

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. APPL 86/2017
GIVEN ON 21 JANUARY 2019
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION : 2019 WAIRC 00848

CORAM : CHIEF COMMISSIONER P E SCOTT
SENIOR COMMISSIONER S J KENNER
COMMISSIONER T B WALKINGTON

HEARD : SUBMISSIONS IN WRITING 28 NOVEMBER 2019,
29 NOVEMBER 2019

DELIVERED : MONDAY, 9 DECEMBER 2019

FILE NO. : FBA 2 OF 2019

BETWEEN : THE PHARMACY GUILD OF WESTERN AUSTRALIA
Appellant

AND

THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES'
ASSOCIATION OF WESTERN AUSTRALIA, THE MINISTER
FOR COMMERCE AND INDUSTRIAL RELATIONS, SAMUEL
GANCE (ABN 50 577 312 446) T/AS CHEMIST WAREHOUSE
PERTH
Respondents

FILE NO. : FBA 3 OF 2019

BETWEEN : SAMUEL GANCE (ABN 50 577 312 446) T/AS CHEMIST
WAREHOUSE PERTH
Appellant

AND

THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES'
ASSOCIATION OF WESTERN AUSTRALIA, THE MINISTER
FOR COMMERCE AND INDUSTRIAL RELATIONS,
PHARMACY GUILD OF WESTERN AUSTRALIA
Respondents

ON APPEAL FROM:

Jurisdiction : **WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**
Coram : **COMMISSIONER T EMMANUEL**
Citation : **2019 WAIRC 00016**
File No : **APPL 86 OF 2017**

Catchwords : Industrial Law (WA) – Supplementary reasons for decision in an appeal against a decision of the Commission – Award interpretation – *The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977* – Award coverage of retail pharmacy industry – Whether Full Bench should vary the award to remedy any defect or give fuller effect to declaration – Glover scope clause and difficulty in identifying industry of respondents – Declaration of true interpretation of award and award varied

Legislation : *Industrial Relations Act 1979 (WA)*

Result : Minute of proposed declaration and orders issued

Representation:*Counsel:*

Pharmacy Guild of Western Australia
Organisation of Employers : Mr T Dixon of counsel and Mr A Drake-Brockman, industrial agent

Samuel Gance (ABN 50 577 312 446) t/as Chemist Warehouse Perth : Mr N Tindley of counsel

The Shop, Distributive and Allied Employees' Association of Western Australia : Mr D Rafferty of counsel

The Minister for Commerce and Industrial Relations : Mr R Andretich of counsel

*Supplementary Reasons for Decision***SCOTT CC AND KENNER SC:**

- 1 By Reasons for Decision issued on 21 November 2019 [2019 WAIRC 00825], the Full Bench by majority upheld the appeals in these matters and said that it would declare that the *Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977* (the Award) does not apply to the industry of retail pharmacy as carried on by Boans Ltd and Perth United Friendly Society Chemists (PUFSC) (paragraph 67). It proceeded to note ‘that the Award makes reference to chemist shops and pharmacies in provisions which have become obsolete given that the Award does not apply to those shops. It may be that the presence of those other clauses causes confusion’ (paragraph 68).
- 2 Accordingly, the parties were invited to make submissions as to whether, in accordance with s 46(1)(b) and s 49(6) of the *Industrial Relations Act 1979* (the Act), an order should be made varying the Award to remedy the defect. Those submissions have now been received.
- 3 The Pharmacy Guild of Western Australia and Samuel Gance trading as Chemist Warehouse Perth submit that the Award should now be varied to remove references to pharmacies (however described) and chemist shops, and have set out the relevant clauses and variations.
- 4 The Shop, Distributive and Allied Employees’ Association of Western Australia (the Union) raised two particular issues. In the first, it submits that as a matter of law, the scope of the Award, as made, had not been reduced to exclude the retail pharmacy industry as an industry to which the Award applies. It says that the Commission lacked the power to reduce the industry scope of the Award by striking out PUFSC (or any other named respondent) in April 1995, in the exercise of its power under s 47 of the Act. Further it says that the steps taken by the Commission in 1995 of its own motion, to strike out PUFSC under s 47, did not reduce the scope of the Award, and says that it continued to extend to the retail pharmacy industry.
- 5 The Union also asserts that the Commission lacked power to vary the industry scope of the Award as made, or to reduce the common rule effect of the Award either of its own motion or at all. It says that that power is exercisable only by the Commission upon the application of parties who have standing pursuant to ss 38 and 40 and in compliance with s 29A of the Act. It says that no such application has been made.
- 6 The second issue raised by the Union is that it conducted its case at first instance on the basis that the naming of Boans and PUFSC as original named respondents to the Award was effective to bind unnamed retail pharmacy employers and their employees to the Award by force of common rule. It says that at first instance, it conceded it did not know of any presently named respondents listed in Schedule C to the Award having carried on the retail pharmacy businesses when the Award was made. However, the Union says it did not and could not concede that, as a matter of fact, none of the presently named respondents listed in Schedule C to the Award carried on retail pharmacy businesses at the time the Award was made. It refers to page 18 of the transcript of the hearing at first instance on 30 October 2018. It says that as such the proposal to delete reference to all chemist shops and pharmacies would require

