**TASMANIAN INDUSTRIAL COMMISSION**

***Industrial Relations Act* 1984**
s.29(1A) application for hearing of an industrial dispute

**Australian Nursing and Midwifery Federation (Tasmanian Branch)**

**(T14398 of 2016)**

**and**

**Minister administering the State Service Act 2000 – Department of Health and Human Services**

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| COMMISSIONER M A GAY | HOBART, 21 November 2016 |

**Industrial dispute – application pursuant to s.29(1) of the Industrial Relations Act 1984 – dispute as to application of an agreement - anomalous pay progression classifications under agreement - beneficial interpretation of an instrument - text considered - application for order denied**

**DECISION**

1. On 10 March 2016, Ms N Ellis, the Tasmanian Branch Secretary of the Australian Nursing and Midwifery Federation (the ANMF, the Applicant) lodged an Application for Hearing pursuant to s.29(1) of the Industrial Relations Act 1984 (the Act). That section provides, inter alia, for an organisation to apply to the President of the Tasmanian Industrial commission (the Commission) for a hearing in respect of an industrial dispute.
2. Upon being allocated to the Commission as presently constituted, the matter came on in Hobart for Hearing/Conference on 22 April 2016 and subsequently for a Report Back Conference on 22 July 2016. When it was apparent that it would be necessary for the Commission to determine the matter in dispute, Directions issued and the matter came on for hearing on 19 September 2016. Ms J Thomas then appeared with Mr A Brakey for the ANMF and Mr M Johnston with Ms L Ross for the Minister administering the State Service Act 2000.

**The Heads of Agreement 2010**

1. The dispute said to exist between the ANMF and the Department of Health and Human Services (DHHS, the Respondent) was given as concerning an ‘anomaly’ arising from the advanced pay progression available to certain Grade 3 Registered Nurses and midwives (together in this decision, RNs) under the ‘Tasmanian Department of Health and Human Services, Nurses and Midwives Heads of Agreement 2010’ (the HoA).
2. The HoA was an agreement reached by the parties in late December 2010, between the Minister Administering the State Service Act (2000) and the then Australian Nursing Federation. At clause 1.1 the HoA gave as its purpose an intention ‘to reflect changes to current or the introduction of new entitlements’. The HoA went on to detail many such changes and foreshadow that its terms would form part of a proposed new agreement, the ‘Intended Agreement’, which was to operate from 1 December 2010 to 30 June 2013. Until that time the HoA was to apply.
3. Such an agreement was subsequently lodged in the Commission, so that the Nurses and Midwives (Tasmanian State Service) Interim Agreement 2013 (the Interim Agreement) operated in fact from 1 December 2013 until 30 November 2014. The parties included the HoA as part of the Interim Agreement at Appendix A. For completeness it can be recorded that the Interim Agreement was, in turn, replaced by the Nurses and Midwives (Tasmanian State Service) Agreement 2014, (the 2014 Agreement). Provisions of the Interim Agreement relevant to the question of Advanced Progression for Grade 3 RNs are also to be found in the 2014 Agreement, see Appendix C, Translation, Classification to the Nurses and Midwives Career Structure and Review.

**The Background**

1. Relevant to the present dispute is the extensive background set out in the ANMF’s s.29 (1) Application for Hearing. That material reflects the disadvantage said to affect the 2010, 2011 and 2012 graduates engaged by the DHHS as Registered Nurses over that period.
2. The disadvantage affecting this substantial group was described by the ANMF as arising from the implementation of transitional classifications introduced by the HoA. The ‘anomaly’ arose from the parties’ agreement (embodied in the HoA) that there should be a capacity for Grade 3 RNs who had completed Grade 3, year 4 to progress directly, according to an accelerated incremental movement termed ‘Advanced Progression’, to Grade 3, Year 6.
3. The parties’ agreement allowing Advanced Progression for Grade 3 RNs who had completed year 4 is set out at clause 5.2.6 of the HoA under a heading, ‘*features of the classification structure are*’:

*“****Grade 3***

*Application for advanced progression to Year 6 will also be available for those who have completed Year 4.”*

1. Additionally, Schedule 3 to the HoA provides, under the heading, CAREER STRUCTURE – IMPLEMENTATION PROCESS

**“*Grade 3***

*4. Advanced progression is available for Grade 3 nurses from year 4 to year 6. It is the responsibility of the individual nurse to apply for personal progression from Grade 3 (year 4 to year 6). They will need to demonstrate that they are meeting the required criteria that are specified in the Agreement. Assessment shall be through a process which includes peer review.”*

