



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

AM2024/11

AM2021/63

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

Application by Australian Nursing and Midwifery Federation
(AM2024/11)
(AM 2021/63)

Nurses Award 2020

Sydney

9.30 AM, FRIDAY, 17 MAY 2024

Continued from 04/04/2024

PN1

JUSTICE HATCHER: Good morning. I will take the appearances. Mr McKenna, you appear with Mr Hartley and Ms Jones for the ANMF?

PN2

MR J McKENNA: If your Honour pleases. Thank you.

PN3

JUSTICE HATCHER: Thank you.

PN4

Mr O'Grady and Ms Leoncio, you appear for the Australian Private Hospitals Association, Catholic Health Australia, Day Hospitals Australia, Healthscope Operations and Adelaide Community Healthcare Alliance; is that right?

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MR C O'GRADY: Yes, your Honour.

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JUSTICE HATCHER: Yes, and Mr Ward, you appear for Australian Business Industrial and ACCP; is that right?

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MR N WARD: Yes, your Honour. Thank you.

PN8

JUSTICE HATCHER: All right. Look, I might turn to you, Mr O'Grady. Firstly, you would have, or your clients would have received the without prejudice document from the ANMF which was the subject of a first direction on 4 April.

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MR O'GRADY: Yes. That's right.

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JUSTICE HATCHER: Have your clients had a chance to consider that?

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MR O'GRADY: We have had a chance to see it. We haven't come to any conclusions about it, your Honour. It's, without going into the detail, it's at a very high level.

PN12

JUSTICE HATCHER: I see. Well, I have read the submissions which you filed yesterday and do I understand from your proposed directions that your clients have a preference that the Nurses Award issues, as they inter-relate with the Aged Care proceedings, should be dealt with first before the rest of the award is dealt with?

PN13

MR O'GRADY: Yes, your Honour.

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JUSTICE HATCHER: Is that what I think it is?

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MR O'GRADY: Yes, your Honour. As we understand the stage 3 decision, at 207 and 208, the Full Bench was conscious of the fact that there may be an impact on the Nurses Award generally from fixing the classifications in respect of aged care. In our submission, there are some fundamental differences between the two sectors and what we're proposing is a hearing to identify those differences for the Full Bench so that that could then be taken into account, either in fixing the classifications in the aged care sector, or alternatively, as we have foreshadowed, by ring fencing, if you like, those classifications so that they don't flow on to nurses more generally in the hospital sector.

PN16

JUSTICE HATCHER: But we have an application to deal with the Nurses Award more generally which obviously your clients are going to have to confront. One of the purposes in having the ANMF send to you the without prejudice document was to explore whether the entire award could be sorted out by way of a single and perhaps consensual process. Are you ruling that out?

PN17

MR O'GRADY: Well, I don't have instructions on that issue, your Honour, but my clients have seen the document. I don't have instructions really beyond the fact that what is proposed is not acceptable to my clients at this stage.

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JUSTICE HATCHER: Okay.

PN19

Mr Ward, what do you say about the proposed directions of Mr O'Grady's clients?

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MR WARD: I would simply start here, your Honour. In relation to aged care we had three discrete issues to resolve with the ANMF. My clients have resolved one by consent. They have resolved one, in principle by consent, and there's a wording issue to be resolved.

PN21

You made directions on the last occasion for the filing of evidence and submissions to resolve those matters. Everybody was invited to file, including Mr O'Grady's clients. The ANMF filed in accordance with the directions on the 26th. We filed in accordance with the directions on 16 May.

PN22

Our view is quite simple. We think there's only, effectively, one issue left between my clients and the ANMF in the aged care matter. We would ask that that be set down for hearing and dealt with.

PN23

I think it's time to cut us away from the Nurses Award proper. If that means we end up with a distinct classification structure sitting in the Nurses Award for aged care sobeit, but my clients are keen to have the aged care case finished, and it would seem that - - -

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JUSTICE HATCHER: Yes.

PN25

MR WARD: It would seem there's very little. We probably only need half a day of hearing for Mr McKenna and I to dispose of the residual matter.

PN26

JUSTICE HATCHER: Yes. All right. Of course there's a few inter-related issues which here we're bouncing about which are hard to put together. So we have to determine the operative date issue for the aged care increases as a whole and perhaps we need to determine that issue first before we can finalise the classification because there may be issues of time scale involved.

PN27

MR WARD: I would accept that, your Honour.

PN28

JUSTICE HATCHER: And it may be, notwithstanding what the stage 3 decision said, it might be easier to, having heard what the attitude of the respondents to the Nurses Award generally are, maybe we should consider reuniting the matters, but I will speak to the panel about that.

