Employment is an employment services provider based in North Queensland. We try to find employment opportunities for people with barriers and health issues in the community. We operate on a not-for-profit basis.

3. NQ Employment has a subsidiary, NQ Green Solutions, through which we operate two social enterprises:

    a. A Container for Change recycling program (**Containers for Change**); and

    b. Lawn and Gardening service (**Burdekin Lawn Care**)

NQ Employment

4. NQ Employment is a Disability Employment Service (DES) which aims to place workers with disabilities in meaningful employment.

5. NQ Employment receives payments from the Commonwealth Government if we are able to place a worker in ongoing employment. The funding we receive is staged – we receive payments after 4, 13, 26 and 52 weeks of continuous employment for a person we have placed in employment that meets eligibility criteria.

Social Enterprises

6. NQ Employment (through the subsidiary, NQ Green Solutions) operates two social enterprises.

7. Both of these social enterprises primarily (and except as indicated below) engage workers with disabilities to perform their working operations.

8. What sets us apart from many other employers who engage workers with disabilities, and ADEs in particular, is that we pay our workers full award wages. By that I mean that we do not use any method of discounting wages for individuals – instead we pay our workers the same rates that would be payable to a worker who did not have a disability.

9. Neither of the social enterprises we operate receive any form of Government assistance in their own right. NQ Employment does, however, receive the funding I have described above in respect of each worker which is placed by NQ Employment in employment with one of the social enterprises (in this respect NQ Employment receives the same funding it would receive for placing that worker with another employer).

10. Both of the social enterprises we operate are commercially viable in their own right. While they are operated on a not-for-profit basis; if this were not the case they would both be competitive, profitable and at the very least viable. Both rely exclusively on commercial contracts as their sole source of revenue.

Burdekin Lawn Care

11. Burdekin Lawn Care is a general lawn care business. The services it provides include general yard maintenance, lawn servicing and green waste removal.

12. Burdekin Lawncare engages about 2-3 employees at any given time.

13. The workers at Burdekin Lawncare are all paid according to *the gardening and landscaping award.*

Containers for Change

14. Queensland has a container deposit scheme to promote recycling.

15. The scheme involves members of the public bringing containers and/or bottles into to a facility such as ours where they receive 10 cents per eligible container or bottle.

16. We have a contract with the Queensland Government which allows us to receive containers and/or bottles from the public, for which we pay 10 cents per item. The Queensland Government then reimburses us the equivalent of the 10 cents per item, as well as a small (per item) processing fee for each item we process.

17. This is a commercial contract and not government funding – we receive no more or less than any other similar service provider participating in this scheme.

18. We hire workers in a range of roles to operate the Containers for Change facility. In total there are about 10-15 employees at any given time. The ongoing workers perform work ranging from counting and sorting of containers and bottles to truck and forklift driving.

Workforce Composition

19. Across both of our social enterprise workforces we primarily engage workers living with disabilities, The only workers we engage who do not have disabilities are as follows:

    a. In addition to the ongoing workforce at Containers for Change, we also hire casual workers (who do not have disabilities) over the school holidays to deal with the excess demand during these peak periods.

    b. We have a fulltime supervisor at the Containers for Change site. She performs an ordinary supervisory role.

    c. We have employment consultants at NQ Employment who work with our employees. Their role involves ensuring that the workers are given the support and training that they need to perform their roles as directed. In most cases, after some initial training and mentoring our workers become familiar and proficient in their roles and do not require much assistance – they know how to do the role and end up doing it efficiently.

20. In terms of retention, I believe our operation represents any comparable private operator. For example, out of the number of employees at Containers for Change, we have about 3-4 remaining "foundation" members who were engaged when we started the program about 3 years ago. We have about 4 employees who have one or two years' service, about 3 employees with between 6 and 12 months' service and also a small number of workers who have started within the past few months.

21. Some of our employees transition to open employment, which we think is a good thing. We generally only hire new people according to business needs – for example when an existing employee leaves of their own accord.

Our Approach

22. One of the fundamental differences between us and ADEs is that we recognised a commercially viable business opportunity then looked to start a business which we could staff predominantly with workers who were living with disabilities.

23. We didn't take the availability of a lowly paid workforce as our starting point, then consider work opportunities from there.

24. Instead, we wanted to run a business that was commercially viable but also provided fair wages that would be payable to any employee – whether or not they had a disability.

