



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

AM2020/99, AM2021/63, AM2021/65

s.158 - Application to vary or revoke a modern award

**Application by Health Services Union and Others
(AM2020/99)**

**Application by Australian Nursing and Midwifery Federation
(AM2021/63)**

**Application by Health Services Union
(AM2021/65)**

Sydney

9.30 AM, TUESDAY, 25 JULY 2023

Continued from 13/02/2023

PN1

JUSTICE HATCHER: Good morning, I will take the appearances. Mr Gibian, do you appear for the HSU?

PN2

MR M GIBIAN: I do. I should mention I have Ms Parkin from Maurice Blackburn here and Ms Delpiano from the HSU.

PN3

JUSTICE HATCHER: Thank you. Mr McKenna and Mr Hartley, you appear for the ANMF?

PN4

MR J McKENNA: That is so, your Honour, thank you.

PN5

JUSTICE HATCHER: That's all right. Ms Wills, you appear for the ASU?

PN6

MS V WILLS: Yes, your Honour.

PN7

JUSTICE HATCHER: Mr Taylor, you appear for the AWU?

PN8

MR G TAYLOR: Yes, your Honour.

PN9

JUSTICE HATCHER: Ms Harrison, you appear for the UWU?

PN10

MS L HARRISON: Yes, your Honour.

PN11

JUSTICE HATCHER: Ms Bhatt, you appear for the Australian Industry Group?

PN12

MS R BHATT: Yes, your Honour.

PN13

JUSTICE HATCHER: Ms Rafter and Ms Bailey, you appear for ABI and the Aged & Community Care Providers Association?

PN14

MS A RAFTER: Yes, your Honour.

PN15

JUSTICE HATCHER: And, Mr Reeves, you appear for the Commonwealth?

PN16

MR S REEVES: Yes, your Honour.

PN17

JUSTICE HATCHER: Is that all the appearances? Thank you. We made accessible to the parties last week a document which the Commission understands to be the issues outstanding in these proceedings. Does anybody wish to say anything about that document, and in particular does the document miss any issues that are outstanding or identify issues that are no longer at play?

PN18

MR GIBIAN: I don't believe so, your Honour. The only observation I was going to make about it is I think there's an issue at the bottom box on page 4 which refers to principles, classification progression, time versus competency-based. As we read the Full Bench earlier decisions there was some encouragements, particularly arising from evidence of Professor Charlesworth and some submissions made by the Commonwealth for the parties to look at the issues within the classification structure, including the degree of gap between the rates, in particular classifications and the opportunities for progression and the like which may be contemplated by that issue, but it might be somewhat more broadly phrased than it was in that box. But that was the only observation I had.

PN19

JUSTICE HATCHER: All right, well that's noted. Does anyone else wish to add anything on that point? All right. As to the further programming I note the draft proposed orders by the HSU, which I assume everyone has seen. Notwithstanding that my strong preference is to try to program the matter for hearing in December this year. Does that pose an insurmountable obstacle to anybody?

PN20

MR GIBIAN: Can I just have a moment, your Honour?

PN21

JUSTICE HATCHER: Yes.

PN22

MR GIBIAN: Your Honour, if I can just make one observation. Your Honour might have seen, and may be it's not particularly clear from the potential directions that we had set out, there are in a sense in our view at least two tracks, as it were, that we would propose in terms of the preparation of further evidence.

PN23

One being whatever further evidence or submissions parties wanted to put in relation to the increase for indirect care workers who haven't received any increase at all as yet, and whatever further increase ought be awarded so far as direct care workers are concerned, including some other issues in relation to COVID measures and staffing issues that had been raised by the Full Bench. Those are matters that can certainly fit within the timeframe that your Honour is contemplating.

PN24

The second track in terms of the classification issues did raise some issues of greater complexity which may require some more time for consideration and preparation of evidence. In particular we were proposing to get Professor

Charlesworth and I think Maher to prepare a further report, but may not be able to be done before sometime in October just because of other commitments they have in terms of overseas travel and the like, which may (indistinct) what your Honour has proposed.

PN25

JUSTICE HATCHER: Sorry, when was that, when in October?

PN26

MR GIBIAN: I think mid to late I am told. I think Professor Charlesworth is overseas for the whole of September. She's overseas (indistinct) for the whole of September as I understand it, so we would need some time after her return to do that work.

PN27

JUSTICE HATCHER: What I had in mind - just give me a second - is to devote two weeks in December to this. That would be non-sequential. So the first would be the week beginning 4 December, and the second would be the week beginning 18 December. So I am wondering if we can use the first week to deal with your first track issues, and the second week to deal with the classification issues.

PN28

MR GIBIAN: Potentially, your Honour. Can I just have a moment?

PN29

JUSTICE HATCHER: Yes.

