

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

s29 application for hearing of an industrial dispute

Australian Nursing Federation, Tasmanian Branch
(T13915 of 2012)

and

Minister administering the State Service Act 2000
(Department of Health and Human Services)

PRESIDENT TIM ABEY

HOBART, 13 November 2012

Industrial dispute – alleged refusal to recognise Nurses and Midwives (Tasmanian Public Sector) Heads of Agreement – community nurses – entry point for new appointments – status quo – principles of award construction – found no agreement in place – decline to make orders sought - recommendation

DECISION

[1] On 13 June 2012 the Australian Nursing Federation, Tasmanian Branch (ANF) (the applicant), applied to the President, pursuant to s.29(1) of the *Industrial Relations Act 1984* (the Act) for a hearing before a Commissioner in respect of an industrial dispute with the Minister administering the State Service Act 2000 (MASSA) (Department of Health and Human Services) (DHHS) (the employer). This dispute concerns the entry point for the employment of community, family and child care nurses (community nurses) consequent upon the registration of the Nurses and Midwives Heads of Agreement 2010 (HOA).

[2] A hearing commenced at 144 Macquarie St, Hobart on 27 July and continued on 3 and 4 October 2012. Ms N Ellis appeared for the ANF with Ms Agnes Stanislaus-Large and Ms L Grosser. Mr P Baker appeared for MASSA with Mr M Double and Mr T Sales of DHHS.

[3] The HOA contains a new 'single spine' career structure for nurses. This structure has nine grades of which Grade 3 is the base grade for a nurse registered with the Nursing and Midwifery Board of Australia and who holds a current practicing certificate.

[4] Relevantly the HOA in describing features of the classification structure prescribes in point 5.2.6 of Appendix A, the following:

"Grade 3 – is the entry point for all registered nurses. Whilst there are 8 incremental points on this scale progression from year 4 to year 5 will depend on successful application of a Formal Capability Assessment. Application for Advanced Progression to year 6 will also be available for those who have completed year 4. A review of the implementation and direct entry points for nurses entering/working in the community will be undertaken by the parties by the end of February 2011 with the outcome of the review to be included in the Agreement." [my emphasis]

[5] Whilst the parties remain committed to the entry point review as contemplated by 5.2.6 above, unfortunately it proved not possible to meet the target completion date of February 2011 and indeed is yet to be completed.

[6] In correspondence dated 21 March 2011 the ANF outlined a package of proposals aimed at ensuring that nurses are not disadvantaged as consequence of delays in previously agreed timelines arising out of the HOA implementation process. Relevantly this includes the following:¹

3. *All community/family child health nurses to be employed as per the status quo arising for the 2005 Award classification until finalisation of the community settings review.*
4. *Community settings review to continue with consultation period with affected nurses. Next meeting scheduled for 25th March 2011."*

[7] By correspondence dated 29 March 2011 DHHS responded as follows:²

- *"There is agreement that all community/family child health nurses to be employed as per the status quo arising from the 2005 award classification until finalisation of the community settings review, that is, previous Level 1 year 6 translates to Grade 3 year 4.*
- *The Community Nurse review will continue with the current process."*

[8] The ANF maintains that subsequently, the DHHS has limited the application of the 'status quo' "...as being confined to the first increment of the classification only and not the entire classification of six increments."³

[9] This, the ANF contends, means that prior service in other medical jurisdictions (usually interstate) is either not recognised, or alternatively only partially recognised when a community nurse is recruited to the Tasmanian service. The ANF contends that this is contrary to past practice, has given rise to recruitment and retention issues, and has caused inequities within the community nurse settings.

[10] On the other hand, the DHHS maintains there was never an agreement consistent with the ANF contention, the terms of the HOA are clear and have been properly implemented.

[11] This dispute relates to approximately 22 community nurses who have been employed subsequent to January 2011.

[12] The ANF seeks orders and a remedy to maintain the status quo for the employment of community nurses under the classification structure arising from the Nurses (Tasmanian Public Sector) Award 2005 (2005 Award) together with back pay for nurses who have not been employed under the terms of the status quo until such time as the entry point working party review has been finalised.⁴

What is the Status Quo?

¹ Exhibit A4

² Exhibit A5

³ Transcript p2.