Brendan Ford

Friday, 22 July 2022

IN THE FAIR WORK COMMISSION
AT MELBOURNE

MATTER NO. AM2014/286

IN THE MATTER OF A REVIEW OF THE SUPPORTED EMPLOYMENT SERVICES AWARD 2010

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

FURTHER WITNESS STATEMENT OF ROBYN SMITH

I, Robyn Smith of work address 38 Panalatinga Road, Old Reynella, South Australia 5161, vocational services officer, state as follows:

Introduction

1. I refer to my statement of Friday 20 May filed in these proceedings (**First Statement**).

2. Since making the First Statement, I understand that Andrew Wallace has also filed a witness statement in these proceedings, which I have read and understood.

3. This is the second statement I am making in these proceedings. In response to the witness statement of Andrew Wallace, I say as follows.

Andrew Wallace

4. Andrew Wallace is the Executive Director at SAGE.

5. I cannot recall seeing Mr Wallace on the shop floor at work observing or otherwise participating in the way that work is done. When I have seen Mr Wallace on the shop floor, it has usually been as he is travelling along a walkway to get from one place to another.

"Job Tailoring"

6. In his statement, from paragraph 28 onwards, Mr Wallace describes what he calls "Job Tailoring" at SAGE.

7. These examples appear to be the only such examples across the workforce. This small number of examples do not change the view I expressed in the First Statement, that the predominant way things operate in practice is that employees are placed in pre-existing jobs, rather than having jobs created or even tailored for them.

Staff Numbers

8. At paragraph 20 of Mr Wallace's statement, he states what he says are the correct current staffing numbers. He also suggests a supervision ratio at paragraph 24 of his statement.

9. Mr Wallace says that there are usually 3 area supervisors, however we have only ever had 2. Mr Wallace also says there are usually 19 VSOs or team leaders, whereas we only have 12. In terms of calculating the supervision ratio, Mr Wallace may be counting the training and support staff into the supervisor count. This would be incorrect, because those staff do not work on the floor or perform supervision.

10. The ratios and supervision that Mr Wallace refers to generally are also not always applied in practice. For example, recently we had a situation where a line leader had to run a job with 3 agency staff and two supported employees and no VSO / team leader. On other occasions, jobs have been run with no supported employees at all.

Robyn Smith

Friday, 22 July 2022

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WITNESS STATEMENT OF RODNEY DAVIS

I, Rodney Davis [redacted] state as follows:

Introduction

1. I am currently employed by Bunnings Australia at their Springvale store on 849 Princes Highway, in the Lifestyle section of the store, part-time.

2. I have been told that I have a disability that is an intellectual disability. I am part of the NDIS and I get a disability support pension.

3. Before starting at Bunnings, I worked at Marriot Industries. This has disability services work and I worked there with other disabled workers. I worked at its factory in Keys Road Cheltenham, Melbourne.

My Work at Bunnings

4. I started working at Bunnings about 2019 I think, after receiving help from an employment disability service, St John of God, to get the job.

5. I do a lot of kinds of jobs at Bunnings now. I put stock on shelves, I collect trolleys and anything else that my manager wants me to do around the store. However, when I started at Bunnings the only work job I was given to do, and did, was to water the plants in the gardening section of the store and anywhere else we had plants in the store. I was supervised to do that work when I started. After a few months of me working at Bunnings, my manager said that I could do more so I was given more things to do. I showed that I could do more.

6. When COVID happened, my manager at Bunnings wanted the workers to do more things around the store. I was given the opportunity to obtain an electric pallet jack license and a forklift license to expand my qualifications further. I am currently getting these licenses. Bunnings have helped me to do this.

7. When I started at Bunnings, I remember doing assessments of the work that did. I don't know what these were called. I get a full wage. I think I am getting paid the same wage as other Bunnings workers who work in the store like me.

ADE employment

8. Before I worked at Bunnings, I worked at Marriot Industries. It had disabled workers. I was a supported employee. I am a person with speech and reading difficulties

9. Marriot Industries contacted me for work after my brother and sister visited their factory and organized an interview on my behalf. When I started, I had to do a 2-week trial in work they had at the factory so that it could be decided whether I could do the work they wanted me to do or move me somewhere else. In the trial I worked on my own at a workstation where I would pack and sort whatever items the factory were dealing with at the time, such as planter boxes. After the trial period, I stayed at Marriot Industries. I was given the packing job after the trial period was over. I was paid about $9 per hour.

