DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Clinical Laboratories Pty Ltd T/A Australian Clinical Labs
v
Health Services Union
(C2024/2368)

VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT WRIGHT
DEPUTY PRESIDENT SLEVIN

SYDNEY, 28 JUNE 2024

Appeal against decision [2024] FWC 787 of Commissioner McKenna at Sydney on 27 March 2024 in matter number C2023/7237 – Permission to Appeal Granted – Appeal Dismissed – Award Construction – Whether employer is a 'medical practice' or a 'pathology practice'

Introduction

[1] Clinical Laboratories Pty Ltd T/A Australian Clinical Labs (**ACL** or the **appellant**) has lodged an appeal under s 604 of the *Fair Work Act 2009* (Cth) (the **Act**), for which permission is required, from a decision of a Commissioner of the Fair Work Commission (the **Commission**).[1] The decision concerns an application for the Commission to deal with a dispute pursuant to s 739 of the Act concerning the interpretation of a modern award.

[2] The dispute at first instance raised a narrow question as to the proper interpretation and application of clause 27.5 of the *Health Professionals and Support Services Award 2020* (the **Award**). The clause concerns "Direction to take annual leave during shutdown – dental and medical practices."

[3] The dispute came before the Commission by way of an application made by the Health Services Union (**HSU** or the **respondent**) for the Commission to deal with a dispute under clause 36 of the Award. When the matter first came before the Commission in late November 2023, there was a live industrial issue concerning directions issued by ACL to employees requiring them to take annual leave in the impending Christmas/New Year period. The correspondence stated, among other things:

> In accordance with clause 27.5 of the Health Professionals and Support Services Award 2020 (the Award), I am writing to inform you that Australian Clinical Labs may require you to take accrued annual leave during a temporary shutdown of operations from 25 December 2023 to 7 January 2024.

[1] *Health Services Union v Clinical Laboratories Pty Ltd T/A Australian Clinical Labs* [2024] FWC 787.

[4] The HSU contested the entitlement of ACL to direct employees to take annual leave. Ultimately, the immediate dispute was resolved because the parties reached a without prejudice agreement in relation to the arrangements to apply in the Christmas/New Year period 2023/2024. ACL subsequently withdrew the directions given to employees.

[5] The underlying dispute as to the entitlement of ACL to direct employees to take paid annual leave during a temporary shutdown period remained a matter of contention. That question turns on whether ACL is a "medical practice" for the purposes of clause 27.5 of the Award. The parties proposed that the disputed issue be determined by the Commission. The Commissioner recorded that it was common ground that the Commission was empowered to determine the dispute because of the operation of the dispute resolution procedures in clause 36 of the Award.[2] We understand this to be a reference to the parties having agreed to the Commission dealing with the dispute by way of a consent arbitration as contemplated by clause 36.5 of the Award.

[6] The dispute was subject of a hearing conducted on 13 March 2024 and the Commissioner handed down her decision on 27 March 2024. The Commissioner determined that ACL is not a medical practice for the purposes of clause 27.5 of the Award and, rather, was correctly to be characterised as a pathology practice. The consequence of that determination is that clause 27.5 of the Award is not available to ACL to give a direction to its employees to take annual leave during a shutdown period.[3]

[7] ACL seeks permission to appeal from the decision and, in relation to the appeal, seeks to rely on further evidence in the form of a statutory declaration of Associate Professor Christopher Barnes dated 21 May 2024. The HSU did not oppose admission of the further evidence and confirmed that it did not propose to cross-examine Associate Professor Barnes. In the circumstances, the Full Bench determined to accept the further evidence. However, as explained below, the further evidence is of limited (if any) assistance.

[8] For the reasons which follow, we have decided to grant permission to appeal but to dismiss the appeal. The Commissioner's construction of the Award is correct.

