FAIR WORK COMMISSION

Matter: AM2014/286

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

SUPPLEMENTARY SUBMISSION FROM AED LEGAL CENTRE REGARDING THE PROVISIONAL CONCLUSIONS OF THE FULL BENCH

1. AED seeks leave (if leave be required) to file this supplementary submission. Given the number of submissions that have been filed in advance of the hearings scheduled for this month, AED has endeavoured by this supplementary submission to reduce the time consumed by further oral submissions in order to use the time allocated by the Full Bench as efficiently as possible.

Background

2. A vice of the current wage assessment tools prescribed by cl. 14.4 of the Award identified in [15(2)] of the April Statement is that in some cases they may contravene the *Disability Discrimination Act* 1992 for reasons similar to those found in *Noijn v the Commonwealth* (2012) 208 FCR 1 ***(Noijn)***. An objective identified by the Full Bench is that any tool that replaces those currently in the Award be non-discriminatory. AED has expressed concern that the Proposed Wages Tool, in the conceptional form advanced so far, fails to meet that objective.

3. The Commission may include minimum wages terms in a modern award, including for employees with a disability.[1] However, subject to s. 153(3) of the FW Act, terms that *discriminate against* an employee because of, relevantly, physical or mental disability must not be included. For modern award purposes, the FW Act distinguishes between discrimination against employees with a disability and unlawful disability discrimination. This distinction is apparent from the terms of s. 153 and s. 161 of the FW Act.

4. Section 161 provides as follows:

"161 Variation of modern award on referral by Australian Human Rights Commission

[1] Section 139(1)(a) of the FW Act.

> *(1) The FWC must review a modern award if the award is referred to it under section 46PW of the Australian Human Rights Commission Act 1986 (which deals with discriminatory industrial instruments).*
>
> *(2) The following are entitled to make submissions to the FWC for consideration in the review:*
>
> *(a) if the referral relates to action that would be unlawful under Part 4 of the Age Discrimination Act 2004—the Age Discrimination Commissioner;*
>
> *(b) if the referral relates to action that would be unlawful under Part 2 of the Disability Discrimination Act 1992—the Disability Discrimination Commissioner;*
>
> *(c) if the referral relates to action that would be unlawful under Part II of the Sex Discrimination Act 1984—the Sex Discrimination Commissioner.*
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> *(3) If the FWC considers that the modern award reviewed requires a person to do an act that would be unlawful under any of the Acts referred to in subsection (2) (but for the fact that the act would be done in direct compliance with the modern award), the FWC must make a determination varying the modern award so that it no longer requires the person to do an act that would be so unlawful.*
>
> *Note: Special criteria apply to changing coverage of modern awards (see section 163).=*

5. This provision evinces an intention that a modern award not include terms that oblige[2] an employer to act in ways that amount to *unlawful* discrimination of a kind that, relevantly, falls within one of the particularly described forms of discrimination prohibited by the *Disability Discrimination Act* 1992 (the **DDA**).[3] It is to be further observed that if a minimum wages term obliges such action by an employer it ceases to have the character of a term that provides for *discrimination against* employees with a disability "*merely* because it provides for minimum wages…". If this be so, s. 153(1) of the FW Act is engaged.

6. A s. 161(3) review is engaged by a referral under section 46PW of the *Australian Human Rights Commission Act 1986*. However, in this proceeding the Full Bench can have regard to the mandatory nature of the relief that s. 161(3) requires the Commission to give upon formation of the requisite opinion. The section does not confer a discretion. The award must be varied to remove the offending terms. The provision is a powerful indicia of a statutory intention that tells against inclusion of terms in a modern award that might fall foul of the DDA in the exercise of the discretion conferred by s. 139(1)(a). It would plainly be futile to do so if such a term did authorise contravening conduct.

7. Notably, in conducting a s. 161(3) review the Commission is required to consider unlawfulness from a standpoint that excludes the fact that the employer may have done what

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[2] See s. 45 of the FW Act.

[3] Discrimination in its ordinary meaning is broader than the particulars kinds of discrimination prohibited by anti-discrimination statutes. See *IW v City of Perth* (1996) 191 CLR 1: per Brennan CJ and McHugh J at p. 12. Also *Waters v Public Transport Corporation* (1991) 173 CLR 349 per McHugh J at p. 408-409.

it did in order to comply with the modern award. The text of s. 161(3) draws attention to the exception stated in s. 47(1)(c) and (d) of the DDA, which relevantly provides as follows:

> "(1) *This Part does not render unlawful anything done by a person in direct compliance with:*
> *(b) an order of a court; or*
> *(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.*
>
> *Note: A person does not comply with an industrial instrument for the purpose of this subsection if that person purports to comply with a provision of that instrument that has no effect. Accordingly, the exemption under this subsection for acting in direct compliance with such an instrument would not apply in such circumstances.*
>
> *(2)…….*
>
> *(4) In subsection (1):*
>
> ***disability support pension** has the same meaning as in the Social Security Act 1991.*
>
> *(5) ……..*

8. If this exception is put aside, the ultimate assessment of lawfulness in respect of minimum wages conduct authorised by a modern award falls to be assessed by reference to s. 15(2) of the DDA, which states:

> *"It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against an employee on the ground of the employee's disability:*
>
> *(a) in the terms or conditions of employment that the employer affords the employee; or*
>
> *(b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment; or*
>
> *(c) by dismissing the employee; or*
>
> *(d) by subjecting the employee to any other detriment."*

9. This provision also uses the phrase *"discriminate against an employee"*. However, discrimination in the DDA is specific. It is direct or indirect and defined by s. 5 and by s. 6 respectively.

10. Section 6(1) of the DDA treats as "indirect discrimination" requirements or conditions imposed by an employer that a disabled person does not or cannot comply with and that does or is likely to disadvantage that person. It was this form of discrimination that arose for consideration in *Noijn*.

Requirement or condition

11. The Proposed Wages Tool would set the parameters for determining a minimum wage, consisting of a pro rata amount of the full minimum wage, for an ADE employee with a disability. As AED understands it, the job size element is conceived of as a set of pre-determined, fixed and apparently arbitrary proportions of the full award wage, expressed as a range. The range to which an employee would be assigned will be determined by an individual work value assessment "with a particular focus on the range of tasks required to be performed compared with those to the relevant Award classification". The words "required to be performed" in this statement is not understood by AED as referring to an employer's contractual right to direct. Rather, AED takes the Full Bench to be referring to the range of duties or tasks that the employer wants done and accepts from an ADE employee which the employee *can* perform. In this way, job size serves as a proxy for the value of an individual's work, and has the effect of reducing the quantum of minimum wages that would otherwise be payable for labour output absorbed by the employer.[4]

12. If the Proposed Wages Tool is included in the Award, an employer will be obliged by s. 45 of the FW Act not to contravene the term that contains it. To avoid doing so, the employer must observe the parameters it establishes in ascertaining the quantum of an employee's wages. The amount of those wages will, because of the job size element, be linked to the tasks the disabled employee can perform compared with another without their disability. To qualify for a higher wage the employee will be required to demonstrate greater work capacity.

13. Whilst output remains part of the assessment, job size will be the dominant determinate of an employee's pro rata wage because the assessment results in the employee being classified

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[4] There is no necessary correlation between "job size" and any particular percentage of the full award rate. Further, assessing non-productive time separately from output results in unfairness for the reasons given by the ACTU: ACTU submission at [13].

within a fixed job size range. The assessment is, and is intended to be, an assessment of what work an employee can do having regard to the effects of the person's disability on their work capacity, sounding directly in their wages. The Proposed Wages Tool conditions wage alterations for ADE employees with a disability. The Court in *Noijn* accepted that an award based tool with this feature could constitute a requirement or condition imposed by the employers.[5]

Inability to comply

14. The second element of indirect discrimination is inability to comply with the imposed requirement or condition. This element is to be assessed from the perspective of the ADE employee with the disability.[6] In *Noijn* the Court held that the applicants suffered less favourable treatment from the imposition of the BSWAT tool because they had intellectual disabilities which limited their work capacity. Like the Proposed Wages Tool, the *Noijn* applicant's disabilities correlated with lower work competence and hence lower wages. The methodological differences between the BSWAT and the Proposed Wages Tool do not compel a different answer to compliance.

15. The Proposed Wages Tool configures the job element of the tool around the work effects of an individual ADE employee's disability. A direct link is forged between the disability and the quantum of minimum wages. The disabled employee with work impairments will be unable to comply with a condition that implicitly views what he can't do as a basis for discounting his or her wages from the full minimum wage for the performance of work at the basic award level. Compared with the notionally fully competent employee or an employee with the same disability employed in open employment, the ADE employee suffers wage detriment[7] in this system of wage determination.

Reasonableness

16. The last element, reasonableness, is objective and plainly evaluative. The Commission would be required to make such an assessment if it was required to conduct a s. 161(3) review.[8] Without limiting what may be relevant to that inquiry, the considerations referred to by

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5 *Noijn* per Buchanan J at [122]-[123]; per Flick J at [195]-[199]; per Katzmann J at [232]-[233] and [237].