10. The work I did at Marriot Industries was work that was already there. I had to show whether I could do it. No-one spoke to me about making up a job. It looked to me that I was bit more capable than some workers I saw at Marriott, but we all did pretty similar work. The work mainly involved packing items such as furniture, fencing, toys, and planter boxes, etc. After Marriot Industries stopped doing the packing work, I went on to do other work at Marriot which involved assembling eco-bins, packing them away, and doing what ever else needed to be done.

11. When I worked at the workstation, I didn't have a supervisor who checked my work. Once I moved on to eco-bins, me and the other workers who did this work were asked to experiment with different ways of getting the work done. I worked alongside others disabled workers and managers to do this and it resulted in improvements to the way we did the work.

12. After 6 months of working with eco-bins, I spent a brief period packing batteries for major Australian brands. After a few months of this, I decided to leave Marriot Industries and pursue work elsewhere.

13. I worked at Marriot Industries for approximately 2 to 3 years. I was paid around $9 per hour. The pay would be adjusted sometimes depending on how you behaved at work, how you did the work, if you did the work properly, if you were under supervision, and I think other factors I cannot now remember.

My transition into open employment

14. After leaving Marriot Industries, I contacted Centrelink to help me connect with a disability service provider so that they could help me in finding a new job. The man that looked after my case found a job listing for Bunnings and thought that I would be perfect for the role. He initiated the job application process for me.

15. At Bunnings I am paid significantly more than what I received for my time at Marriot Industries.

16. Now that I am earning a liveable wage again, my quality of life has improved. I have a lot less financial stress and greater flexibility to do things in my life and buy things I need. It feels good to be able to support myself with money that I earn. I enjoy making my own decisions and I believe that I was restricted from having financial independence with the wage I received during my employment at Marriot Industries. I am being paid a reduced disability services pension now.

17. I made this statement by telling [redacted] what I wanted to say. [redacted] later read this statement to me and asked me if I agreed what it says. I told him that I did agree.

Rodney Davis

Thursday, 21 July 2022

IN THE FAIR WORK COMMISSION
AT MELBOURNE

MATTER NO. AM2014/286

IN THE MATTER OF A REVIEW OF THE SUPPORTED EMPLOYMENT SERVICES AWARD 2010

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FURTHER WITNESS STATEMENT OF SHARON LOUISE DULAC

I, Sharon Louise Dulac [redacted] state as follows:

Introduction

1. This is the second statement I have made in this proceeding.

2. I have read the proposed alternative classification structure for grades A and B proposed by Australian Business Industrial, the New South Wales Business Chamber and National Disability Services. This proposal is attachment A to a document headed outline of submissions. In this second statement I describe this proposal as the Employer Classification Proposal.

3. The Employer Classification Proposal provides additional subclassifications for each of grades A and B.

4. Both proposals have 2 preliminary requirements for grading, being

    a. the employee meets the impairment criteria for the DSP; and

    b. the employer has created a position of duties and a level of supervision tailored and adjusted to the circumstances of the employee's disability that does not fall into Grades 1-7 above.

    Point b indicates that unless a position is tailored to "the employee" then grades A or B don't apply. As I read the requirement, if a role has been adjusted based on the operational considerations of an ADE, grades A and B would not apply. This would indicate based, on my experience of ADEs, that the number of employees fitting to Grade A or B would be minimal, yet trial results indicate that the majority (63%, table A 28) of ADE employees have been assessed at levels A or B. This was even higher in the separate trials conducted by ABI when in excess of 90% of employees were classified to grades below grade 1. It is not clear to me how this could be so which gives rise to concerns about the application of the grading system.

5. Turning then to the Employer Classification Proposal.

6. Each of the sub-grades proposed for grade A describes simple tasks that could involve the use of a jigs, equipment or tools. Sub-grades A1 and A2 are

differentiated by the additional criterion in sub-grade A1 that refers to the need for the employee to receive "regular assistance to keep on task."

7. Grades B1 and B2 are differentiated by a criterion in sub-grade B2 that the employee "self-advocates their own and/or others task progress, issues or errors to a supervisor." As I mention in paragraph 7 of my first statement, I have read the decision of the Fair Work Commission dated 3 December 2019. Sub-grades A1 and A2 of the Employer Classification Proposal are quite different from grade A of that decision. The Commission refers only to the performance of a simple task or tasks consisting of up to 3 sequential actions under direct supervision and constant monitoring for grade A. Additionally, the "self-advocates" aspect of sub-grade B2 adds quite a new work element to the grade B proposal of the Commission. I return to these matters below.