**The ANMF submission - Advanced Progression**

1. Ms Thomas presented a detailed case to the Commission in support of the ANMF position that the ‘anomaly’ affecting the 2010, 2011 and 2012 graduates required the Commission’s order in the following terms; “*All nurses who were graduate nurses in 2010, 2011 or 2012 are eligible to apply for advanced progression after four completed years of service as intended by the HoA 2010, Schedule 3, Grade 3, No 4.”*
2. The circumstances of RNs Nerissa Burdon and, to a lesser degree, Chloe Komarzynski were considered in some detail in the presentation of the ANMF case and are dealt with further below in the consideration of RN Burdon’s evidence.
3. In practical support of the somewhat skeletal treatment accorded Grade 3 Advanced Progression in the HoA, the ANMF advised the Commission that; “Rather than including the detail of the application and appeal process for advanced progression in the Agreement, the parties negotiated a detailed *Guideline*, *Registered Nurse/Midwife Progression Grade 3, year 4 to year 5, Advanced Progression Grade 3, year 4 to year 6*.” (the *Guideline*) Dispute Notification, Attachment 7, Guideline, Updated 21 November 2012)
4. It was submitted by the ANMF that:
* the assessment criteria for Advanced Progression were, by design, stringent, to ensure support was given for those “who consistently demonstrate excellent (sic) in clinical practice in nursing and midwifery.” (ANMF written submissions, paragraph 12)
* the *Guideline* applied to all nurses and midwives, providing an opportunity for appropriate nurses “to apply for advanced progression at the completion of year 4” as the *Guideline* “do(es) not state that applications need to have completed G3y4. G3y4 is simply a pay point in the salary structure.” (ANMF written Outline of Submissions, paragraph 14/15)
1. The ANMF highlighted that nurses commencing employment with the Respondent from 2013 onward “will reach Grade 3 year 4 after 4 years of service and be eligible to apply for advanced progression.”(ANMF written outline paragraph 16)

**The ANMF Acknowledges ‘Interim’ Pay Points**

1. The structural attention given to the classification scales by the parties in coming to the HoA was commented upon by the ANMF in its observation that, “The new career structure meant it was necessary to introduce a staged approach to pay rates by way of ‘interim’ pay points (a) and (b). This meant that nurses commencing in years 2010, 2011 and 2012 have completed more than 4 years of service by the time they reach G3y4.” (ANMF written outline, paragraph 17)
2. The purpose served by the Grade 3 interim pay points agreed by the ANMF and the DHHS was said by the ANMF to be the gradual introduction of alterations to the pay/classification scales made necessary by the parties’ having agreed upon the new career structure. Nevertheless it was put by the ANMF “that (there) was no intention or expectation that these new nurses would be disadvantaged in the career structure because of the interim pay points.”
3. The argument was extended to contend that by virtue of the interim pay scales some nurses had completed their fourth year of service but had not yet completed the 11th pay point which coincided with Grade 3 year 4. The submission then was that as the applicant nurses and others in their cohort, including at Launceston General Hospital, had completed 4 years of service at GR3 they possessed “the ability to apply for advanced progression and be recognised, for their superior skills.” (ANMF written outline, paragraph 26)

**The Individual Applicants**

1. Although the Application was progressed as a vehicle via the Grade 3 nurses whose career circumstances to date are set out below, it was abundantly clear that the ANMF were advancing an action intended to have general application for the Grade 3 nurses within the 2010, 2011 and 2012 graduate entry cohort.
2. RNs Burdon and Komarzynski graduated in 2010 and commenced duty at Royal Hobart in 2011. Both were affected by the new pay scales, particularly by the coming into existence of the interim G3 Y1a, G3 Y1b ‘pay points’. The pay points, so termed, can be considered as not different than year-long service increments which, arranged in a hierarchy of grades, go to constitute the nurses career structure.
3. The ANMF stressed that the DHHS had justified its denial of the claim for recognition of RNs Burdon and Komarzynski’s advanced progression skills and attributes, notwithstanding that their claims had the formal support of their supervisors, on the basis that pay point 4 of GR3 had not been completed. It should be appreciated that RNs engaged post 2012 did not have to work through the interim pay scales and consequently could avail of their right of Advanced Progression after four years’ service at Grade 3 - a full year before the applicant RNs. In submitting that this state of affairs was inequitable, it was put by the ANMF that, “…notwithstanding this administrative categorisation pay point, it is clear that they have had 4 years of service.” (ANMF Written Submissions, paragraph 41)
4. The comparison with other RNs was said to reflect RN Burdon and Komarzynski’s different treatment relative to those recruited at other times with “4 years of experience that coincidentally align with the administrative pay point.” (ANMF written submissions, paragraph 43)
5. The position as to RNs recruited externally was sought to be further developed by the argument that, had the applicant RNs worked outside the Health Service for four years and been recruited, “their years of service would have been recognised and so they would have commenced with the Respondent at G3Y4.” (ANMF Written Submissions, paragraph 44)

**Breach of Responsibilities/Delegation**

1. The submission was put that there had been a failure to apply the *Guideline* (Attachment 7 to ANMF S.29(1) Application) agreed, as anticipated by the HoA) which provided at pages 9 and 10 that the Nurse Unit Manager, or their delegate, had the responsibility to oversee that the advanced progression criteria were met. In noting that the CEO’s delegate Craig Watson had ‘ultimately endorsed the applications’ it was contended that the payroll branch of the Health Service did not have the authority or delegation to ‘veto’ the approved applications.