evidence to establish that none of the originally named respondents to the Award, who continue to be listed in Schedule C to the Award, carry on retail pharmacy businesses. It says that this issue was not before the Commission at first instance, and therefore it could not have been open for the Commission at first instance to delete all references to chemist shops and pharmacies.

- 7 The Union says that the Full Bench should not remove the references to chemist shops and pharmacies. It says the provisions are not obsolete and to delete them would disentitle relevant retail pharmacy employees of the benefits of the Award. However, the Union seeks the declaration foreshadowed in paragraph 66 as soon as practicable.

Consideration

- 8 Section 46 – *Interpretation of Awards and Orders by Commission*, subsection (1)(a) of the Act provides that “the Commission may, on the application of any employer, organisation, or association bound by an award, declare the true interpretation of the award.” In accordance with paragraph (b) the Commission may, ‘where that declaration so requires, by order vary any provision of the award for the purpose of remedying any defect therein or of giving fuller effect thereto.’

The First Issue

- 9 The first issue raised by the Union ignores that the decision of the majority of the Full Bench dealt with these questions in paragraphs 45 to 57 of the Reasons. It is not now open, or proper, to seek to challenge those Reasons and conclusions in dealing with an invitation by the Full Bench to make submissions about what ought to occur as a consequence of that decision. It may be for another time and place.

The Second Issue

- 10 The matter before the Commission at first instance was an application for a declaration under s 46(1)(a) that the Award ‘applies to workers employed in the chemist shop/pharmacy industry and to employers employing those workers’ (Form 1 – Notice of application (general) filed on 3 November 2017). The same question was set out in the amended application filed on 23 February 2018. In paragraph 2 of the Reasons for decision at first instance [2019 WAIRC 00015], the learned Commissioner noted that ‘the parties agree that in the current version of the Shop Award, there are no known respondents carrying on the retail pharmacy industry. They disagree about whether other clauses that reference chemist shops or pharmacies, for example cl 40, can have an effect on one scope of the Shop Award.’ At paragraph [3], the learned Commissioner set out the question the Union sought to be answered as ‘does the Award as varied apply to workers employed in any calling or callings mentioned in the award in the Retail Pharmacy Industry and to employers employing those workers’.
- 11 There has been no appeal or challenge to the learned Commissioner’s comment at paragraph [2]. The only named respondents considered in the matter at first instance, for the

purpose of determining whether it applies to the retail pharmacy industry, were Boans Ltd and PUFSC.

- 12 The majority of the Full Bench has found that the Award does not apply to the industry of retail pharmacy as carried on by Boans Ltd and PUFSC. What the Union now seeks to do in its submission is refer back to an exchange between its counsel and the Commission at first instance, on 30 October 2018. In that exchange, Mr Rafferty for the Union said that the Union had not conceded that none of the current named respondents were ever engaged in retail pharmacy. He said that:

[Y]ou'll see in the evidence I'm about to take you to there's reference to David Jones and Myer having pharmacies in or around the time the Award was made and they were listed as named respondents to the Award.

Now, it seems to us that those department stores didn't actually own those pharmacies. It may have been that there was, as you will see from the evidence of Geoffrey Bingemann an arrangement like Boans has in its suburban department stores where this place was leased to a private pharmacist but because of those matters we're not in a position to concede the point. So if I can take you – so now we're going to deal with the evidence concerning Boans – Boans Limited of Murray Street Perth.