8. The Employer Classification Proposal does not appear to propose rates of pay. However, in a document attached to witness statements there is a document headed "Guidance note: application of an alternative classification structure." This contains a table that has rates of pay for each of the sub- grades. The table shows that:

    (a) For Grade A1 $5 per hour is proposed.

    (b) For Grade A2 $6 per hour is proposed.

    (c) For Grade B1 $9 per hour is proposed.

    (d) For Grade B2 $11.50 per hour is proposed.

9. ADEs tender for contracts to do the work they know they have the workforce and infrastructure to deliver. I have described this in paragraph 9-10 of my first statement. ADEs do a great diversity of work. I agree that ADE's often make adjustments to the tasks they want done to ensure they can be undertaken by employees with a disability. However, this is also evident in most commercial operations, whereby multiple tasks make up a job role and contribute to product completion. For example, on production lines employees may only undertake one or few of the tasks required to create a final product. Some of these tasks will be simple, others are more complex. Like any employee, those with disability have different skills and abilities that the employer can match to the task it wants to be done. Given that the proposed Grades allow for one or more tasks, this could potentially indicate that an employee is undertaking multiple tasks with the only proviso for lower wages being the number of steps / tasks. However, there is nothing fixed about what amounts to a task or step and once an employee is undertaking multiple tasks, even if simple, this indicates a level of flexibility and adaptability.

10. An employee who requires "regular assistance to keep on task" (a new requirement proposed for sub-grade A1) describes someone in the 16% group referred to by the ARTD report and mentioned in paragraph 16 of my first statement. When an employee requires "regular assistance to keep on task" this will significantly impact productivity and hence a low productivity % of SWS assessment will reflect this. Therefore, appropriate renumeration can be discerned by the SWS.

11. Sub-grades B1 and B2 of the Employer Classification Proposal refers to an employee who uses mechanical or electrical equipment or tools. The potential for those employees to use mechanical or electrical equipment or tools suggests a level of dexterity as well as the cognitive ability to understand how to use such equipment; to do so in the way the employer wants and to do both safely. This is reflective of a grade 2 classification and not a grade level below the national minimum wage. These employees may undertake these tasks at a lower level of productivity, and this can be measured using the SWS.

12. Since basic functionality is not a limitation that applies to grade B in relation to mechanical or electrical equipment or tools, which could consist of more than three sequential actions (unlike grade A), the work could be quite diverse.

13. The only difference I am able to discern between grade B1 and grade 2 is that grade B1 would require direct supervision and regular monitoring, but in my experience of ADE work the two things are the same. There is no difference between grade B2 and grade 2 that I can discern.

14. The proposed requirement that a sub-grade B2 employee "self-advocate" their own and/or others task progress, issues or errors to a supervisor indicates an ability on the part of the worker to recognise and to monitor their own work. However, the expectation of sub-grade B2 of the Employer Classification Proposal is that the employee should also be able to do that for co-workers too. The work described by sub-grade B2 is work that would not require direct supervision and is not basic or simple. However, the Employer Classification Proposal proposes $11.50 per hour for this work. This is 56% of the Grade 1 rate, which is $20.33 per hour.

Employment Adjustments

15. Through the work that I do, I am aware of many examples of the way work that an employer wants done can be, and is, arranged to assist disabled employees to do it, whether in open employment or ADE employment. Some examples of which I am aware include:

    (a) An employee employed by community service organisation as an administration assistant. The employee undertakes three simple tasks: emptying office bins to a large bag, shredding and making welcome packs (this involves placing of pre-sorted info sheets to folder).

(b) An ADE employer with a defence force contract to undertake document destruction and archiving. The ADE's employees have tasks that range from document shredding, sorting to piles for shredding and more complex tasks that include preparing documents for scanning, and then scanning and naming electronic files. This is a national contract that had been put out to public tender.

(c) I have observed disabled employees employed as kitchen hand positions in open employment where the disabled employees only undertake loading and unloading of a dishwasher and very basic food preparation (peeling or tipping pre prepared product to trays.).