**Beneficial Interpretation of the HoA**

1. The ANMF submission was that in interpreting the HoA and the subsequent instruments into which it was absorbed, the Commission should adopt a beneficial interpretation/construction. In this regard reliance was had for the principle that a beneficial interpretation should be applied in the construction of an industrial instrument. The submission was that as Abey P (in T14366, an Award interpretation application of MASSA in respect of the Health and Human Services (Tasmanian State Services) Award) had viewed with favour the approach of Sams DP, then in the NSW Industrial Commission, in *Transport Workers Union of Australia NSW Branch v Toll Transport Pty Ltd*, ([2006] NSWIRCOMM 123), so should the Commission in this case.
2. The application of a beneficial interpretation in the circumstances of this case reduced to this; that where, in the HoA, the term “who has completed year 4” is used in Clause 5.2.6 and, further, where at page 5 in the *Guideline* developed for application of Advanced Progression, the expression “who has completed Grade 3 year 4” is used, these should be construed to be “a reference to a nurse who has completed four years of service.” (ANMF written submissions, paragraph 50) Ms Thomas emphasised this aspect of the ANMF case in presenting the oral argument in the Commission, submitting “particularly we say that references to year 4 and completion of year 4 is a reference to completion of years of service.” (Transcript, P28, lines 15/16) Such an approach was given as complementary to the HoA’s broader objectives and those of the *Guideline*. These were portrayed as seeking “to recognise and reward high performing nurses through advanced progression once they have a minimum of 4 years’ experience.” (ANMF Written Submissions, paragraph 51)

**The Evidence of RN Burden**

1. While not required by the DHHS for cross examination, Ms Burdon gave evidence supplementing that provided in her detailed Witness Statement (Exhibit ANMF3 - Statement of Ms Narissa Burdon). This material supported RN Burdon’s technical expertise and high level of practice across a significant number of areas, including professional development, acting as preceptor to both undergraduate students and graduate nurses in the transition to practice program, dealing with patients presenting with complex conditions and coordinating shifts.
2. In my view (and in that of her expert reviewers) RN Burdon’s detailed responses to the practice and other professional areas required by the application procedures, make out a breadth of both knowledge and vocational commitment of the highest order. One well understands how it is that Ms Thomas is able to represent RN Burdon as exemplifying the cohort sought to be captured in the HoA, that is, reward for high performing nurses exhibiting excellence in practice. One notes finally in this subjective regard, that two Nurse Unit Managers supported the application and that Ms C Paton, the Executive Director of Nursing at Royal Hobart Hospital, personally identified with the recommendation.
3. In the light of the comments and the analysis to follow it is to be hoped that RNs Burdon and Komarzynski appreciate that the fate of their applications did not turn on an aspect of their professional practice found wanting.
4. The vive voce evidence was that during her graduate year Ms Burdon had attended an orientation session which extended for three days. During this time an unnamed departmental representative “attended to speak to us about the career structure and informed us of our ability to advance progress (sic) at what we understood to be four years of service” and that she was “working towards that in terms of taking on additional roles and things like that to make sure that we would - our application would be accepted, basically, when we applied.” (Transcript P22, lines 23-30)
5. For completeness it is noted that RN Burdon had supplemented the detailed material attached to her witness statement. That material reflected the efforts undertaken completing the work required to fulfil the significant obligation placed on an applicant for Advanced Progression to make good their candidacy. Included was a detailed Performance Development Agreement, essentially a self-critique under a series of criteria as to ‘Clinical knowledge and skills’, ‘Potential for clinical leadership’ and ‘Education of self and others’. RN Burdon’s application, accompanied by a Referee’s Report, had been the subject of favourable review and comment by a panel, including the Nurse Unit Manager, proceeding thereafter to approval of relevant executive officers.
6. RN Burdon was not cross-examined and Mr Johnston indicated that he “had no intention to question the merits of Ms Burdon at all. …No intention.” (Transcript P21, lines 26/27)

**The Precedent**

1. The ANMF relied upon the fact that, following its representations, that the Director of Human Capital, Tasmanian Health Organisation - North, Ms Rebecca Howe, had on 29 July 2013, acceded to a request for Advanced Progression for a Grade 3 RN under circumstances materially relevant to the present matter. (see attachment 5 to the ANMF Originating s.29 (1) application)