⁴ Transcript p 3

[13] The 2005 Award contains a classification for a *Registered Nurse (RN) Level 1* (one to seven years) and *Level 2* (one to four years.) In addition there is a separate classification *Registered Nurse – Community Health, Family and Child Health*. This contains six salary points based on years of service, commencing at the equivalent of *RN Level 1, year 6* and progressing to the equivalent of *RN level 2, fourth year and hereafter*.

[14] The Nurses (Tasmanian Public Sector) Enterprise Agreement 2007 (2007 Agreement) included a classification titled *Community FCH* with six salary points based on years of service and similar salary range as the 2005 Award.

[15] The HOA came into effect from 1 December 2010. The new 9 level classification structure identifies Grade 3 as the entry point “*for all registered nurses.*” Schedule 3 relevantly provides:

“6. Grade 3 will provide an entry point for nurses who wish to undertake a career pathway within the Community Sector. It is envisaged that a limited number of placements will be available to enable novice community nurses to work with experienced nurses in a team environment. The parties have agreed to undertake a review of all entry points/career pathways for nurses working in community settings. This review shall be completed by the end of February 2011.”

[16] The previous RN level 2 no longer exists. A new Grade 4 has been introduced and is accessible only on application. The HOA provides:

“Progression to Grade 4 is voluntary and based on the applicant’s ability to demonstrate that they meet the established criteria and the fulfillment of this advanced role.”

[17] Translation to the new structure is on a wage point to wage point basis. RN level 2 nurses translated to Grade 4. Similarly, community nurses who were at the time at year 3 and above, also translated to Grade 4. The uncontested ANF assertion is that 80% of community nurses translated to G4, year 3, the highest available increment point.

[18] It is common ground that the salary range available to community nurses is from G3 year 4 (\$61,739) to G4 year 4 (\$74,620), noting that G4 year 4 commenced on 1 December 2011. For the purposes of this dispute the status quo upper limit is G4 year 3 (\$73,765).

[19] It is also common ground that under the previous arrangements, relevant service elsewhere is recognised on appointment.

[20] The position is illustrated by a nurse with, say, 20 years relevant service. It is the ANF contention that under the status quo, this nurse would commence at G4 Year 3.

[21] As I understand the DHHS position, it is not necessarily contested that the ANF contention accurately reflects the status quo. Rather, the DHHS position is that it has not been agreed that the status quo would apply as the appropriate entry points.

[22] The practical impact of this is that under the DHHS position, the 20 year nurse would commence at Grade 3 year 8 (\$69,758). After 12 months at this point the nurse would then be eligible to apply to be classified at G4 year 1.

Submissions

For the ANF:

[23] The longer than expected delays concerning the career pathway and review of entry points for community settings have disadvantaged a section of the profession who are recognised with a higher entry point and career pathway in all other states and territories due to their inherent independence of practice, specialty knowledge and requirement often to work in an isolated environment.

[24] Community nurses have always been classified under a separate classification and promotable grade. The ANF did not agree that this group is to be classified through the normal career spine applicable to nurses working in supporting environments like hospitals.

[25] The HOA clearly shows that it is the intent of the parties to review the entry points for community nurses. Maintenance of the status quo is not pre-empting the outcome of this review; rather, it provides for a workable arrangement whilst the review is undertaken.

[26] Through the exchange of correspondence⁵ the DHHS has agreed to apply the status quo. According to the Webster Dictionary, status quo means "*the existing state of affairs.*" That means all six increments, not just the first increment as applied by the DHHS.

[27] The DHHS position applies the status quo for nurses with less than four years' experience. However if they have more than four years' experience the status quo does not apply. The majority of nurses applying for these specialty positions have more than four years' experience.