6 *Noijn* per Buchanan J at [130]-[131]

7 Detriment as it appears in s. 15(2)(d) of the DDA has a wide connotation and encompasses disadvantage. The prejudice to an employee from an inability to earn additional income is one such detriment: *Watts v Australian Postal Corporation* (2014) 222 FCR 220 at [67]-[68].

8 The onus now falls on the person imposing the requirement or condition to show that it is reasonable: s. 6(4) of the DDA. At the time of *Noijn* the onus was on the aggrieved person to show the requirement or condition was unreasonable.

Buchanan J in [137] and [139] of his reasons in *Noijn*, and the differential wage assessment standard cited by Katzmann J at [258] of her Honour's reasons are apposite. So too are the observations of Katzmann J at [266] and [268].

17. It is not necessarily determinative that the wages criteria the Proposed Wages Tool would apply may be seen as facially neutral or could be viewed as appropriate and adapted for the purpose it is designed to serve.[9] One only gets to an assessment of reasonableness under s. 6 of the DDA because it has first been established that disabled persons are disadvantaged by the imposition of, what has been found to be, a requirement or condition with this effect. [10] Weight is to be given to the objective of the DDA to eliminate discrimination on the ground of disability "as far as possible", including in the area of work.[11] In the FW Act, this is given additional emphasis by the presence of s. 161(3).

18. The Full Bench observes in the April Statement that ADEs employ disabled persons "by adjusting their daily job tasks to suit their abilities".[12] This observation is relevant to reasonableness.

19. The DDA obliges[13] an employer to make reasonable adjustments (if not to do so treats the disabled employee less favourably than a person without their disability or has that effect).[14] The obligation to make reasonable adjustments is statutory recognition that disability produces a relevant difference, productive of disadvantage, that requires the taking of positive steps to bring these differences into account and remedy them. The observation of Brennan J in *Waters v Public Transport Corporation* (1991) 173 CLR 349 at p. 373 is apt:

> "Disabilities - physical, functional and mental - are almost infinitely various and they create needs which vary according to the nature and extent of the disability. Services may be required to satisfy those needs and, in many cases, the services are provided by public authorities. Indeed, a measure of the civilization of a society is the extent to which it provides for the needs of the disabled (and of other minorities) and protects them from adverse and unjust discrimination which offends their human dignity."

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9 *Waters v Public Transport Corporation* (1991) 173 CLR 349 per Brennan J at p. 379. See also *Catholic Education Office v Clarke* (2004) 138 FCR 121 at [115(iii) and (iv)].

10 c/f *Noijn* per Katzmann J at [257].

11 Section 3 of the DDA/

12 April Statement, at [15(1)].

13 *Watts v Australian Postal Corporation* (2014) 222 FCR 220 at [34].

14 See s. 5(2) of the DDA. Notably, an adjustment made by a person is treated by the DDA as a reasonable adjustment unless making the adjustment would impose unjustifiable hardship. See s. 4 of the DDA.

20. There can be no doubt that the adjustments made by ADEs for their disabled employees constitute reasonable adjustments for DDA purposes.[15] The fact they are made indicates an ability to make them and a preparedness to accept the work of employees as adjusted. For ADE employees, they facilitate employment with the rights and benefits thereof, including the award safety net and the non-pecuniary benefits of work.[16]

21. In these circumstances, it is incongruous that the substantive equality benefit that the DDA secures for disabled workers should for ADE employees only sound in inferior wages. The job size element of the Proposed Wages Tool appears to do just that by viewing the adjustments that ADE employers make (and are obliged by law to make) for individual employees through a value lens and imposing a wage penalty for them. Moreover, it would do so only in ADE employment, conferring on these employers the unique benefit of "costing in" the adjustments they make for their disabled employees by discounting the minimum wages they pay for work they require and accept from them.

21 November 2018

M. Harding

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15 See the definition of adjustments in s. 4 of the DDA and also *Watts v Australian Postal Corporation* (2014) 222 FCR 220 at [23]. Mortimer J went on to state at [25] of *Watts* that: "Much will depend on the particular disability and the particular individual, together with the circumstances in which the adjustment must operate. In order for s 5(2) of the DDA to provide, insofar as it is intended to, substantive equality for all individuals with disabilities, where those disabilities have different impacts on different people, it is important that there be no rigid categorisation or stereotyping of a concept such as an "adjustment".

16 *Watts v Australian Postal Corporation* (2014) 222 FCR 220 at [16]- [18]. Those benefits extend to the kind of non-pecuniary benefits that come from work recognized by the High Court in *Blackadder v Ramsey Butchering* (2005) 221 CLR 539 at [80] and by Bromberg J in *Quinn v Overland* (2010) 199 IR 40 at [110].