Availability and Nature of Appeal

[9] The parties assumed that an appeal, at least with permission of the Full Bench, is available from the decision. That assumption is sound. As has been mentioned, the proceedings at first instance were a consent arbitration for the purposes of clause 36.5 of the Award. Clause 36 of the Award is entitled 'Dispute Resolution' and sets out procedures to be followed if a dispute arises about a matter under the Award or in relation to the National Employment Standards. The clause provides as follows:

> **Clause 36 – Dispute Resolution**
>
> 36.1 Clause 36 sets out the procedures to be followed if a dispute arises about a matter under this award or in relation to the NES.
>
> 36.2 The parties to the dispute must first try to resolve the dispute at the workplace through discussion between the employee or employees concerned and the relevant supervisor.

[2] Ibid at [3].

[3] Ibid at [22].

> 36.3 If the dispute is not resolved through discussion as mentioned in clause 36.2, the parties to the dispute must then try to resolve it in a timely manner at the workplace through discussion between the employee or employees concerned and more senior levels of management, as appropriate.
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> 36.4 If the dispute is unable to be resolved at the workplace and all appropriate steps have been taken under clauses 36.2 and 36.3, a party to the dispute may refer it to the Fair Work Commission.
>
> 36.5 The parties may agree on the process to be followed by the Fair Work Commission in dealing with the dispute, including mediation, conciliation and consent arbitration.
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> 36.6 If the dispute remains unresolved, the Fair Work Commission may use any method of dispute resolution that it is permitted by the Act to use and that it considers appropriate for resolving the dispute.
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> 36.7 A party to the dispute may appoint a person, organisation or association to support and/or represent them in any discussion or process under clause 36.
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> 36.8 While procedures are being followed under clause 36 in relation to a dispute:
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> (a) work must continue in accordance with this award and the Act; and
>
> (b) an employee must not unreasonably fail to comply with any direction given by the employer about performing work, whether at the same or another workplace, that is safe and appropriate for the employee to perform.
>
> 36.9 Clause 36.8 is subject to any applicable work health and safety legislation.
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> NOTE 1: In addition to clause 36, a dispute resolution procedure for disputes regarding the NES entitlement to request flexible working arrangements is contained in section 65B of the Act.
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> NOTE 2: In addition to clause 36, a dispute resolution procedure for disputes regarding the NES entitlement to request an extension to unpaid parental leave is contained in section 76B of the Act.

[10] As will be apparent, clause 36.4 provides that, if a relevant dispute is unable to be resolved at the workplace, a party may refer the dispute to the Commission. Clause 36.5 contemplates that the parties will agree on the process to be followed in dealing with the dispute. One process which the parties may agree to is that the Commission will conduct a consent arbitration.

[11] Clause 36.6 indicates that, if the dispute remains unresolved, the Commission may use any method of dispute resolution that it is permitted by the Act to use and that it considers appropriate for resolving the dispute. The Commission is only able to deal with a dispute by arbitration if expressly authorised to do so under or in accordance with a provision of the Act.[4] Relevantly, where a modern award includes a term that provides for a procedure for dealing with disputes, the Commission is empowered to deal with the dispute under s 739 of the Act.[5]

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[4] *Fair Work Act* 2009 (Cth), s 595(3).

[5] *Fair Work Act* 2009 (Cth), s 738(a).

The Commission is, in that event, able to arbitrate the dispute only if the parties have agreed that it may do so.[6]

[12] The nature of the function exercised by the Commission in dealing with a dispute pursuant to an agreed dispute settlement process has been considered extensively in the context of dispute settlement terms contained in enterprise agreements. The role of the Commission in dealing with a dispute pursuant to a dispute settlement procedure of an enterprise agreement does not involve exercising public law functions under the Act. Rather, the Commission is performing a role as a private arbitrator.[7] The same applies to consent arbitration under clause 36 of the Award.

[13] The nature and extent of the function to be undertaken by the Commission is dictated by the agreement of the parties. That is express in the case of clause 36 of the Award which, in clause 36.5, provides that the parties may agree on the process to be followed by the Commission in dealing with the dispute. Where the parties agree to a consent arbitration taking place, the parties may agree to limit or expand the role of the Commission as the Commission's powers are derived from the agreement of the parties.[8]

[14] That extends to appeals. It is open to the parties to a dispute, in agreeing that the dispute be arbitrated by the Commission, to agree that any decision of the member of the Commission to which the dispute is allocated be subject of appeal. Where the parties do so, the nature of any appeal can also be the subject of express agreement. The parties may, for example, agree that there will be a right of appeal and remove or modify the requirements ordinarily applicable to permission to appeal being granted.[9] Equally, the parties may agree that there be no appeal.