[28] There is evidence that experienced nurses moving from interstate are significantly financially disadvantaged.⁶

[29] The approach of the DHHS is giving rise to serious anomalies and inequities. In one case an experienced nurse was engaged as a G4 year 3. In a subsequent engagement the salary was reduced to G3 year 8, for doing the same work in the same team.⁷

[30] The current arrangements are causing difficulties with recruitment and retention, which in turn is adversely impacting on workload for the remaining nurses in the team.⁸ Ms Ellis went on to submit:⁹

"The Department of Health now employ experienced community nurses at Grade 3 Year 8, regardless of years of experience interstate, internationally or in Tasmania, in the community specialty sector. This is not the status quo. This is affecting recruitment, moral and work disparity within nurses because all the other community nurses in all of these teams have come across under the transition of the Heads of Agreement to Grade 4 Year 3. So they're all

⁵ Exhibits A4 and A5

⁶ Exhibit A7

⁷ Exhibits A8 and A9

⁸ Exhibits A10 and A11

⁹ Transcript p 22

being paid significantly more money than their colleagues coming on board now with – potentially the colleagues have got miles more experience but are being paid less and not recognised due to this dispute.

So ANF seeks a status quo of the entire award classification for the community family child health nurses as agreed in writing between the parties for all nurses in this classification which means increments as per the status quo pending the finalisation of the community review. This dispute is not about the merits of the community health review, merely the interim agreed conditions that whilst the parties continue to meet there is not a disadvantage and the status quo remains as per the award. ANF seeks back pay for those who have not been paid as per the interim agreement and as part of the order of the Commission. "

For the Employer:

[31] The new career structure in the HOA applies to all nurses. The HOA specifically provides that *"Grade 3 will provide an entry point for nurses who wish to undertake a career pathway within the Community Sector."*¹⁰

[32] There is a specific process that nurses must undertake to move from Grade 3 to Grade 4. This means that they must be G3 year 8 and complete a formal capability assessment. The advantage for the nurse is that there does not need to be a vacancy.

[33] The DHHS has a differing view as to the meaning of the status quo and *"...that in itself suggests that we never had an agreement as to what terms and conditions we would provide above and beyond the Heads of Agreement."*

[34] The correspondence from DHHS¹¹ does not use the same language as the ANF letter and provides clarity by specifically stating that *"Previous Level 1 year 6 translates to Grade 3 year 4."* The correspondence points to a specific point in time and specific employee cohort who would be at that increment point. The reason for this is that the Agency agreed to provide a higher level entry point for those nurses for the purposes of attraction and recruitment.

[35] There is nothing in the DHHS correspondence concerning incremental progression or exemption for community nurses from the required process to get to G4. The same correspondence made it clear that the Department cannot advertise positions at Grade 4.

[36] Grade 3 year 4 is the minimum entry point. With more experience it is possible to enter the service at up to G3 Year 8.

[37] In relation to the absence of an agreement, Mr Sales said:¹²

"So I guess that sums up the first part of my response in terms of that at the core of this argument is do we have an agreement to provide a condition above and beyond what was articulated in the Heads of Agreement and we had a clear understanding of what we meant by employ, we meant bringing on new employees, and that was the limit of what we meant by status quo. Now unfortunately the ANF had a different interpretation, that's fine, but that

¹⁰ HOA p15 of Appendix A item 6.

¹¹ Exhibit A5

¹² Transcript p 32

means that there was not an agreement. And if there was no agreement it would appear that either we are given approval by the ANF to continue paying a certain group of people above award or we revert back to what the terms and conditions are in the Heads of Agreement."

[38] There is no data to support the ANF contention concerning attraction and retention. In any event, this is not an issue for the Tasmanian Industrial Commission (TIC).

[39] The 'essential qualifications' for a community nurse is the same as for a registered nurse. i.e. *"Registered with the Nursing and Midwifery Board of Australia..."* without any additional specialisation required.

[40] A registered nurse with 20 years interstate experience in a hospital environment would also start at G3 year 8.

[41] What was relevant for community nurses under the 2005 Award is no longer relevant. Grade 3 is the entry point for all registered nurses, with no exceptions. The TIC is obliged to give effect to the HOA. The means of progressing from G3 to G4 is explicit. There is no ambiguity which might justify looking behind the agreement or the conduct of the parties. That said, the conduct of the employer has been consistent with the HOA.