**The Remedy**

1. The ANMF sought for an Order providing for RNs Chloe Komarzynski and Nerissa Burdon to be “correctly paid” from the date their progression applications were approved by their NUM, the Executive Director of Nursing and the CEO delegate. It was further sought that the Order provide that those RNs who were graduate nurses in 2010, 2011 and 2012 be “eligible to apply for advanced progression after the completion of 4 years of service in accordance with the provisions of clause 5.2.6, Appendix B of the Interim Agreement 2013. (ANMF written submissions, paragraph 59)

**The Submissions of the Respondent**

1. The case put for the DHHS took issue with the ANMF submissions, other than as to the technical merit of the Applicants. Nothing was put directly or by way of inference, which could be taken as questioning the technical or personal competence of the Applicants. For the Respondent, the ANMF case was to be denied solely by reason of the parties having, inter alia, agreed upon a new structure in the HoA, and subsequently negotiated a comprehensive implementation protocol (the *Guideline* pamphlet), which should be given effect. The argument was that there was no anomaly “arising out of the implementation of transitional classifications associated with restructuring…There has been an explicit design of a new classification structure which included two transitionary classification points at entry level for Grade 3 nurses…Those two particular points are transitionary, but they drop off by the effluxion of time et cetera et cetera and don’t apply for those registered nurses commencing after the particular pay points drop off.” (Transcript, Mr Johnston, P33, lines 29-41)
2. The DHHS case relied both on an explanation of what the parties can be seen to have done in the HoA and the *Guideline* which forms part, as Appendix B, of the Interim Agreement 2013.

**The DHHS Submissions emphasised that;**

* the classification structure created under the HoA was a ‘single spine’ set of key points complemented at Grades 2, 3 and 4 by an additional increment or pay point. (Exhibit MASSA 1, paragraphs 6/7)
* the text of the 2010 HoA was said to be both “clear and consistent in its use of incremental points (designated by Grade and Year) for event triggers (like advancement) or appointments.” (Exhibit MASSA 1, paragraph 8). Reliance was placed in this regard upon the text of clause 5.2.6 of the HoA, which, as set out earlier, is a key provision dealing with Grade 3 and Advanced Progression. (Exhibit MASSA 1, paragraph 9)
* the HoA spoke of grades and the year within the grade, when particularity was called for. For example, in dealing with Grade 3 the parties recorded their agreement in the following clear way; “Application for Advanced Progression to Year 6 will also be available for those who have completed Year 4.” (Exhibit MASSA 1, paragraph 9)
* when the HoA intended to deal with ‘years of service’ in contradistinction to a position on the incremental scale, it did so explicitly. The illustration of this drafting differentiation was given in relation to the parties wishing to describe those nurses eligible for one of eight sabbatical packages. It did so by reference to nurses in Grade 8 or 9, not by reference to their place on the incremental scale, but rather by referring to those “…who have completed five (5) years of continuous service.” (Exhibit MASSA 1, paragraph 11)
* reference to the HoA at page 11 shows that the ‘Schedule Career Structure - Wage Structure’ explicitly aligns the pay points of the consolidated wage spine with a ‘Grading’, which is a Grade and incremental year. The use of Grade and Year designations is consistent and the operation of the transient increments affecting Grade 3 first year nurses in 2010 and 2011, that is Grade 3 Y1a at pay point 6, and in 2012 only, Grade 3, Year 1b at pay point 7, clearly sets out the position to apply. (Exhibit MASSA 1, paragraph 12)
* there were to be particular provisions governing the progression of Grade 3 nurses for the graduate years in question, i.e. 2010, 2011 and 2012. These are to be found at page 12 of the HoA where a series of provisions plot the wage progress of Grade 3 nurses as they move through the increments/pay points and their Grade and Year designations change accordingly. (Exhibit MASSA 1, paragraph 14)
1. Mr Johnston’s submission stressed that through these explanatory notes and charts (not all here adverted to) it is very clear that the parties referred not to years of service, or years of service in a grade, but consistently used the Grade/Year designation. It was submitted that the detailed attention given by the parties (as affecting Grade 3 nurses) in the HoA should be seen as ‘bespoke progression arrangements’ the purpose of which was “to offset the lower entry points for graduates appointed in those years.” (Exhibit MASSA 1, paragraph 16)
2. Moving to Schedule 3 of the HoA (from page 14) the Respondent relied on the detailed treatment of Grade 3 nurses (at page 15 of the HoA) including as to Advanced Progression. In that respect it was put that the ‘agreed arrangements’ for Advanced Progression were given in a clear, consistent text which was “explicitly concerned with attainment and conferral of certain Grade, Year designations. Not once does the section mention years of service.” (Exhibit MASSA 1, paragraph 18) The Advanced Progression provision reads;