PN30

MR McKENNA: Your Honour, whilst Mr Gibian is taking that moment can I just raise something as well. For the ANMF we also would have some difficulty filing evidence with respect to classification pay structures before say mid October. And one other issue that arises from that is that there is at the moment significant difference between the union parties as to classification structures, and so it's anticipated that there would need to be a fulsome reply as between the unions which would likely make it difficult to proceed with a hearing in late December as to those classification pay structure issues.

PN31

The position for the Federation is that - and we understand that the position put by the UWU is that it would be appropriate to proceed in the first instance with some form of determination for indirect care workers and pay increases for them, and we think that is certainly sensible, and it might be that that can be dealt with as a first instance. And if that were the case we would seek a decoupling of the evidence filed in proposed order 1 by the HSU of indirect care and direct care, such that evidence for indirect care would proceed first with evidence for direct care at a later time.

PN32

JUSTICE HATCHER: Yes. When you say mid October what evidence are you talking about in that respect?

PN33

MR McKENNA: As things stand, your Honour, there is a significant difference between the HSU and the ANMF with respect to whether there be consolidation of personal care workers and assistants in nursing within the Aged Care Award, and we anticipate that there will be evidence filed presumably by both parties as to whether or not that's a good idea. And I understand from what Mr Gibian says that there will be expert evidence from them and quite possibly expert evidence from the Federation as well. So that's why it's anticipated there will be some time taken to prepare that, and as I say likely also the need for reply evidence likely to other parties as well.

PN34

JUSTICE HATCHER: If I give the parties until mid October for the second track why can't they then respond say by the end of November, (indistinct) the end of the first week in December?

PN35

MR McKENNA: I think in terms of the reply material that would be achievable. It then makes it very difficult though to be filing submissions in advance of the hearing, if we're anticipating a hearing in December, your Honour.

PN36

JUSTICE HATCHER: The difficulty I have is if you have read the annual wage review decision is this decision connects with everything else. So it's highly desirous to wrap this up before the end of the wage review. Anyway, does any other party wish to say anything? Let's start with the ASU, so Ms Wills.

PN37

MS WILLS: Nothing at this time, your Honour.

PN38

JUSTICE HATCHER: All right. Ms Harrison?

PN39

MS HARRISON: Thank you, your Honour. As I think was just foreshadowed by my friend the UWU does have a slightly different position to the HSU's proposed orders, which is that we're mindful that there's an entire cohort of workers, that being the indirect care workers, that didn't receive the benefit of the interim increase. And in that respect our concern with the orders that have been proposed in relation to timetabling in February was the fact that the prospect of the determination of whether or not there is in fact a (indistinct) increase for those indirect care workers then gets shifted in effect into February despite the fact that the evidence is being heard earlier, because submissions aren't proposed to be filed until December and then the hearing is not until February.

PN40

I note your Honour's proposal in relation to the December timetabling. I'm in the other parties' hands in relation to the practicalities of that, particularly around the classification evidence, which I suspect they intend to file a greater volume than what the UWU does. But certainly in relation to indirect care workers it would be our preference that if there is different tranches of evidence that there be an

opportunity in relation to submissions as well, and then perhaps an interim decision. But I'm in the Commission's hands in that respect.

PN41

JUSTICE HATCHER: All right. Mr Taylor, do you wish to add anything?

PN42

MR TAYLOR: Your Honour, other than that we adopt the same position as the United Workers' Union. We want the indirect care workers dealt with as fast as possible, please.

PN43

JUSTICE HATCHER: All right. Ms Bhatt?

PN44

MS BHATT: Your Honour, I wish to raise only one issue concerning the form of the proposed orders that have just been shared with me by the HSU, and that is that the direction should clearly require parties to articulate any specific variations that are proposed. I understand that to some extent that might already have happened in submissions that have previously been filed. But it appears that in relation to at least some issues there have been submissions made, but it's not clear whether a specific variation is proposed. Nothing further from me.

PN45

JUSTICE HATCHER: All right. And, Ms Rafter?

PN46

MS RAFTER: Thank you, your Honour. From the joint employers perspective we have reviewed the draft orders proposed by the HSU and had no real difficulty with those orders, and we understand that your Honour proposes a more truncated quicker timetable. But on that matter something that we thought might be assistive in these particular proceedings was on the matter of classifications we had thought given the divergence that's come forth through the responses to the background document 10 that there might be a utility in having conferences dedicated to the classifications issues; such that if there's some issues that aren't controversial that could be identified and areas of disagreement more crystallised that might be a better way to move forward and possibly reduce the amount of matters to be traversed in evidence. That was a suggestion we thought might help with efficiency there.

PN47

And the only additional matter that we would seek regarding evidence is in terms of evidence to put on regarding the financial status of the industry. So that's something that we would want to ensure the joint employers get an opportunity to put on, because that would be relevant to operative date should any increase for either indirect care workers or care workers as well be considered or contemplated.

PN48

JUSTICE HATCHER: Would that not fit in either the first or second tracks of the proposed HSU's orders?