[15] Where the agreement is silent on the existence or nature of an appeal, it is generally assumed that the parties intended to take the Commission as they find it. In *DP World Brisbane Pty Ltd v Maritime Union of Australia* [2013] FWCFB 8557; (2013) 237 IR 180, for example, the Full Bench said (footnotes excluded):

> **[47]** As a matter of general principle when jurisdiction is conferred on an established court or tribunal it may be assumed that the legislature intended to take the court as it finds it, with all its incidents including any liability to appeal. This presumption is clearly stated by the High Court in Electric Light and Power Supply Corp Ltd v Electricity Commission of New South Wales:
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> > "When the legislative finds that a specific question of judicial nature arises but that there is at hand an established court to the determination of which the question may be appropriately submitted, it may be supposed that if the legislative does not mean to take the court as it finds it with all its incidents including the liability to appeal, it will say so. In the absence of express words to the contrary or of reasonably plain

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[6] *Fair Work Act* 2009 (Cth), s 739(4).

[7] *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* [2001] HCA 16; (2001) 203 CLR 645 at [31]-[32]; *Construction, Forestry, Mining and Energy Union v Wagstaff Piling Pty Ltd* [2012] FCAFC 87; (2012) 203 FCR 371 at [41] (Buchanan and Katzmann JJ); *Linfox Australia Pty Ltd v Transport Workers' Union of Australia* [2013] FCA 659; (2013) 213 FCR 479 at [27] (Rares J).

[8] Subject to the constraints imposed by s 739 of the Act.

[9] *Victoria Police Force v Police Federation of Australia* [2009] AIRCFB 146; (2009) 178 IR 275 at [13]; *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Silcar Pty Ltd* [2011] FWAFB 2555; (2011) 208 IR 33 at [28]; *Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees v Woolworths Limited T/A Woolworths* [2013] FWCFB 2814; (2013) 232 IR 255 at [22].

> intendment the inference may be made that it takes it as it finds it with all its incidents..."
>
> **[48]** The above proposition also applies to tribunals. When the parties to an enterprise agreement choose to confer a power of private arbitration on the Commission then, absent any contrary intention, they take the Commission as they find it, including the liability to appeal. On appeal the Commission exercises a power of private arbitration conferred by the implied agreement of the parties (s.739(4)). Such a conclusion is also consistent with Full Bench authority.

[16] The consequence in *DP World* was that an appeal was available subject to the appeal procedure in s 604 of the Act, including the requirement to obtain permission to appeal.[10] The same conclusion was reached by the Full Court in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial Australia Pty Ltd* [2015] FCAFC 123; (2015) 235 FCR 305. In that matter, the Full Court concluded that a simple reference to a dispute being subject of "arbitration" by the Commission should be construed as including the appellate process identified in s 604.[11]

[17] Here, the HSU's application for the Commission to deal with the dispute indicates that, if the matter was not resolved by conciliation, that the Commission arbitrate the dispute with consent of the Respondent in accordance with clause 36.5 of the Award.[12] The parties did not otherwise constrain or elaborate upon the powers the Commission could exercise or the procedure to be adopted in arbitration. In those circumstances, the parties' agreement was that the arbitration include the appellate process in s 604 of the Act, including the requirement to seek permission to appeal.

[18] The question at issue between the parties concerned the construction of clause 27.5 of the Award. The proper construction of the Award is, obviously enough, a question of law to which there is only one true answer.[13] As such, the appeal is one to which the correctness standard applies.[14] The question on appeal, if permission is granted, is simply whether the answer given by the Commissioner was correct or incorrect.

