[2024] FWC 787 [Note: An appeal pursuant to s.604 (C2024/2368) was lodged against this decision - refer to Full Bench decision dated 28 June 2024 [[2024] FWCFB 296] for result of appeal.]

DECISION

Fair Work Act 2009
s.739 - Application to deal with a dispute

Health Services Union
v
Clinical Laboratories Pty Ltd T/A Australian Clinical Labs
(C2023/7237)

COMMISSIONER MCKENNA — SYDNEY, 27 MARCH 2024

Alleged dispute about any matters arising under the modern award and the NES; [s146]

[1] The Health Services Union ("HSU") and Australian Clinical Laboratories Pty Ltd T/A Australian Clinical Labs ("ACL") are in dispute about the applicability of clause 27.5 of the *Health Professionals and Support Services Award 2020* ("Award"). Clause 27.5 of the Award addresses "Direction to take annual leave during shutdown – dental and medical practices".

[2] The application made pursuant to s.739 of the *Fair Work Act 2009* to deal with the dispute originally came before the Commission in late-November 2023. At that time, there was a live industrial issue concerning directions - purportedly under clause 27.5 of the Award - that ACL had given to employees in relation to taking leave over then-impending Christmas/New Year period arrangements, specifically, in the period 25 December 2023 to 7 January 2024. It is unnecessary to describe the detail of what occurred concerning matters over the Christmas/New Year period, because the parties reached a without prejudice agreement about arrangements that were to apply for that particular period. Shortly stated, ACL withdrew the directions it had given to employees. However, the underlying dispute remained concerning the ACL's ability to give directions to employees take leave.

[3] The parties proposed that the disputed matter should be determined by the Commission. It is common ground that the Commission is empowered to determine the dispute because of the operation of the dispute resolution procedures in clause 36 of the Award.

The Award clause

[4] The Award provides as follows in relation to a direction to take annual leave during a shutdown:

"**27.5 Direction to take annual leave during shutdown – dental and medical practices**

(a) Clause 27.5 applies if an employer:

(i) intends to shut down all or part of a dental or medical practice for a particular period (temporary shutdown period); and

(ii) wishes to require affected employees to take paid annual leave during that period.

(b) The employer must give the affected employees 28 days' written notice of a temporary shutdown period, or any shorter period agreed between the employer and the majority of relevant employees.

(c) The employer must give written notice of a temporary shutdown period to any employee who is engaged after the notice is given under clause 27.5(b) and who will be affected by that period, as soon as reasonably practicable after the employee is engaged.

(d) The employer may direct the employee to take a period of paid annual leave to which the employee has accrued an entitlement during a temporary shutdown period.

(e) A direction by the employer under clause 27.5(d) :

(i) must be in writing; and

(ii) must be reasonable.

(f) The employee must take paid annual leave in accordance with a direction under clause 27.5(d).

(g) In respect of any part of a temporary shutdown period which is not the subject of a direction under clause 27.5(d) , an employer and an employee may agree, in writing, for the employee to take leave without pay during that part of the temporary shutdown period.

(h) An employee may take annual leave in advance during a temporary shutdown period in accordance with an agreement under clause 27.4 .

(i) In determining the amount of paid annual leave to which an employee has accrued an entitlement, any period of paid annual leave taken in advance by the employee, in accordance with an agreement under clause 27.4, to which an entitlement has not been accrued, is to be taken into account.

(j) Clauses 27.7 to 27.9 do not apply to a period of annual leave that an employee is required to take during a temporary shutdown period in accordance with clause 27.5."

The disputed matter

[5] The HSU contends that ACL is not a "medical practice" for the purposes of clause 27.5 of the Award. Rather, ACL is a "pathology practice". In consequence, the position of the HSU is that ACL cannot give a direction under clause 27.5 of the Award to its employees (relevantly

HSU members who are employed by ACL as pathology collectors) to take annual leave during a "temporary shutdown period". In addition to its written and oral submissions, the HSU adduced evidence from Ms Tammy Fitzpatrick, who has been employed by ACL and its predecessor as a pathology collector for about a decade.

[6] ACL contends that it is a "medical practice" for the purposes of 27.5 of the Award and it may give a direction to its employees to take annual leave during a shutdown period. In addition to its written and oral submissions, ACL adduced evidence from its Chief Executive Officer, Mr Christopher Brownlow.

