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CASENOTE: HSU v Catering Industries (NSW) Pty Ltd [2023] FCAFC 82 (29 May 2023)

The Health Services Union (also '**HSU**' or '**Union**') was engaged in bargaining with Catering Industries ('**Catering**' or '**Employer**'). HSU sought an enterprise agreement, but bargaining broke down over the industrial award underpinning the "better off overall test", or 'BOOT' test in section 186(2) of the *Fair Work Act* 2009 (Cth) ('**FW Act**').

In December 2021, HSU sought a declaration as to which award applied to Catering's employees working in another business: for Heritage Botany; and whether the *Hospitality Industry (General) Award* 2020 ('**Hospitality Award**') applied to the employees; or alternatively (as the Union maintained) the *Aged Care Award* 2010 ('**Aged Care Award**') was the correct award. Both instruments are modern awards. The former award contained detailed classifications; where the Aged Care Award contained a more general description.

1. <u>First instance</u>

Catering operates a contract catering, cleaning and laundry services business to a number of aged care providers in NSW. Catering's operations included:

(i) providing "food and beverage services" at Heritage Botany, preparing food and beverages for residents as approved by Heritage. Meals were prepared in compliance with residents' personal care plans (where applicable), and with their dietary needs;
(ii) prior to outsourcing in 2019, catering at Heritage Botany was performed in-house pursuant to an earlier agreement, loosely called the 'Predecessor Agreement'; and
(iii) this meant that the question at first instance was what modern award *would have* hypothetically applied, if the Predecessor Agreement did not remain in force and effect: see section 57 of the FW Act.

Clause 3.1 of the Aged Care Award provides:

> *…the provision of accommodation and care services for aged care persons in a hostel, nursing home, aged care independent living units, aged care services apartments, garden settlement, retirement village or any other residential accommodation facility[.]*

The parties agreed, that Heritage Botany falls within that definition. The main disagreement between the parties was on the *coverage* of the awards – and whether Catering was 'covered' in the sense of section 48 of the FW Act, by the Aged Care Award. A further disagreement existed in respect of which *classifications* were appropriate, due to the terms of cl 4.7 of the Aged Care award.

The trial judge Justice Rares, found[1] where the disputed work involved a skilled trade; and where the Hospitality Award contained specific classifications, that this should be preferred. His Honour found that such levels are much more appropriate than the more general descriptions in schedule B to the Aged Care Award. Justice Rares found for the Respondent-employer, and found the Hospitality Award covered Heritage's employees. The Union appealed.

[1] [2022] FCA 754.

2. Appeal

Justices Katzmann, Snaden and Raper of the Federal Court of Australia heard the appeal.

HSU argued its appeal on the basis of two errors, which were:

(i) the primary judge found that the Catering employees are covered by the Hospitality Award and not covered by the Aged Care Award by operation of clause 4.4(d)(xi) of the Hospitality Award; and
(ii) further, the primary judge should have found that if both the Hospitality Award and the Aged Care Award applied, then the Catering employees are covered by classifications in the Aged Care Award as these are most appropriate to their work.

After considering the Court's jurisdiction (chiefly under section 21(1) of the Federal Court of Australia Act 1976 (Cth)) to grant declaratory relief, the Court moved to the main questions – being *coverage* (of the awards) and clause 4 in particular. That clause provides:

> ***4.1*** *This industry award covers employers throughout Australia in the aged care industry and their employees in the classifications listed in clause 14-Minimum weekly wages, to the exclusion of any other modern award.*
>
> ***4.7*** *Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally* [works] *. . .*

The Court on appeal found that (as found at first instance) the coverage issue was more clearly resolved by the classifications in the Hospitality Award being more appropriate – as was found at first instance. To this extent, the appeal bench agreed with Rares J. The appellant's claim was dismissed.

Significance of the decision

Despite certain publicity[2] – some of which did not articulate the true questions in the proceeding – the question in this claim and then again on appeal was simple. It was whether 'industry' in modern awards means and meant the industry of the Employer, or whether it meant something else.

The question of construction of Awards and agreements is significant for several purposes. One is the bargaining (which underpins this case) and in particular the "better off overall test" test in the FW Act. The other is in respect of back-pay claims, where existing and former employees or group of employees seek payment *even when* the Award or agreement claimed does not cover or apply to the work performed in any meaningful legal sense.

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[2] See https://www.afr.com/work-and-careers/workplace/union-launches-legal-action-over-slashed-aged-care-wages-20220529-p5apc2; and also https://www.theweeklysource.com.au/health-services-union-seeks-precedent-setting-case-against-catering-industries-paying-aged-care-kitchen-staff-under-different-award/. The latter of these two seems to be curated by HSU itself.