Relevant Award Provisions

[19] The Award is described as an industry and occupational award and covers employers in the health industry and their employees in classifications listed in Schedule A as well as any employer employing a health professional employee in a specified classification.[15] The "health industry" is defined to mean employers whose business and/or activity is in the delivery of health care, medical services and dental services.[16]

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[10] *DP World Brisbane Pty Ltd v Maritime Union of Australia* [2013] FWCFB 8557; (2013) 237 IR 180 at [51].

[11] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial Australia Pty Ltd* [2015] FCAFC 123; (2015) 235 FCR 305 at [58].

[12] Appeal Book, p180.

[13] *Onesteel Manufacturing Pty Ltd v BlueScope Steel (AIS) Pty Ltd* [2013] NSWCA 27; (2013) 85 NSWLR 1 at [61] (Allsop P).

[14] *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2018) 264 CLR 541 at [46] and [48]-[49] (Gageler J); *FreshFood Management Services Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2023] FWCFB 97 at [29].

[15] Clause 4.1.

[16] Clause 4.2.

[20] The provision directly at issue in the proceedings is clause 27.5 which deals with directions to take annual leave during a shutdown. The clause provides as follows:

> **Clause 27.5 – Direction to take annual leave during shutdown – dental and medical practices**
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> (a) Clause 27.5 applies if an employer:
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> (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.
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> (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):
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> (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.

[21] On its face, clause 27.5 applies only to "dental and medical practices". As there is no suggestion ACL is a "dental practice", the dispute is as to whether it is a "medical practice" for the purposes of clause 27.5.

[22] Clause 2 sets out a number of definitions but contains no definition directly of the term "medical practice". Relevant to the present matter, however, clause 2 includes the following definition:

> **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.

[23] The bulk of conditions prescribed by the Award apply without differentiation to all employers and employees who are covered by it. However, some conditions are specific to particular types of practices of which clause 27.5 is an example. There are other examples. Clause 11.3 provides for a shorter period of minimum engagement for cleaners "employed in private medical practices". Whereas clause 11.2 provides that generally the minimum period of engagement of a casual employee is 3 hours, the minimum engagement period for a cleaner employed in a private medical practice is 2 hours. Clause 13.2 provides for a different span of hours for a day worker in a private medical, dental, pathology, physiotherapy, chiropractic and osteopathic practice.

The Decision

[24] In the decision, the Commissioner noted the position of the parties. The HSU submitted that ACL is not a "medical practice" for the purposes of clause 27.5 but rather a "pathology practice" and, in consequence, could not give a direction under clause 27.5 of the Award to its employees to take annual leave during a temporary shutdown period. ACL, on the other hand, contended that it is a "medical practice" for the purposes of clause 27.5 of the Award and so could direct employees to take annual leave during a temporary shutdown.[17]

[25] The Commissioner ultimately determined that ACL was not a "medical practice" for the purposes of clause 27.5 of the Award. Three matters were of particular significance to the Commissioner's conclusion.

[26] *First*, the Commissioner rejected the proposition that the term "medical practice" in clause 27.5 is properly to be read as constituting some form of collective noun that includes a "pathology practice". Rather, the Commissioner read the definition of "private medical, dental, pathology, physiotherapy, chiropractic and osteopathic practice" in clause 2 to mean that, unless contrary intention appears, a private pathology practice "means" a pathology practice. The Commissioner did not detect any contrary intention in clause 27.5.[18]

[27] *Second*, the Commissioner was reinforced in her conclusion that the Award speaks to different things in its separate references to "medical" practices and "pathology" practices by

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[17] [2024] FWC 787 at [5]-[6].