- 13 The Union now says that it would not have been open for the Commission at first instance to delete all reference to chemist shops and pharmacies because the Union did not and could not concede that as a matter of fact, none of the presently named respondents listed in Schedule C to the Award carried on retail pharmacy businesses at the time the Award was made.
- 14 Given the manner in which the question to be answered was set out by the Union, the hearing at first instance proceeded, the question was answered by the learned Commissioner and the grounds of the appeals were couched and answered, it is clear that it was always presumed, apart from the brief extract from transcript, that the issue was about whether the Award covered the retail pharmacy industry by reference to the only two known chemist shops/retail pharmacies named in Schedule C. It cannot be seriously suggested that there were respondents other than Boans Ltd and PUFSC, who could now be identified as being in the retail pharmacy industry.
- 15 Given the significance to the Union of the answer to the question it posed in its application for interpretation, we assume that it would have made every endeavour to identify any such employers. If the Union has been unable to identify any such named respondents, we find it difficult to accept that there may be any. For it to now, at this stage of the proceedings, say that there may be other employers engaged in the retail pharmacy industry who cannot be identified is not, in our view, appropriate, proper or credible.
- 16 In any event, we note that the arrangement Mr Rafferty for the Union raised in the extract from transcript at first instance was that David Jones and Myer leased premises to pharmacists, but did not themselves operate retail pharmacies or employ workers in these pharmacies.

- 17 We understand the Union's strong desire to maintain its position regarding the scope of the Award. However, this is not the point in the proceedings for this matter to be raised. We also recognise that the issue arose because of the problematic nature of *Glover* clauses (*Western Australian Carpenters and Joiners, Bricklayers and Stoneworkers Industrial Union v Terry Glover Pty Ltd* (1970) 50 WAIG 704) with the passage of time.
- 18 However, as the Union has raised this matter, it is now appropriate that we reconsider the declaration that we foreshadowed issuing in paragraph [66] of the substantive Reasons in the appeal. We had concluded in paragraph [65] that "In our view, this put beyond doubt the earlier variation to the Award to remove PUFSC as the sole respondent carrying on that industry". We concluded paragraph [68] with the proposed declaration "that the Award does not apply to the industry of retail pharmacy as carried on by Boans Ltd or PUFSC".
- 19 We are now, as we note above, confirmed in the view that there are no other identifiable respondents listed in Schedule C to whom the Award applies who operate in the retail pharmacy industry and therefore the declaration ought to make this clear, and not to include reference to Boans Ltd or PUFSC.
- 20 Further, as we have already noted, the question asked in the application was whether the Award applies to workers employed in any calling or callings mentioned in the Award in the retail pharmacy industry and to employers employing those workers. It was not conditioned by reference to Boans Ltd or PUFSC.
- 21 The declaration made by the learned Commissioner at first instance answered that question in the positive, also without the qualification relating to Boans Ltd and PUFSC.
- 22 Therefore in upholding the appeal and issuing a declaration, the Full Bench ought to declare the negative answer to the question asked, without qualification relating to Boans Ltd and PUFSC. The declaration ought to read that the Award does not apply to employees employed in the retail pharmacy industry and to employers employing those employees. (We note for completeness that we have used the term *employees* rather than *workers* because that is the term now used in the *Industrial Relations Act 1979*, not *workers* as was used in the Award when it issued in 1977).

Conclusion

- 23 Section 49(6) provides that where the Full Bench varies a decision under subsection (5)(b), the decision as so varied shall be in the terms which could have been awarded by the Commission that gave the decision.
- 24 The Commission at first instance could have declared the true interpretation of the Award and where the declaration so required, by order vary any provision of the Award for the purpose of remedying any defect or giving fuller effect to the Award. Therefore, the appropriate conclusion of these matters, in accordance with the powers of the Full Bench is to declare the true interpretation of the Award and to vary the Award to give effect to that declaration. In our view the disposition of the appeals ought to be that;
 1. the appeals be upheld;

2. a declaration issue, answering the question raised, that the Award does not apply to employees employed in the retail pharmacy industry and to employers employing those employees;
 3. the Award be varied to remove references to pharmacies and chemist shops in accordance with those amendments set out by the Pharmacy Guild and Samuel Gance trading as Chemist Warehouse Perth in their submission and consequential re-numbering.
- 25 A Minute of Proposed Declaration and Orders now issues. The parties are asked to advise by no later than Monday, 16 December 2019 whether they require a speaking of the minutes.

WALKINGTON C:

- 26 I have read the Reasons for decision of Chief Commissioner Scott and Senior Commissioner Kenner. I agree and have nothing to add.