“***Grade 3***

*…*

*4 Advanced Progression is available for Grade 3 nurses from year 4 to year 6. It is the responsibility of the individual nurse to apply for personal progression from Grade 3 (year 4 to year 6).”* (HoA, Schedule 3, page 15)

1. The Respondent’s submission was that it was not tenable for the ANMF to conflate years of service with the Grade and Year designations provided for in the 2010 HoA. A plain reading did not support the terms and approach adopted (Grade and Year) bearing, as a substitute, years of service.
2. Taking a broader view, less Grade 3 oriented view, it was put that ‘on any reading’ the agreement makers, the ANMF and the employer, had given significant consideration to the employees covered by the HoA, not only in it providing a range of benefits, but also as to the tailored incremental progression in the early years of the RNs employment (in Grade 3). (Exhibit MASSA 1, paragraphs 22 and 23)
3. In relying on the principles of construction of an instrument set out by Abey P in T14366 of 2015 the Respondent reflected a rare moment of unanimity with the ANMF. The moment was short-lived as the DHHS submitted that;
* the Applicant sought to displace the “clear and consistent meaning of certain terms of the instrument, with what they believe the terms should mean.” (Exhibit MASSA 1, paragraph 25)
* the effect of the ANMF application was to subvert the HoA and Appendix B of the Interim Agreement. This was because the instruments were consistent in their reference to incremental points as opposed to a ‘years of service’ meaning, which latter meaning, when intended, was explicitly stated. (Exhibit MASSA 1, paragraph 26)
* the words used are unambiguous and not reasonably open to substitution with other words. (Exhibit MASSA 1, paragraph 27)
* there was no ambiguity evident, no drafting errors, which might require recourse to extrinsic material. (Exhibit MASSA 1, paragraphs 28/29)
* the terms used, the express language, were readily comprehensible in the context of the instrument/s therefore not requiring the importation of terms. This was so as to the Grade/Year designators having consistent application in the questioned provisions and more broadly across the instruments. (Exhibit MASSA 1, paragraph 33)
* to alter the references to ‘year’ within the classification structure (as in Grade 3, Year 4) by substituting a notion of ‘years of service’ or ‘years post registration’, would compromise the integrity of the instruments. (Exhibit MASSA 1, paragraph 34)

**The Respondent’s Submission as to Advanced Progression**

1. It was put that;
* the sole reason for not accepting RNs Burdon and Komarzynski’s applications for Advanced Progression was that they had not satisfied the qualification required by the agreement/instrument, i.e. completion of Year 4 of Grade 3.
* it was accepted that the graduate nurses employed in the transition years of the HoA i.e. 2010, 2011 and 2012, were required “to work for more than four years to attain the requisite incremental point to access advanced progression.” (Exhibit MASSA 1, paragraph 37)
* the requirement set out immediately above was ‘not unintended’ and it “was part of the package of matters comprising the negotiated, drafted and registered Agreement.” (Exhibit MASSA 1, paragraph 38) (Transcript, page 46, lines 8-9)
1. The ANMF contention that “there was no intention or expectation that these new nurses would be disadvantaged in the career structure because of the interim pay points” (ANMF written submissions of 5 August 2016, paragraph 25) was said to ‘belie’ the plain meaning of the text and the relevant tables and “conveniently ignores the deliberate mitigation of the additional pay points by way of the bespoke progression arrangements previously cited.” (Exhibit MASSA 1, paragraph 39)
2. It was also submitted that the ANMF was entirely conscious of the effect of the agreement that had been reached as evident from an ANMF ‘Update’ to its membership of November 2012 stating in part; “To be eligible to apply for Advanced Progression from year 4 to year 6 you must: Have completed Grade 3, Year 4…” (Exhibit MASSA 1, Attachment 3)
3. To the ANMF submission that a newly appointed (say, in 2016) RN from outside the service with 4 years recognised professional experience would be appointed at Grade 3 Year 4, the Respondent agreed, but submitted that this was so only by virtue of the interim pay points i.e, Grade 3 Year 1a and Grade 3 Year 1b, ‘agreed to by the ANMF and employer’ no longer having application for Grade 3 nurses.
4. Reliance was had for the text of the HoA providing at 5.2.6 that “Application for Advanced Progression to year 6 will also be available for those who have **completed** year 4.” (Emphasis Respondent’s) (Exhibit MASSA 1, paragraph 42)
5. The Respondent further contended, as to the precedent value of RN Hilliar’s advancement, that an error does not create a precedent and, in any event, that “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)
6. Reference was made to email correspondence exchanged between the parties wherein the Respondent set out examples of RNs who had been required to complete five years’ service in Grade 3 prior to being accorded access to Advanced Progression, that is, “they reach the Advanced Progression point at the conclusion of Grade 3, Year 4.” (Exhibit MASSA 1, paragraph 55)
7. A general argument was advanced by the Respondent that acceding to the claim would be to unwind the application of ‘multiple agreements’ since the registration of the HoA and would be to permit an industrial party to re-open an agreement when what had been agreed to was no longer palatable. As the parties’ agreement was clear, conveyed considerable benefit, with mitigation afforded the RNs within the transitional Grade 3 scales which, far from being accidental were, rather, by the design of competent individual parties, the claim should not be accepted. (Exhibit MASSA 1, paragraphs 58/59)