[18] Ibid at [12].

an examination of the predecessor Award, namely, the *Health Professionals and Support Services Award 2010* (the **2010 Award**).[19] In particular, the Commissioner noted that, although the definition in clause 2 has now been expanded to include reference to private physiotherapy, chiropractic and osteopathic practices, the 2010 Award contained a definition that distinguished between medical and pathology practices. The Commissioner also noted that the 2010 Award contained provisions which prescribed distinct conditions depending upon the type of practice in relation to the minimum engagement period for cleaners, the span of ordinary hours, and directions to take annual leave.[20]

[28] *Third*, the Commissioner concluded that a pathology practice is ordinarily understood to be different and that it was counterintuitive for ACL to contend that it is a medical practice rather than a pathology practice.[21]

Permission to Appeal

[29] Although we have concluded that the construction adopted by the Commissioner was correct, we have decided to grant permission to appeal. We have done so for two reasons. *First*, the dispute involves the construction of a modern award applying to many employers and employees in the health industry as defined. Whilst only the immediate parties to the dispute will be bound by the outcome of the appeal, it is appropriate to grant permission to appeal in this matter given the likely persuasive force of the decision for other employers and employees.

[30] *Second*, although the conclusion reached by the Commissioner was correct, our reasoning for arriving at the same outcome differs in at least one respect from that of the Commissioner. As explained below, the definition of "private medical, dental, pathology, physiotherapy, chiropractic and osteopathic practice" in clause 2 is not able to be directly read into clause 27.5 of the Award. However, as also explained below, the definition is significant in demonstrating an intention in the Award to distinguish between a medical practice and a pathology practice and, as such, nonetheless supports the Commissioner's conclusion.

Consideration

[31] The question raised in the dispute requires the interpretation of a modern award. The resolution of a question of construction turns upon the language of the award, understood in light of its industrial context and purpose.[22] It has long been recognised that weight must be given to the nature of an award as a beneficial instruction which is often the consequence of industrial compromise. In that context, an overly strict or literal approach will rarely be appropriate and meanings that avoid inconvenience or injustice, and contribute to a sensible industrial outcome, may reasonably be strained for.[23] Interpretation, however, remains a text-based activity.[24] The nature of a modern award, which must be understood and applied by all

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[19] Ibid at [13]-[17].

[20] Clauses 10.4(c), 24.2 and 31.4 of the 2010 Award respectively.

[21] [2024] FWC 787 at [18].

[22] *Amcor Ltd v Construction, Forestry, Mining and Energy Union* [2005] HCA 10; (2005) 222 CLR 241 at [2] (Gleeson CJ and McHugh J) and [66]-[67] (Kirby J) (*Amcor*).

[23] *Kucks v CSR Ltd* (1996) 66 IR 182 at 184 (*Kucks*); *Amcor* at [96] (Kirby J).

[24] *Amcor* at [67] (Kirby J).

employers and employees across the industry or occupation which it covers, underscores that it is necessary to bear in mind that the task remains one of interpreting the text of a document.[25]

[32] ACL raises five contentions on appeal which broadly followed the grounds set out in the notice of appeal. The first contention is that the Commissioner incorrectly applied the definition of "private medical, dental, pathology, physiotherapy, chiropractic and osteopathic practice" in clause 2 to interpret clause 27.5 of the Award. ACL submitted that the typographical composition and arrangement of the words in clause 27.5 does not correspond with the definition in clause 2 and, as a result, a presumption arises that the drafters of the Award did not intend the definition to apply, or be used in the interpretation of, clause 27.5. In particular, ACL pointed to the absence of the word "private" before the words "medical practice" in clause 27.5 and submitted that the definition was only intended to be used in relation to clause 13 of the Award.

[33] The submission misunderstands the decision of the Commissioner and the relevance of the definition to the interpretation of clause 27.5. It is correct to say that the definition of "private medical, dental, pathology, physiotherapy, chiropractic and osteopathic practice" cannot be read directly into clause 27.5. The full phrase does not appear in clause 27.5. The definition provides that "private medical, dental, pathology, physiotherapy, chiropractic and osteopathic practice" means the practice of any practitioner and then provides examples which includes a "pathology practice".

[34] However, that does not mean the definition is irrelevant to ascertaining the meaning of the phrase "medical practice" in clause 27.5. The definition indicates that the Award distinguishes between a "medical practice" and a "pathology practice". The defined term itself makes that very distinction. The repetition of the defined term in clause 13.2(b) in a manner that distinguishes between a "medical practice" and a "pathology practice" emphasises the distinction. In contrast, clauses 11.3 and 27.5 make specific provision with respect to a "medical practice" without reference to a "pathology practice". As the Commissioner observed, the language of those provisions, when considered together, is inconsistent with the proposition that the phrase "medical practice" is being used as a collective term which encompasses a pathology practice. We do not believe the absence of the word "private" before "medical practice" is of any significance.