[7] I did not consider that the witnesses' evidence-in-chief, or the nature of the cross-examination of the witnesses, assisted me particularly, if at all, in relation to the question of the proper interpretation or application of the Award as it concerns clause 27.5 and ACL. Similarly, the submissions made by the parties traversed various matters which simply were not relevant to the question of the proper interpretation of the Award as it concerns clause 27.5. In some instances, matters addressed in the submissions, evidence and/or cross-examination were manifestly irrelevant to the determination of the matter in dispute. Broad dictionary-type definitions did not assist, because those definitions/meanings are not Award-conditioned. Similarly, matters such as to what occurred in relation to (a) the past unfolding of the industrial dispute (b) the potential future implications for the HSU members should directions be given, on the one hand, and commercial implications for ACL on the other hand if directions are not given, are not relevant to the question of the proper applicability of clause 27.5 of the Award – because discretionary considerations do not relevantly arise. Either ACL can give a clause 27.5 direction or it cannot. Given the lack of relevance of much of what the parties advanced in their respective cases, I do not propose to provide the detail of matters such as these, or summarise them, in this decision.

Consideration

[8] Clause 2 of the Award deals with definitions, including the following definition:

> "**2. Definitions**
>
> In this award, unless the contrary intention appears:
>
> …
>
> **private medical, dental, pathology, physiotherapy, chiropractic and osteopathic practice** means the practice of any practitioner, such as medical centre, general practice, specialist practice, family practice, medical clinic, dental practice, pathology practice, physiotherapy practice, chiropractic practice, osteopathic practice and women's health centre, but does not include medical imaging practices, hospitals or hospices.
> …".
>
> (Bold in original)

[9] Thus, it may be seen from the definitions clause in the Award that it references various types of practices operating within the broader health industry. Specifically, the clause 2 definition references "pathology practice" in a discrete way as part of a sequence of different types of practices, rather than the different types of practices being referred to collectively as, hypothetically, "health industry practices" or "health industry and dental practices" (given, for example, the broad "health industry" meaning in the coverage provision in clause 4.2 of the Award, namely, "The health industry means employers whose business and/or activity is in the delivery of health care, medical services and dental services."

[10] The Award contains various provisions which apply equally across the nominated types of practices. That is, there are multiple undifferentiated provisions applying to various matters concerning pay and conditions, and rights and obligations, in the Award; and, conversely, there are some practice-specific arrangements in the Award. For example, clause 13 deals with the ordinary hours of work, identifying the following:

"**13. Ordinary hours of work**

13.1 Ordinary hours

(a) The ordinary hours of work for a full-time employee are an average of 38 hours per week in a fortnight or 4 week period.

(b) Not more than 10 ordinary hours of work (exclusive of meal breaks) are to be worked in any one day.

13.2 Span of hours—day workers

(a) The ordinary hours of work for a day worker are worked between 6.00 am and 6.00 pm, Monday to Friday, unless otherwise stated.

(b) Private medical, dental, pathology, physiotherapy, chiropractic and osteopathic practices

The ordinary hours of work for a day worker in private medical, dental, pathology, physiotherapy, chiropractic and osteopathic practices are worked between:

(i) 7.30 am and 9.00 pm, Monday to Friday; and

(ii) 8.00 am and 4.30 pm on Saturday.

(c) Private medical imaging practices—five and a half day practices

Where a practice services patients on a 5.5 day a week basis, the ordinary hours of work for an employee are worked between:

(i) 7.00 am and 9.00 pm, Monday to Friday; and

(ii) 8.00 am and 1.00 pm on Saturday.

(d) Private medical imaging practices–seven day practices

Where the work location of a practice services patients on a 7 day a week basis, the ordinary hours of work for an employee at that location are worked between 7.00 am and 9.00 pm, Monday to Sunday.” (Bold in original)

[11] As may be seen from clause 13 of the Award, it deals with ordinary hours of work and the span of hours for day workers at clauses 13.1 and 13.2. Clause 13.2(b) next deals, specifically, with the ordinary hours of work for a day worker in private medical, dental, pathology, physiotherapy, chiropractic and osteopathic practices. Clauses 13.2(c) and 13.2(d) then identify arrangements to apply to private medical imaging practices, depending on the number of days of operation. Separately, clause 11.3 of the Award identifies that the minimum period of engagement of cleaners employed in private medical practices is two hours; there is no equivalent minimum engagement provision for cleaners for other varieties of practices contemplated in the Award. The minimum engagement specification concerning cleaners is particular in the Award to “private medical practices”.