PN29

MR WARD: Your Honour, I should, just for clarity, I should just indicate that ABI does have an interest outside aged care in the Nurses Award, in particular, in relation to members who employ many thousands of agency nurses, and also perhaps unsurprisingly, we have an interest in occupational health nurses.

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JUSTICE HATCHER: All right.

PN31

Well, Mr McKenna, what do you think should happen now?

PN32

MR McKENNA: For clarity, your Honour, in terms of the proposed orders by Mr O'Grady's clients, that those are opposed by the ANMF. Order 1(a) mirrors the material that was due to be filed yesterday and I don't really see why an extra two months should be provided for that, particularly in circumstances where the order was made for the filing of reply material at the request of one of Mr O'Grady's clients on 4 April.

PN33

In respect to the second issue, dealing with the extent to which issues outside the aged care have potential flow-on effects, the panel in the stage 3 decision made

reference to a risk of a fait accompli arising. In our submission, that rises no higher than a risk.

PN34

The applications for aged care and the application for the broader nurses and midwives proceeding relate to what are discrete sets of classifications. The effect of the earlier decision in the aged care proceeding has been to separate out the classifications, so we would urge the finalisation of the aged care proceeding, including as to resolve the outstanding nurses, enrolled nurse and registered nurse issues, and of course, those issues, once determined, in a further proceeding it would be open to Mr O'Grady and his client to come along and say to the Commission that different findings should be made in a subsequent proceeding, and of course, the Commission would have to be satisfied. The panel would have to be satisfied of the matters in section 157.

PN35

So the private hospitals have had an opportunity to respond to the outstanding ER and RN issues. They haven't taken that up. Insofar as we understand it, there is, as things stand, only - there is limited prospect of being able to resolve the broader nurses and midwives application on a consent basis quickly and so that does leave the increases sought for aged care nurses hanging, and one other matter, of course, that your Honour would be aware of that has arisen since we were last before you, is the position of the Commonwealth, and what the Commonwealth has said is that it is, in effect, awaiting clarification from the panel as to the position for aged care nurses and midwives before it commits, makes a final commitment for those.

PN36

So our submission is that the aged care proceedings - nurses and midwives and aged care proceeding should be reunited with the applications in respect of the Aged Care Award and the SCHADS Award. The outstanding ER and RN issues should be resolved.

PN37

As Mr Ward has indicated, there isn't any substantial movement there. There is now only a very limited area of dispute as between the ANMF and the joint employers and they are, in our submission - - -

PN38

JUSTICE HATCHER: So just to sum this up. So there appears to be a consensus that we should finish the nurses' issues in the aged care case first and then turn to the rest of your work value application. So your difference with Mr O'Grady's clients is one of the timing. Is that - - -

PN39

MR McKENNA: It is. We would urge the Commission to finalise the aged care proceeding as quickly as possible. There are obviously a number of matters outstanding, one of which was alluded to, or arises from a matter that your Honour was informed of this morning. VHIA are engaged in bargaining with the ANMF and the Victorian Public Sector. That includes aged care. My instructions are that that is having a negative impact on bargaining and a resolution of these issues would have a positive impact on those negotiations.

PN40

So there are a number of reasons, and of course, none the least of which is that it's undesirable for gender-based undervaluation to continue, particularly in light of the changed objectives to the Act with respect to the need to address or the need to achieve gender equality. The Commission has made findings about that and we would urge the Commission to resolve those matters as quickly as possible.

PN41

JUSTICE HATCHER: Well, if we turn to your broader work value application. What do you say should happen to that; that is, in the event that we program the aged care matters for finalisation I would be inclined to also start programming that matter?

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MR McKENNA: Yes.

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JUSTICE HATCHER: Go ahead.

PN44

MR McKENNA: I'm sorry, your Honour. I don't mean to cut you off.

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JUSTICE HATCHER: No. Go ahead. So I just want to hear from you as to what the program should be for the work value application.

PN46

MR McKENNA: Your Honour, we do remain supportive of any attempts to limit or narrow the issues there. I take it, from what Mr O'Grady has said, that that is a process that hasn't yet really been carried through by his clients and, presumably, further consideration will be given to that. We remain open to a process that involves discussions with his clients to try and narrow the issues and it might be appropriate to pursue that path further before full programming of that matter occurs.

PN47

JUSTICE HATCHER: Well, we can do that simultaneously with at least taking the first step of your client filing its case. If we did that, how long might your client need?

PN48

MR McKENNA: As your Honour would be aware, it's a large case. The short answer is six months, particularly as your Honour would be aware, we would be wishing to file evidence on the application of the tool, (indistinct) tool, to identify any skills. That's all in process. So in short, evidence and submissions in six months or thereabouts, your Honour.