[35] ACL endeavoured to support its contention by reference to the history of the provision and the consequences of the construction adopted by the Commissioner. As to consequences, ACL submitted that, if the Commissioner's decision was correct, a "medical centre", "general practice", "specialist practice" or "family practice" would also be excluded from the operation of clause 27.5. That submission again misunderstands the definition. It may be accepted that a "medical centre", "general practice", "specialist practice" or "family practice" are forms of "medical practice" because those types of practices are not separately identified in the text of the defined term. A "pathology practice" is, however, separately identified in the defined term in a manner that cannot be reconciled with ACL's submissions.

[36] As to history, ACL referred to *Re 4-yearly review of modern awards* [2019] FWCFB 120. That decision resulted in the introduction of the definition of "private medical, dental,

[25] *Transport Workers Union of Australia v Coles Supermarkets Australia Pty Ltd* [2014] FCAFC 148; (2014) 245 IR 449 at [41] referring to the second part of the well-known passage from *Kucks* case (at 184).

pathology, physiotherapy, chiropractic and osteopathic practice" in its current form. Previously, the definition appeared in clause 3 of the 2010 Award as follows:

> **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.

[37] Associated with a consolidation of the span of hours provision[26], the Full Bench expanded the definition to also refer to physiotherapy, chiropractic and osteopathic practices. In doing so, the Full Bench removed the word "medical" which appeared before the word practitioner in the definition to reflect that the definition was proposed to include physiotherapy, chiropractic and osteopathic practices which are allied health practices.[27]

[38] ACL suggests that the removal of the word "medical" indicates that the Full Bench considered medical, dental and pathology were all forms of medical practice. The submission cannot be accepted. The definition in clause 3 of the 2010 Award also distinguished in the defined term itself between a medical practice and a pathology practice (and a dental practice). Consistent with the current Award, the term pathology practice was specifically referred to in clause 24 of the 2010 Award dealing with span of hours. Clause 24.1 of the 2010 Award provided a general span of hours of 6am and 6pm Monday to Friday "unless otherwise stated". Clause 24.2 provided a span of hours for private medical, dental and pathology practices and clause 24.3 provided a span of hours for private medical imaging practices.

[39] The reason that a different span of hours applied to different services or practices covered by the 2010 Award was explained by the Full Bench as follows:[28]

> Particular submissions were made on the span of hours for various private practices which reflected the underlying awards and the needs of the sectors. Whilst some rationalisation has taken place we have sought to maintain a specific spread in these areas.

[40] The decision of the Full Bench in relation to the making of the 2010 Award also dealt with the making of 26 other modern awards. In relation to annual leave, the Full Bench made the following general comments applicable to all modern awards published with that decision:[29]

> Some of the priority modern awards made on 19 December 2008 permit an employer to require an employee to take annual leave in specified circumstances. The circumstances are mainly of two kinds. The first kind deals with annual close down. The second kind deals with excessive accumulations of annual leave. A number of the exposure drafts for the Stage 2 modern awards also contain such provisions.
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> It was not suggested that any provision, either in the modern awards already made or in the exposure drafts, allowed an unreasonable requirement to take leave or should be altered as a result of the 18 December 2008 amendment. In particular it was not suggested that any of the provisions should be altered to include a general requirement for reasonableness in relation to the exercise of the rights given to employers. In the circumstances we have decided not to alter

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[26] Dealt with in *Re 4-yearly review of modern awards* [2018] FWCFB 7350.

[27] *Re 4-yearly review of modern awards* [2019] FWCFB 120 at [9].

[28] *Re Award Modernisation* [2009] AIRC 345; (2009) 181 IR 19 at [154].

[29] Ibid at [17]-[18].

> any of the existing modern award provisions and we have included similar provisions in a number of the Stage 2 modern awards.