[12] As to the provisions in the Award concerning a clause 27.5 direction to take annual leave during a shutdown in medical practices (and dental practices), I do not consider that the clause heading of clause 27.5 or the body of the text comprising 27.5(a)(i) of the Award concerning their references to “medical practices” is to properly to be read as constituting some form of collective noun that includes “pathology practice”. Relevantly, the Award identifies in the clause 2 definitions that “unless the contrary intention appears”, a private pathology practice “means” a pathology practice. No contrary intention is found within clause 27.5 of the Award, i.e., no intention appears from the text to the Award to lead to a conclusion that there was, for example, an intention to “group” pathology practices as being comprehended as medical practices and, self-evidently, the Award does not otherwise separately identify pathology practices in that clause.

[13] I am reinforced in my conclusion that the Award speaks to different things in its separate references to “medical” practices as against “pathology” practices by an examination of the predecessor to the Award, namely the *Health Professionals and Support Services Award 2010* (“2010 Award”). In so concluding, I have read and considered the decisions to which reference was made in ACL’s submissions around historical developments. I do not accept ACL’s submissions that the referenced decisions of the Commission support any conclusion that “There is acceptance by the Fair Work Commission for over a decade that pathology is a form of medical practice” and that ACL’s referenced decisions “reconcile with the Respondent’s view that it is a ‘medical practice’ for the purpose of” clause 27.5 of the Award.

[14] In fact, the 2010 Award provided the following meaning in clause 3 (Definitions and interpretation) which was narrower than the prevailing definition in that it did not include practices such as physiotherapy, chiropractic and osteopathic practices. The predecessor clause read:

“**3. Definitions and interpretation**

3.1 In this award, unless the contrary intention appears:

…

private medical, dental and pathology practice means the practice of any medical practitioner, such as medical centre, general practice, specialist practice, family practice, medical clinic, dental practice, pathology practice and women's health centre, but does not include medical imaging practices, hospitals or hospices.

…".

(Bold in original; my underline)

[15] Clause 10.4(c) of the 2010 Award contained, like the Award, a minimum engagement of two hours for cleaners in private medical practices. In the 2010 Award, there were span of hours provisions that applied generally (24.1), that applied to private medical, dental and pathology practices (24.2), that applied to private medical imaging practices (24.3); and that applied to physiotherapy practices (24.4).

[16] As to the predecessor to clause 27.5 of the Award, clause 31.4 of the 2010 Award was applicable to dental practices and medical practices *only* (and did not refer to pathology practices even though clause 3.1 referred also to pathology practices among the categories of practices much narrower than now contained in the Award). That is, the predecessor provision in the 2010 Award read:

"**31.4 Close down periods—dental and medical practices**

Where an employer temporarily closes a dental or medical practice, an employee may be directed to take paid annual leave during part or all of this period provided such direction is reasonable. Where an employee does not have sufficient accrued annual leave for this period, they may be required to take annual leave in advance where such requirement is reasonable."

[17] The existing clause 27.5 in the Award was brought about in May 2013 as part of variations to a large number of awards under the umbrella of the 4 yearly review of modern awards in relation to shutdown provisions. However, when the Award was varied, the categories of practices - dental and medical practices - did not change as part of the insertion of a more standardised clause.

[18] Last, a pathology practice is different from a medical practice and is ordinarily understood to be so. It is counterintuitive for ACL to contend it a medical practice rather than a pathology practice. This is so, even if the various ACL pathology practices and separately-own and operated medical practices are, in effect, co-located in the same physical premises or located proximately. Aspects of the evidence given by Ms Fitzpatrick was relevant in such respects. Pertinently, the Award itself, within terms, proceeds on that basis of differentiation given the discrete references to separate practice types (albeit the Award could have, in effect, characterised pathology practices as medical practices for relevant purposes). This is so notwithstanding the evidence of Mr Brownlow (adopted in ACL's submissions) positing

reasons why, he contended, ACL is a medical practice. For instance, Mr Brownlow's evidence included:

> "16. Pathology is the medical specialty concerned with the study of the nature and causes of diseases. It underpins every aspect of medicine, from diagnostic testing and monitoring of chronic diseases, to cutting-edge genetic research and blood transfusion technologies.
>
> 17. ACL engages medical practitioners including amongst others, Doctors that have become specialists in the fields of Biochemistry, Histology, Immunology, Anatomical Pathology, and Microbiology who provide specialised medical services to patients within the community.
>
> 18. ACL also operates at over 30 specialist skin cancer clinics to provide skin cancer care to patients. This work is performed by General Practitioners.
>
> 19. More than 90% of the fees that ACL charges to patients are reimbursed under the Medicare Benefits Schedule.
>
> 20. The Doctors that are employed by ACL are insured as participating in a medical practice.
>
> 21. ACL is accredited by the Royal College of Pathologists Australasia (RCPA) as a specialist medical training site and ACL's medical services are under the governance of a specialist Pathologist - Professor Anthony Landgren.
>
> 22. ACL is accredited as a specialist medical practice for the practice of Pathology, (which is a discipline of medicine) and ACL's medical practitioners are registered with the Australian Health Practitioner Regulation Agency."

[19] For its part, the HSU made submissions including the following:

> "27. The *Health Insurance Act 1973* (Cth) (Health Insurances Act) provides the regulatory obligations for a pathology practice required under the *Health Insurance (Accredited Pathology Laboratories – Approval) Principles 2017*. These principles are regulated by the Australian Commission on Safety and Quality in Health Care.
>
> 28. The National Pathology Accreditation Advisory Council (NPAAC) is responsible for developing and maintaining the accreditation standards for Australian pathology laboratories.
>
> 29. On its website, the Respondent advertises itself to be a "leading provider of pathology services in Australia". Furthermore, the Respondent holds an active National Association of Testing Authorities (NATA) accreditation which allows for organisations to perform testing activities in accordance with the appropriate standards.
>
> 30. The Respondent advertises itself to employ Royal College of Pathologists of Australasia (RCPA) accredited pathologists and scientists and holds over 1,300

approved collection centres. The Respondent does not employ any medical practitioners which provide services in general medical practice on behalf of the business but employs qualified pathologists providing specialist medical services. Medical practitioners are required to obtain registration with the Medical Board (Australian Health Practitioners Regulation Agency) (AHPRA).

31. The Respondent is also a member of Australian Pathology which is the peak body representing private pathology in Australia.

32. Therefore, different regulatory arrangements are in place for businesses providing pathology services in comparison to medical practitioners. This is also consistent with the AHPRA which lists a register of practitioners, none of which include pathologists however refer to medical practitioner (doctors) only.

(Italics in original; bold and references not reproduced)

[20] In its submissions, the HSU further elaborated various other regulatory-related matters and also referred to specific matters such as Medicare billing arrangements for general medical services as against pathology services.

[21] It is unnecessary for the purposes of the decision to canvass matters that were addressed the two preceding extracts other than to say that they provide some backdrop. But matters such as, for example, how ACL describes itself in advertising materials do not assist in resolving the question of whether ACL is an Award-specific medical practice which has the ability to properly give a clause 27.5 direction to its employees.

Conclusion

[22] While there was some issue between the parties as to the appropriate matter for determination, I will proceed on the basis that an appropriate way to determine the dispute is to say that ACL is not a medical practice for the purposes of clause 27.5 of the Award (and it is common ground that ACL is not a dental practice). I discern nothing arising from the evidence and submissions, or from my own reading of the Award and its predecessor, which would lead me to conclude that ACL could correctly be characterised as a medical practice for the purposes of the Award: ACL is a pathology practice for the purposes of the Award. Absent being a dental practice or a medical practice, the provisions of clause 27.5 of the Award are not available to ACL to give a direction to any employee/s to take annual leave during a shutdown.

[23] The proceedings are concluded.

COMMISSIONER

Appearances:

S Mohammad for the Health Services Union.

A Berry for Australian Clinical Laboratories Pty Ltd T/A Australian Clinical Labs.

Hearing details:

2024.
Sydney:
13 March 2024.

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