[42] The HOA is a bargaining outcome which inevitably involves swings and roundabouts. *"It is not a matter of picking the eyes out of the bits you like."*¹³

Principles of Award Construction

[43] The principles governing award interpretation are well established and are summarised in ANF v MASSA (T13858).¹⁴ For convenience, they are reproduced below:

"

- *Terms of awards (and agreements) must be interpreted in light of their industrial context and purpose, including the commercial and legislative context in which they apply. (Amcor Ltd v CFMEU (2005) 222 CLR 241 at (2) and (13))*
- *The matter must be viewed broadly, and after consideration is given to every part of the award, the Court must endeavour to give it a meaning consistent with the general intention of the parties, to be gathered from the award as a whole. (CFMEU v Master Builders Group Training Scheme (2007) 161 IR 86 at 91)*
- *The relevant 'context' to be considered in interpreting the award extends to the origins of the particular clause. However, most often the immediate context, being the clause, section or part of the award in which the words to be interpreted appear, will be the clearest guide. (Short v FW Hercus Pty Ltd (1993) 40 FCR 511 at 517-19 (Burchett J, Drummond J agreeing)).*
- *Whilst context and purpose of an award will be relevant, ultimately a Court or Tribunal's task is to give effect to the meaning of the*

¹³ Transcript p 65

¹⁴ T13858 of 2011 7 June 2012 Abey DP.

award as expressed in its words, objectively (as opposed to subjectively) construed. (Amcor, supra, at (69), (70) and (77)-(114))

- *Other cases in which Courts or Tribunals have interpreted similar words in different awards and agreements, must also be treated with caution. This is because Courts and Tribunals are required to give effect to the terms of an award in the manner intended by the framers of the document (determined objectively.) (Kucks v CSR Limited (1996) 66 IR 182 at 184 (Madgwick J)*
- *Further, it is not appropriate when undertaking that task, to look to evidence of prior negotiations or surrounding circumstances to contradict the language used by the parties. If the words used are susceptible to more than one meaning, only then will objective evidence of background facts be relevant to the interpretation of an award, to the extent it shows mutuality of intention. (AMWU v QANTAS Airways Ltd (2001) 106 IR 307 at (21) and (31)) The subjective evidence of a party's own particular intentions, is not admissible. (Harbour City Real Estate Pty Ltd v Cargill (no 3) (2009) 186 IR 260 at (61)-(62) (McKerracher J))*
- *It is forbidden to use subsequent conduct as an aid to the construction of an award or industrial agreement. (CFMEU v John Holland Pty Ltd (2010) FCAFC 90 at (94); Short v Hercus Pty Ltd (1993) 40 FCR 511 at 517.)*
- *Whilst some assistance might be obtained from the previous conduct of the parties to an award, particularly where the terms have been re-enacted, this is only so where it can be shown by clear evidence that the parties have conducted themselves according to a common understanding of the relevant provision, as opposed to common inadvertence. (ALHMWU v Prestige Property Services Pty Ltd (2006) 149 FCR 209 at (44); SDAEA v Woolworths Ltd (2006) 151 FCR 513 at (31))"*
- *"the history of any provision is relevant and the fact that the parties have re-stated a provision which they have treated as bearing the particular meaning is relevant to the construction of the provision in the new agreement/award (see Short v FW Hercus Pty Ltd (1993) 41 FCR 511 at 517);*
- *the beginning point of an award interpretation is to interpret the words in the context in which those words apply. Whilst it is so that frequently the immediate context is the clearest guide the Commission 'should not deny itself all other guidance in those cases where it can be seen that more is needed'. The context in which a document is to be interpreted may extend to the entire document with which there is an association. (Short v FW Hercus at 518)*
- *in constructing an award or agreement the search is for the meaning intended by the framers of the document bearing in mind that they were likely to be of practical bent; it is justifiable to read an award or agreement to give effect to its evident purposes. Meanings which*

avoid inconvenience or injustice may reasonably be strained for. (Kucks v CSR Ltd (1996) 66 IR 182 at 184)"

...

- The meaning of an industrial agreement, like the meaning of a contract, is to be determined by what a reasonable person would have understood it to mean having regard not only by the text but also by surrounding circumstances known to the parties and the purpose and object of the transaction. (*Toll [FGCT Pty Ltd v Alphaform Pty Ltd [2004] 219 CLR 165 at 41.*)
- Evidence of surrounding circumstances is admissible to assist in the interpretation of the clause language where the clause is ambiguous or susceptible of more than one meaning. (*Codelfa Constructions Pty Ltd v State Rail Authorities of NSW [1982] 149 CLR 337 at 352.*)"

Conclusions and Findings.