PN49

MS RAFTER: I agree it could fit into - I agree it could work quite well alongside. We just wanted to make sure it was noted as a possibility for the Commission to consider. I believe it could work simultaneously.

PN50

JUSTICE HATCHER: Yes, all right.

PN51

MR GIBIAN: I am sorry, your Honour, can I just add something if it's convenient?

PN52

JUSTICE HATCHER: Yes.

PN53

MR GIBIAN: Just on the matter that Ms Rafter raised I would have thought that that would fit within what we have described as the first track if there were some issues about costings and the like. The other issue I was just going to raise is so far as the dates that your Honour had identified the HSU would certainly think that the dates on 4 December could deal with what we have described as the first track.

PN54

So far as the dates from 18 December are concerned for my part I'm afraid I'm not available at that time personally. Whether that's persuasive or not is obviously a matter for the Commission. But not only for that reason the HSU's preference would be for the classifications issues to be dealt with early next year if that can be accommodated by the Commission.

PN55

JUSTICE HATCHER: What about the week beginning 11 December, are you available that week?

PN56

MR GIBIAN: Yes.

PN57

JUSTICE HATCHER: What's the first week which has availability in the new year?

PN58

MR GIBIAN: I will just consult briefly, your Honour, if that's convenient.

PN59

JUSTICE HATCHER: Yes.

PN60

MR McKENNA: And, your Honour, whilst Mr Gibian is doing that could I just return to a matter raised by Ms Bhatt. My friend there indicated perhaps the possibility of the parties articulating their position. The ANMF in its response to background document 10 made clear that what the Federation is seeking is a

benchmarking of the Registered Nurse Level 1, pay point 1, with the C1A of the metals framework. The consequence of that would be an increase that is greater than what is contained in the ANMF's original application.

PN61

The stage 1 decision raised procedural fairness issues that flow from that, but the Federation's position is now on the record. But to the extent that procedural fairness issues would require some further step to be taken we would certainly support that, and if that is included with the orders the position to be taken then that might be appropriate.

PN62

JUSTICE HATCHER: Mr McKenna, I am a bit behind the curb with all this. What are the procedural fairness issues you're referring to?

PN63

MR McKENNA: Yes, certainly. So one issue that, President, you would be well aware of is consistent with the recommendation made in the Pharmacy Award matter. The ANMF is seeking alignment or a benchmarking of an undergraduate qualified nurse with the C1A in the metals framework. The consequence of that is a 35 per cent increase for a registered nurse, or would be.

PN64

The ANMF's original application sought 25 per cent increases. So what the Federation is now seeking is in fact greater than what is contained in the application. The stage 1 decision noted that. There's some, I think, difference of opinion about the consequence of the stage 1 decision as to whether it said it wouldn't do that in stage 1 or wouldn't do it at all. The Federation's position is that it seeks that. We do seek an alignment of university undergraduate qualified nurses with the C1A. That is a part of the classification structure that the Federation will be seeking in stage 3.

PN65

JUSTICE HATCHER: I see.

PN66

MR McKENNA: So to the extent that any step needs to be taken by the Federation (indistinct) we are content for that to be included in the order, or whatever step might be appropriate.

PN67

JUSTICE HATCHER: Perhaps consistent with what Ms Bhatt said would you at a convenient date be open to filing an amended application?

PN68

MR McKENNA: Certainly. Yes, your Honour.

PN69

JUSTICE HATCHER: Yes, Mr Gibian?

PN70

MR GIBIAN: Yes. In terms of the dates next year the most convenient first day would be the week commencing 29 January.

PN71

JUSTICE HATCHER: I know this is early days, but do the parties have any view as to how long it will take to deal with the classification part of the hearing?

PN72

MR GIBIAN: It is difficult to say as your Honour says. I wouldn't have thought more than a week would be required. It's more matters of submission I would have thought.

PN73

JUSTICE HATCHER: All right. Is there anything else any other party wishes to raise?

PN74

MR REEVES: Yes, your Honour, just for the Commonwealth. We're in the parties and the Commission's hands in respect of timing and wouldn't expect that we would be filing any evidence. Just in respect of the HSU's proposed orders they refer to the applicant and union parties filing submissions and employers filing submissions. We would seek to also have the option to file submissions in accordance with the timetable that's ultimately established.

PN75

We ask that that be reflected by us having the chance to file any submissions at the same time that the employer parties would. And then also if we can have the option to file reply submissions in response to anything the employers say at the same time that the unions and applicant parties file their reply submissions, just reflecting that we're not exactly an applicant party here, but we are also not exactly a respondent party. I think we may have something to usefully say in response to either. We're happy to go with whatever timing the Commission and the more active parties settle on otherwise.

PN76

JUSTICE HATCHER: All right. If there's nothing further I will consider what has been put and I will confer with the expert panel and try to issue directions and a listing for hearing as soon as possible. We will now adjourn.

ADJOURNED TO A DATE TO BE FIXED

[10.07 AM]