**Consideration**

1. It will be seen from the foregoing that there exists a stark disagreement as to the way in which the Advanced Progression mechanism should operate, when the HoA, the Interim Agreement and the 2014 Agreement, actually apply to RNs within the affected cadres, that is, those graduates who commenced in 2010, 2011 and 2012, as they progress through Grade 3.
2. The disagreement extends to the way in which the relevant authorities can or should be applied in these circumstances. What is agreed, however, is that the dispute is not about the professional capacity of RNs Burdon and Komarzynski. It is common ground that there is no desire or capacity to impeach their capability to satisfy the required criteria.
3. The case is entirely concerned with the capacity of any Grade 3 RN to make an application for Advanced Progression when that RN had not completed Grade 3, year 4. One also acknowledges that an RN whose clinical practice is of the necessary standard of excellence is likely to note quizzically that the agreement of the ANMF and their employer provided for a classification scale which, whatever its virtues, required the 2010-2012 graduate cohorts to present for five years at Grade 3 before being able to apply for Advanced Progression, when for those of other graduate entry years, four years was sufficient.
4. It is this which, for the ANMF, constitutes an anomaly requiring Commission intervention.
5. It will be recalled that the HoA provides at clause 5.2.6 for RNs to have the ability to apply for Advanced Progression if they have “completed year 4.” (HoA, clause 5.2.6) Schedule 3 to the HoA, headed ‘Career Structure - Implementation Process’ provides that it is the responsibility of the individual nurse to make an application “for personal progression from Grade 3 (year 4 to year 6). They will need to demonstrate that they are meeting the required criteria that are specified in the Agreement. Assessment shall be through a process which includes peer review.” (HoA, Schedule 3, Grade 3, paragraph 3)
6. The subsequent *Guideline* document, developed by the parties collaboratively, deals in significant detail with the process required and criteria necessarily satisfied to warrant Advanced Progression. The parties chose to emphasise that the assessment criteria for Advanced Progression should be stringent to ensure the maintenance of the standard the process was to support, i.e. “…nurses/midwives who consistently demonstrate excellence in clinical practice in nursing and midwifery. …It is important to ensure the integrity of the assessment process is maintained so only those nurses/midwives who meet the specified criteria are rewarded by Advanced Progression.” (Nursing and Midwifery Unit, Progression Grade 3, year 4 to year 5 Advanced Progression Grade 3, year 4 to year 6. *Guideline,* updated 21 November 2012, clause 4, page 5)
7. It is against this background that Mr Johnston indicated that there was no point taken against the commentary of RN Burdon’s peers and supervisors as to her work satisfying the high standard required.

**Advanced Progression**

1. Any consideration of Advanced Progression as a means of accelerating the incremental progress of a technically worthy Grade 3 RN must commence, in my view, with an overview of the context more generally.
2. This entails an appreciation of the breadth and depth industrially of the matters dealt with in the HoA and continued with further refinement in the subsequent dealings of the parties. The Progression *Guideline* of November 2012 formed part of this material (although not part of the HoA). What emerges is an understanding of the scope of the parties’ agreement, initially in the HoA. Many pages set out the scale of the changes wrought, both as to rates of pay, to the career structure, to safe staffing levels and increases to shift penalties, public holiday rates, Professional Development, In Charge Allowance, sabbatical packages to choose a representative few affecting nurses at various levels of the consolidated pay scale.
3. Notwithstanding the detailed treatment of the parties evident in the drafting of the HoA, it is also noteworthy that the parties anticipated, and at various places in the HoA provided for, the further development of an issue or aspect of the matters agreed in the HoA.
4. The Advanced Progression provision is an example of this. It bears repeating that the initial agreement reflected at clause 5.2.6 of the HoA succinctly states the position that, “Application for Advanced Progression to year 6 will also be available for those who have completed year 4.” (HoA 5.2.6) Schedule 3 to the HoA ‘Career Structure - Implementation Process’ supplements clause 5.2.6 by introducing the fact of the ‘required criteria’, the responsibility resting with the RN concerned and the fact of peer review. Twice in four lines the agreed Implementation Process refers to nurses being advanced, first, “from year 4 to year 6 and second, “from Grade 3 (year 4 to year 6).” (HoA, Schedule 3)
5. The *Guideline* pamphlet, agreed, it should be noted, sometime after the HoA, similarly developed the exactitude surrounding Advanced Progression. Having regard for the specificity with which all these provisions are drawn leads me to conclude that the parties came to a clear agreement about which there is no uncertainty or ambiguity. One must, I have considered, be ever mindful that at the same time as the parties reached agreement in the HoA as to Advanced Progression, so too they reached agreement as to the short-lived interim Grade 3 increments or pay points, G3 y1a and G3 y1b. These considerations lead me to construe the HoA, when it legislates for Advanced Progression, to mean what it says.
6. Similarly, I am unable to accept the argument that four completed years of service at Grade 3 is the same as ‘Grade 3, Year 4’. The ANMF argument was put in the following way in the written submissions.
7. “13. Clause 3 of the Guidelines state that:

*Advanced Progression Grade 3, year 4 to year 6 - in accordance with the Nurses and Midwives heads (sic) of Agreement 2010 a Grade 3 nurse/midwife who has completed year 4 is able to apply for Advanced Progression to year 6…”*

14. ANMF submits that the Guidelines apply to all nurses and midwives, providing an opportunity to apply for advanced progression at the completion of year 4.

15. The Guidelines do not state that applicants need to have completed Grade 3 Year 4. Grade 3 Year 4 is simply a pay point in the salary structure.” (ANMF Written Submissions, paragraphs 13-15)

1. My understanding of the HoA, the 2013 Interim Agreement and the *Guideline* is at odds with this submission. It is, in my view, abundantly clear that the parties’ agreement provides that Advanced Progression is available to an RN who has completed Year 4 of Grade 3. The parties consistently said as much and were constant with their nomenclature. Reflective of this, the *Guideline* does provide that an applicant for Advanced Progression must have completed Year 4 of Grade 3. This is what the expressions ‘Grade 3, year 4 to year 6’ and ‘a Grade 3 nurse/midwife who has completed year 4 is able to apply for Advanced Progression to year 6’ found at Clause 3 of the *Guideline* mean.
2. The HoA uses the designations Grade and Year (whether the ‘y’ in ‘year’ is capitalised or not) to carefully delineate specific place within the, then new, classification structure. In respect of Advanced Progression, Grade 3 Year 4 is not “simply a pay point in the salary structure”. Its completion is the exact incremental condition precedent, created by the parties’ agreement, to permit an application for Advanced Progression.

**The Interim Pay Scales and Advancement by Merit**

1. The ANMF application deals with the fact of the new ‘single spine’ classification structure and elements of the agreement that created it. Central to the melding of disparate classifications to achieve an integrated pay structure were the use of special transition arrangements and modified and interim pay points. The task of creating a single-spine classification is likely to have been challenging and intricate. The charts forming the schedules before the Commission attest to this.
2. The ANMF submission acknowledged that insofar as Grade 3 was concerned the interim pay points were necessary “in gradually introducing a change in pay scale…given the new career structure.” (ANMF Written Submission, paragraph 25) The submission was that by virtue of the need for transitional increments in the Grade 3 pay scale, RNs were affected. The material before the Commission, particularly a coloured chart which was Exhibit ANMF 2, reflects that this was so.
3. Close attention to the parties’ agreement, as it affects Grade 3, reflects the detailed workings of the agreement. I have endeavoured to set out the newly devised Grade 3 RN graduate classification structure in the following table which derives closely from ANMF 2 - although in a different format.

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 2009 | G3 y1 8 | G3 y2 9 | G3y3 10 | G3y4 11 | G3y5 12 |
| 2010 | G3 y1a 6 | G3 y1b 7 | G3 y2 9 | G3y3 10 | G3y4 11 |
| 2011 | G3 y1a 6 | G3 y1 8 | G3 y2 9 | G3y3 10 | G3y4 11 |
| 2012 | G3 y1b 7 | G3 y1 8 | G3 y2 9 | G3y3 10 | G3y4 11 |
| 2013 | G2 y1 8 | G3 y2 9 | G3y3 10  | G3y4 11 | G3y5 12 |