[44] From the material before the Commission I am satisfied that for many years the industrial parties have viewed nurses employed in a community setting as having a higher work value than registered nurses engaged in a hospital environment. In the 2005 Award this was recognised through a separate classification which was continued by a similar arrangement in the 2007 Agreement. Further, no contest was offered to the ANF contention that this is the position in all other states and territories.

[45] Indeed it would seem that this view has not changed under the HOA. Contemporary Statements of Duties for Community Health Nurses prescribe a salary range from G3 Year 4 to G4 year 4.¹⁵

[46] Similarly the parties are agreed that the minimum entry point for community nurses shall be G3 year 4.

[47] In this context the employer contention that the work value is the same for both categories because of a common '*essential qualification,*' (registration with the Nursing and Midwifery Board of Australia), is unconvincing. Through a combination of independence of practice, specialisation and the requirement frequently to work in an isolated environment, community nurses are viewed as having their own unique work value.

[48] I am further satisfied that, prior to the HOA, relevant experience obtained with another employer was recognised in determining the entry point. This has now changed. Previous experience is recognised to a point, but is capped at a maximum of G3 Year 8. This means that an experienced nurse is financially disadvantaged by up to approximately \$4,000 per annum, compared with what would have applied, had the previous arrangements (status quo) continued.

[49] The question for the Commission is not one of work value, because on its face, the parties' view of the work value for community nurses has not changed. The issue is very squarely and solely, whether there is an agreement to maintain the pre-existing arrangements for entry points, pending the wider review of this matter contemplated in the HOA.

¹⁵ Exhibits R1 and R2

[50] This question turns largely on the exchange of correspondence between the parties.¹⁶

[51] In this exchange the ANF proposes:

"All community /family child health nurses to be employed as per the status quo arising from the 2005 Award classification until finalisation of the community settings review."

[52] To which the DHHS responds:

"There is agreement that all community /family child health nurses to be employed as per the status quo arising from the 2005 award classification until finalisation of the community settings review, that is, previous Level 1 year 6 translates to Grade 3 year 4."

[53] Aside from the words following 'review' in the DHHS letter, the wording is essentially the same.

[54] In the circumstances it is quite understandable as to why the ANF construed this response as an agreement to observe the status quo in its widest sense.

[55] On the other hand the employer has never applied this in the manner sought by the ANF and contends that the only agreement was for the minimum entry point of G3 year 4. That construction is open on the words used.

[56] It follows that both parties have a different interpretation on what was intended by the respective items of correspondence. This can be contrasted with the position in T13858. In that matter there was one document under consideration (Joint Fact Sheet), the words of which were not ambiguous. Importantly, the document contained a preamble which the Commission concluded was evidence of a mutuality of intent.

[57] None of these elements are present in the correspondence referred to in this matter. Accordingly I find that the only conclusion open is that there was no agreement to apply the status quo in the manner intended by the ANF. I emphasise that this is a finding of fact, not a conclusion based on merit considerations.

[58] In the absence of an agreement, the construction of the HOA becomes quite straightforward. I find that the DHHS has applied the entry points for community nurses in a manner which is not inconsistent with the various provisions of the HOA.

[59] I decline to make the orders sought by the ANF.

[60] I do however strongly urge the parties to complete the community settings review contemplated in the HOA as quickly as possible. The ANF has presented material which, *prima facie*, points to an unsatisfactory, indeed inequitable, position should the current arrangements continue indefinitely.

[61] I also note that the HOA states that "*Grade 3 will provide an entry point for nurses who wish to undertake a career pathway within the Community Sector.*" [my emphasis.] I would observe that this does not in itself limit entry points to Grade 3.

¹⁶ Exhibits A4 and A5

[62] Pursuant to s 21(2)(c) I refrain from further hearing and close the file. This does not however impact on the continuing discussions concerning the HOA implementation process.

Tim Abey
PRESIDENT

Appearances:

Ms N Ellis with Ms A Stanislaus-Large and Ms L Grosser – ANF
Mr P Baker – MASSA
Mr T Sales and Mr M Double - DHHS

Date and place of hearing:

2012
July 27
October 3
October 4
Hobart

Date of final submissions:

2012
October 12