(d) Some other examples I am aware of include:

(i) An employee with a disability employed by a real estate agent to undertake basic data entry copied from pre-prepared forms;

(ii) Disabled employees employed to undertake basic tasks associated with dog grooming. Those tasks were to wash the dogs in a pre-prepared tub.

(iii) Disabled employees employed by a commercial cleaning company to clean only windows and mirrors.

(iv) Disabled employees employed by a nursery to undertake one or some basic tasks including water plants, pick out dead plants and put in a bin and to fill small pots with soil and put aside for others to add plants or seeds.

(v) Hand sanding small furniture items with a furniture manufacturer.

(vi) Floor sweeping in the work area of tradespeople employed by an engineering workshop.

Sharon Dulac

22 July 2022

IN THE FAIR WORK COMMISSION
AT MELBOURNE

MATTER NO. AM2014/286

IN THE MATTER OF A REVIEW OF THE SUPPORTED EMPLOYMENT SERVICES AWARD 2010

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

FURTHER WITNESS STATEMENT OF WALTER GRZENTIC

I, Walter Grzentic [redacted] Director, state as follows:

Introduction

1. I refer to my statement of Friday 20 May filed in these proceedings (**First Statement**).

2. Since making the First Statement, I have read and understood the following statements, which have been filed in these proceedings:

    a. Witness Statement of Chris Christodoulou;

    b. Witness Statement of Eric Teed;

    c. Witness Statement of Andrew Wallace;

    d. Witness Statement of Kristian Dauncey; and

    e. Witness Statement of Alan Wilkie.

3. In response to those witness statements, I make this further statement.

The Nature of Employment in ADEs and in Open Employment

4. A number of witnesses make comment on the nature of ADEs and supported employment services generally. In response to this, I say the following.

5. The advent of the 1986 Disability Services Act (DSA), and the 1992 Disability Discrimination Act (DDA), resulted in watershed changes, and increased opportunities, for people with a disability, in all areas of life, including in employment.

6. It is not correct that ADEs employ those with disabilities in a way that is markedly different than other employers. From my observations of ADEs over a number of years, I say the following:

a. Part of the mandate of a number of ADEs includes providing employment for people with a disability and in doing so satisfying various funding eligibility requirements.

b. The primary operational objectives of ADEs I have observed are to secure profitable contracts, and then organise their available workforce, to fulfill the contract.

c. In this way, the fundamental underlying principles of the work and operations are not markedly different between the supported employment sector and open employment.

Response to Wallace

7. From paragraph 28 of the Witness Statement of Andrew Wallace, Mr Wallace describes what he refers to as "job tailoring".

8. Having read this, I stand by my assessment that for most supported workers at ADEs the nature of work allocation is such that a supported employee is matched to a pre-existing role that is defined by commercial considerations.

9. I also note that "job tailoring" is a widespread practice in open employment. In fact, I would estimate that it is far more widespread in open employment than in ADEs (this is in part due to the large number of workers with a disability in open employment, compared to in ADEs).

10. I am familiar with numerous examples of non-ADE employers who engage supported employees and who have made adjustments to the way that work is performed, including by modifying roles and requirements to better facilitate employee participation. Some example of this, which I have witnessed when undertaking SWS assessment of employees with a disability, are as follows:

a. An employee whose duties were to hang bagged stock on hooks in a small stationery business. This was their only task.

b. An employee whose duties were to construct pizza boxes from flat packs. This was their only task.

c. An employee whose duties were to empty bins and sweep in a small factory.

d. An employee whose duties were to perform basic stock fill and stock rotation in the dairy section of a small grocery shop.

e. An employee whose duties were to dust and mop along aisles in a retail business.

f. An employee whose duties as a kitchen assistant were to weigh frozen chips and then place them into clip-lock plastic bags, repack bulk farm eggs into dozen-egg cartons for re-sale and to wash dishes.

g. An employee employed as a manufacturing assistant in small truss manufacturer to do basic timber cutting and cleaning.

h. An employee employed as a retail assistant, in a small Farm Produce Business, who packs bags of hay, carries customer purchases to their cars and helps to pack shelves with stock.

i. A fencer's labourer whose work was to carry tools and timber to, and from, a work van, hold timber in place and to assist in fence construction.

j. A car wash assistant who worked as part of a team doing the less skilled aspects of car washing, for example spraying the car down, washing and vacuuming.

k. An employee whose job was created by a catering company to undertake window washing, paper shredding, floor sweeping/vacuuming (all under 1:1 supervision).