PN49

JUSTICE HATCHER: All right. One alternative course, which I flagged on the last occasion, was whether, as a first step, your client could file an outline of contentions of fact and law, and then ask for a response from the various employer

respondents to see whether that leads to some substantial agreement about the facts which might obviate the need for a substantial evidentiary hearing. If we chose that path, how long might you need to put that together?

PN50

MR McKENNA: Well, your Honour, I probably need some instructions on that, but it might be more efficient - I guess it's a bit of a chicken and the egg - but it might be more efficient to have some discussions first, and that might then enable identification of narrowing of the issues and then file some sort of contentions of fact and law, but otherwise, I can seek some instructions as to the time that we think it would take to prepare that.

PN51

JUSTICE HATCHER: All right. Well, if you can just seek those instructions and send me a note.

PN52

Now, going back to you, Mr O'Grady. So the directions I made on 4 April contemplated the capacity to file submissions and evidence on the substantive issues by yesterday so why would I allow some further months for you to do that which will delay the finalisation of the aged care case?

PN53

MR O'GRADY: Well, really only for this reason - - -

PN54

JUSTICE HATCHER: I'm sorry, let me just say this. I mean because the simple fact is that, as I recall it, the unions are seeking an operative date which is way before that, so that would frustrate the finalisation of the aged care case.

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MR O'GRADY: Well, we accept that, your Honour. We took from one of the comments you made on 4 April that the issue of timing would turn, to a large extent, on what the Commonwealth said about funding, and the position is that the Commonwealth has fixed a start date for funding in respect of non-nurses of 1 January 2015(sic) for 50 per cent and then - I'm sorry, 2025, and then 1 January 2026 for the remainder.

PN56

It was with that in mind that we thought that there would be an opportunity to ventilate the differences between the two sectors prior to 1 January 2025 and that would not impact upon the flow-on of the wage increases to nurses. So that's why we fixed the timing that we did, and given the variety of matters that would need to be addressed, we weren't in a position to put on substantive material given the deadline that your Honour set for yesterday.

PN57

JUSTICE HATCHER: But, Mr O'Grady, I'm just trying to understand what is the case you want to present in respect to aged nurses; that is, if you're saying that other nurses are different, that's the case you would run down the track, isn't it? Why would you run that case in respect of the aged care finalisation?

PN58

MR O'GRADY: Well, our concern, your Honour, was to address the issue that we thought emerged from paragraphs 207 and 208 of the stage 3 decision; namely, the capacity for the classifications structure put in place in respect of aged care to flow on to the hospital sector. Now, if it be the case – and I understand Mr McKenna to be suggesting that it is the case – that there's not going to be any argument that there should be a flow-on of that classification in respect of the hospital sector, then that addresses my client's concerns.

PN59

JUSTICE HATCHER: Well, I don't think that's the point, with respect. I fully anticipate there will be such an argument, but what are you going to say in respect of aged care nurses about that? We're not determining that issue in the aged care case.

PN60

MR O'GRADY: I accept that, your Honour. Well, the point - - -

PN61

JUSTICE HATCHER: I mean let me make it clear. It seems to me that if you run that contemplated case in the aged care proceedings and it's not accepted, then there will be a fait accompli. That seems to logically follow, doesn't it?

PN62

MR O'GRADY: Yes, and we would run a merits case to suggest that there should not be such a fait accompli. It was really to avoid the Commission - - -

PN63

JUSTICE HATCHER: Sure, but that obviates the purpose of separating out the aged care case because you then turn the aged care case into the decision key for the whole case.

PN64

MR O'GRADY: Well, it is a significant component in respect to the whole case. There is going to be some matters that would not have to be dealt with in the hearing that we were talking about. It was really designed to deal with this question of, or avoiding a situation where the classification structure put in place in respect of aged care would be ill adapted to the hospital sector and yet would seem to flow on to the hospital sector, and with a view to putting before the Commission material to enable that to be taken into account before finalising the classification structure in aged care.

PN65

JUSTICE HATCHER: And when you say 'ill adapted', what do you mean by this? I mean I'm trying to work out whether this is an issue of rates of pay or an issue about design or both.

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MR O'GRADY: Both, and the focus would be on the latter in the context of the hearing that we were putting forward.

PN67

JUSTICE HATCHER: Okay.

PN68

Well, Mr McKenna, can you obtain your instructions. As I think most of the parties will know, there's a further directions hearing in the aged care matter next week so I think what I will do is we will conduct that directions hearing which will lead to a program for the finalisation of an operative date and then we will try to put the bigger picture back together to see where this all lands. So we will conduct that aged care directions hearing next week and then I will have the panel consider what course should be taken with the matters we have discussed today.

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MR McKENNA: As your Honour pleases.

PN70

JUSTICE HATCHER: All right. Is there anything else that anyone wishes to raise? So I thank you for your attendance and we will now adjourn.

ADJOURNED TO A DATE TO BE FIXED

[9.52 AM]