[41] Clause 31.4 of the 2010 Award had a similar effect to clause 27.5 of the current Award. It provided as follows:

> **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.

[42] There is no specific reference to this provision in the decision of the Full Bench in relation to the making of the 2010 Award. However, the decision to include an annual shutdown provision which applied only to dental or medical practices rather than the health industry more generally is consistent with its approach to span of hours where it "sought to maintain a specific spread" having considered "[p]articular submissions … made on the span of hours for various private practices which reflected the underlying awards and the needs of the sectors." The reference to private medical, dental and pathology practices in clause 24.2 may be contrasted with the reference to only dental and medical practices in clause 31.4. The inclusion of pathology practices in clause 24.2 but not in clause 31.4 indicates that the Full Bench intended that the span of hours clause at clause 24.2 would cover pathology practices but that clause 31.4 would not. That history supports the conclusion of the Commissioner.

[43] The second contention advanced by ACL is that the Commissioner failed to adhere to the principles of award interpretation. It is not strictly necessary to resolve that ground given that the only question we need to consider, at least if permission to appeal is granted, is whether the Commissioner's conclusion is correct. However, it is appropriate to record that there is no merit to the submission. The substance of the contention is that the Commissioner failed to apply the ordinary and natural meaning of the words "medical practice" in clause 27.5 and regarded dictionary definitions of limited utility.[30]

[44] It is true that the task of construction commences with the ordinary and natural meaning of the words used. It is also elementary that a particular clause must be construed in context, most importantly, in the context of the document as a whole.[31] ACL's appeal to the ordinary and natural meaning of the text, in truth, urges the Commission to read clause 27.5 in isolation from the remainder of the Award. It does not assist ACL to suggest that a pathology practice could, in another context and without reference to the remainder of the Award, be characterised as a "medical practice". The question is whether it is a medical practice for the purposes of clause 27.5 of the Award in the context of other parts of the Award. For the reasons we have explained, the Award generally uses the expression "medical practice" in a manner that indicates that it does not include a pathology practice.

[45] Dictionary definitions may assist in ascertaining the ordinary meaning of a word or expression used in an award. Authority suggests, however, that caution should be exercised in reaching for dictionary definitions to resolve questions of statutory construction as the search

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[30] [2024] FWC 787 at [7].

[31] *City of Wanneroo v Holmes* (1989) 30 IR 362 at 278 (French J); *Workpac Pty Ltd v Skene* [2018] FCAFC 131; (2018) 264 FCR 536 at [197].

is for the legal meaning of the words used by Parliament.[32] A similar caution is appropriate in the case of interpreting an award. An undue focus on the possible meanings of individual words derived from a dictionary has the potential to neglect contextual and purposive considerations which should properly guide their interpretation.[33] The concentration in ACL's submissions on dictionary definitions of the words "medical" or "practice" invites that form of error and must be rejected.

[46] The third contention advanced by ACL is that the Commissioner failed to take into account material parts of the evidence. ACL submitted that the Commissioner failed to take into account the evidence of Tammy Fitzpatrick who was a witness called by the HSU, and evidence of the witness called by ACL, Christopher Brownlow.

[47] The Commissioner observed she did not consider that the evidence in chief and the cross-examination assisted her particularly, if at all, in relation to the proper interpretation or application of the Award.[34] The Commissioner was correct to do so. Most of the evidence was of limited relevance. For example, much of the cross-examination was directed at exacting concessions from the witnesses that ACL is (or is not) a medical practice. ACL also relied upon an assertion made by Mr Brownlow that ACL is a "medical practice specialising in pathology". Mr Brownlow's opinion could be of no assistance in determining the question of interpretation that was the subject of the proceedings. It was irrelevant to the legal question of the proper interpretation of the Award.

[48] Evidence was given by Mr Brownlow in relation to the financial position of ACL's business and the alleged costs and inconvenience which would be caused if it was not able to direct employees to take annual leave over the Christmas/New Year period. No doubt an ability to direct employees to take annual leave may be an advantage for some businesses, including ACL. However, it must be remembered that the task involves the interpretation of a modern award covering all employers and employees specified in the coverage clause. Evidence as to the operations of a single employer is of little assistance in construing the Award.