1. The transition period required to achieve the parties’ structural recasting of the various classification scales can be seen in the chart to particularly affect the 2010, 2011, 20112 graduates coming into employment. (There are credit provisions for RNs recruited externally with accepted/relevant service.)
2. An added complexity is that in 2010, 2011 and 2012, the pay points referable to the Grade 3 increments (and given to the right of each increment in the chart above) can be seen to have been affected by the parties’ agreement. Relevant to this case is the impact the parties’ adjustments to the Grade 3 scale had on an RN’s progression to year 4.
3. In coming to the arrangement constituted by the agreement (the single spine) I have taken it as axiomatic that the parties well appreciated that previous relativities and relationships must alter. While there is no viva voce evidence to this affect, I have thought it likely that the creation of the new career-encompassing classification structure, the melding of previously disparate structures (included diagrammatically in the HoA itself) and the pages of transitional arrangements placed into evidence, reflects the parties’ attention to the deliberate task of recasting the structure. There is nothing before me which would support a conclusion that the construction of Grade 3 and its pay points reflected or constituted an unintended consequence.
4. It is against the background commented upon in paragraphs 67 and 68 above, that the ANMF contended that there was, on its part at least, “no intention or expectation that the new nurses (the 2010, 2011 and 2012 cohorts) would be disadvantaged in the career structure because of the interim pay points. Advanced progression was to be based merit.” (ANMF Written Submission, paragraph 25)
5. Several points arise additional to those already made. It will be understood the Commission is constrained in a construction case such as this, in admitting evidence or assertion as to a party’s intentions or expectations in bargaining. No evidence was sought to be led in this regard and there is no evidence of mutual intention, objectively ascertained. What is quite clear is the complex agreement making evident in the HoA registered in the Commission on 23 December 2010.
6. It is clear on the evidence that the agreement resulted in significant variations to the incremental structure. To effect the parties’ agreement some transitional increments/pay points came and went. What cannot be accepted is vital to the ANMF case; that the changes were somehow inadvertent, most particularly as regards the triennium 2010-2012, or unintended, or that their affect on Grade 3 RNs had passed unremarked. On the material before me the contrary is true; the parties gave very close attention to Grade 3 (not just as to Advanced Progression), insofar as incorporating transitional pay points was concerned, as to the Formal Capability Assessment that was henceforth to be satisfied before nurses could advance beyond Grade 3 year 4, and to ensure that RNs who came to the end of Grade 3 Year 4 could lodge an application for Advanced Progression. To assist an appreciation of the close treatment given by the parties to the Grade 3 increments in question it is educative to consider the pay points attaching to years 1 to 5 of Grade 3. In 2010 the respective Grade 3 pay points were, 6, 7, 9, 10 and 11. In 2011 they were 6, 8, 9, 10 and 11. In 2012 they were 7, 8, 9, 10 and 11.
7. While it is true, that “Advanced progression was to be based on merit” (ANMF Written submission, paragraph 25) and that the success or otherwise of an application for Advanced Progression was reliant on the application satisfying the detailed criteria set, this does not support the accompanying claim that an RN who has successfully completed four years at Grade 3 should be permitted progression to Grade 3 Year 6.
8. This is because the parties made clear in their agreement constituting the HoA that to qualify for Advanced Progression an RN had to have completed Grade 3 Year 4. Seen in this light, reference to Grade 3 Year 4 or ‘having completed Year 4’ is not referring merely to an “administrative categorisation pay point” as put by Ms Thomas, but is an explicit reference to a certain stage of completed service within the Grade 3 scale, i.e. Year 4. I have concluded that use of this term, and its variants, is not a reference to four years of service at Grade 3 and, rather, I am satisfied on the material before me, that the term ‘Grade 3, year 4’ consistently appearing in the HoA, is a reference to pay point 11 or, for the years in question, 2010, 2011, 2012, it is a reference to the fifth year of Grade 3 service. Having so concluded I am unable to accept the submission ably advanced by Ms Thomas that “the expression ‘who has completed year 4’ in Clause 5.2.6 of the HoA and the (sic) ‘*who has completed Grade 3, year 4’* on page 5 of the *Guideline* is a reference to a nurse who has completed 4 years of service.” (Emphasis original) (ANMF Written submission, paragraph 50)
9. The effect of these findings is that as to Grade 3 Advanced Progression the DHHS application of the HoA and subsequent agreements should not be interfered with. This is because it is important for agreements to be given full affect unless there is a very strong basis conducing to the contrary and because in this case, experienced bargainers had carefully constructed the pay scales and, most particularly, the by-laws surrounding Advanced Progression. The treatment complained of was a consequence of the HoA, the Agreement and the *Guideline*.

**Conclusion**

1. While one can appreciate the position of the 2010-2012 graduate RNs who may consider themselves disadvantaged by the disparity relative to the progress of others in their accessing Advanced Progression under the HoA I am obliged to apply the unambiguous agreement of the parties. Applying the notion of beneficial construction is not a licence to alter the terms of the HoA, Agreement and *Guideline* when they are clear. For all these reasons the application cannot succeed.



Michael Gay

**COMMISSIONER**

**Appearances:**

Ms J Thomas for the Applicant

Mr A Brakey for the Applicant

Mr M Johnston for the Respondent

Ms L Ross for the Respondent

**Date and place of hearing:**

Hobart

19 September 2016