l. An employee whose job was to repackage Lego characters/pieces, with full supervision, and to gather correct items to be repackaged for re-sale to collectors.

m. An employee employed as a warehouse assistant for whom the duties were modified so that they were limited to sorting in-coming stock (kids accessories) and place them onto shelves.

n. An employee employed as a motor mechanic's trades assistant who only undertook basic tasks like removing and replacing car tyres, workshop cleaning, getting and replacing tools for tradesman, doing basic pre-service checks (under supervision).

o. An employee with autism who was employed in an orchard nursery in a job with duties limited to sweeping up under plant racks, watering, basic pruning/deadheading of plants.

p. An employee with intellectual disability who was employed in a nursery in a job limited to preparing pots for seedlings, moving stock around the nursery, and watering.

11. All of the above examples have been drawn from small business employers. I have done this to demonstrate that employers do not need to be highly resourced to make simple accommodations.

12. I also attribute the prevalence of "job tailoring" in open employment in part to support from what are now called Disability Employment Services who have coached mainstream open employers on how to deconstruct jobs into simpler sets of work activities.

13. In ADEs, on the other hand, are in my observation less likely to engage in "job tailoring" and more likely to place supported employees in pre-defined roles.

14. In both environments, I would estimate that majority of employees do not experience "job tailoring".

Walter Grzentic

Thursday, 21 July 2022

IN THE FAIR WORK COMMISSION
AT MELBOURNE

MATTER NO. AM2014/286

IN THE MATTER OF A REVIEW OF THE SUPPORTED EMPLOYMENT SERVICES AWARD 2010
Fair Work Act 2009 s 156 – 4 yearly review of modern awards

FURTHER WITNESS STATEMENT OF DONALD GREER

I, Donald Greer of work address 38 Panalatinga Road, Old Reynella, South Australia 5161, vocational services officer, state as follows:

Introduction

1. I refer to my statement of Friday 20 May filed in these proceedings (First Statement).

2. Since making the First Statement, I understand that Andrew Wallace has also filed a witness statement in these proceedings, which I have read and understood.

3. This is the second statement I am making in these proceedings. In response to the witness statement of Andrew Wallace, I say as follows.

Executive Director

4. Mr Wallace states his role as Executive Director. At paragraph 4 of his witness statement, he describes his role and duties.

5. Throughout the First Statement I describe how supported employment works in practice. In particular, I set this out at paragraphs 10 – 19 of the First Statement.

6. I have never seen Mr Wallace on the shop floor where I work taking part in the allocation, organisation or arrangement of work.

7. The last time that I saw Mr Wallace on the floor was when he was escorting the CEO around during his roadshows. This is not a criticism of Mr Wallace, I understand that his role requires him to do things other things that are away from the shop floor.

"Job Tailoring"

8. From paragraph 28 of his statement, Mr Wallace describes what he labels "Job Tailoring".

9. Having read this part of Mr Wallace's statement, I stand by what I've said in the First Statement on this issue –

    a. Employees are engaged and placed in roles based on commercial needs;

    b. They perform work that is driven by those commercial requirements, which involve delivering against contracts with clients.

    c. Employees are assigned to pre-existing roles. If they cannot perform these roles, they are usually assigned to other duties.

10. When a new employee starts, they're usually trialled in a number of different roles on the shop floor. From there we work out what skills and capabilities they have, which is then used to assign them to duties going forward.

11. At paragraph 29 of his statement, Mr Wallace refers to placing employees in a "particular job". I am not sure what Mr Wallace means by "particular job". If it's simply the case that he is referring to a job that already exists, then I don't understand him to be saying something that's at odds with what I say.

12. A direct example of the lack of job tailoring occurred just recently. An employee was assessed as being capable of performing a slightly more complicated role which involved placing two mounting blocks together with nuts and bolts and cable ties. The employee was then allocated to that job.

13. However, it turned out that the employee couldn't do that particular job, so they were assigned back to my area to perform simpler tasks. No accommodations, adjustments or "job tailoring" were made. Instead, the employee was simply transferred off those duties and onto others. The reason for this is commercial. The company needs to respond to its client deadlines and complete work in a timely manner and this is what drives decision such as this.

14. In his statement, Mr Wallace puts forward some examples of what he says is "job tailoring". Whether or not these are "job tailoring", they are isolated and infrequent examples which do not reflect the majority of practice.

Donald Greer

Friday, 22 July 2022