[49] In any event, the Commissioner did not fail to consider evidence as to ACL's operations. The Commissioner set out a portion of the evidence of Mr Brownlow as to the nature of ACL's operations.[35] There was no substantial dispute as to ACL's operations. ACL described itself as having the operational purpose of providing pathology services including the collection, transport, testing and reporting for doctors, hospital, patients and corporate clients.[36] Its laboratories are accredited by the National Association of Testing Authorities, it engages medical practitioners or that those practitioners are registered with the Australian Health Practitioner Regulation Agency.[37] The question remains, however, whether it is a medical practice as that term is properly understood in the Award.

[50] The fourth contention is that the Commissioner failed to give adequate reasons for her decision. Again, given that the correctness standard applies and the only question for the Full

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[32] *TAL Life Ltd v Shuetrim* [2016] NSWCA 68; (2016) 91 NSWLR 439 at [80] (Leeming JA); *South Western Sydney Local Health District v Gould* [2018] NSWCA 69; (2018) 97 NSWLR 513 at [78]-[83] (Leeming JA).

[33] *Cooper v The Owners of Strata Plan No. 58068* [2020] NSWCA 250; (2020) 103 NSWLR 160 at [22] (Basten JA).

[34] [2024] FWC 787 at [7].

[35] Ibid at [18].

[36] Appeal Book, p100 at [23].

[37] Appeal Book, p99-100 at [21]-[30].

Bench is whether the conclusion reached by the Commissioner is correct, dissatisfaction with the adequacy of the Commissioner's reasons does not advance the position of ACL. If the reasons were deficient, but the conclusion reached nonetheless correct, the appeal would be dismissed. We observe, however, that there is no merit to the complaint concerning the Commissioner's reasons.

[51] The only aspect of the reasons alleged to be inadequate is that the Commissioner said that "aspects of the evidence given by Ms Fitzpatrick was relevant" without, it was said, identifying what aspects of Ms Fitzpatrick's evidence were considered relevant, why it was relevant or why other evidence was not relevant. The submission does not read the decision fairly or as a whole. The relevant part of the decision recorded as follows:

> **[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 [sic] 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.

[52] When read in context, it is readily apparent that the aspects of Ms Fitzpatrick's evidence being referred to concerned the co-location of pathology practices with medical practices. There was no deficiency in the reasons in that respect or otherwise. ACL confirmed during the hearing of the appeal that there was no dispute as to that fact.

[53] The fifth contention is that the Commissioner made an erroneous finding of fact in deciding that a pathology practice is different from a medical practice. The submission again misapprehends the exercise of construction. The question is what the words mean in an award which is a question of law. To the extent it is relevant, we agree with the Commissioner that a medical practice is capable of being distinguished from a pathology practice as matter of ordinary understanding. A medical practice could be understood to be a practice at which patients receive medical care directly from a medical professional. That is consistent with the construction which emerges from the language of the Award.

[54] Finally, whilst we have considered the further evidence put forward by ACL, the statutory declaration of Associate Professor Barnes did not assist in the resolution of the dispute. Associate Professor Barnes states that pathology is a discipline of medicine, and that ACL is a medical practice specialising in the treatment of patients by investigating their blood, fluids and/or tissues for diseases. Those propositions are not disputed. The question is not whether pathology is a discipline of medicine, but rather whether it is a "medical practice" as that phrase is properly understood in the context of the Award. It is not.

Conclusion

[55] The construction adopted by the Commissioner is correct. ACL is not a medical practice for the purposes of clause 27.5 of the Award and it is not able to give a direction under clause 27.5 for employees to take paid annual leave during a temporary shutdown period.

[56] For the reasons set out above, we order that:

(a) Permission to appeal is granted; and
(b) The appeal is dismissed.

VICE PRESIDENT

Appearances:

A Berry for the appellant.
G Noble and *S Mohammad* for the respondent.

Hearing details:

2024.
Sydney (in person):
13 June.

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