[2015] AATA 416

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| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number(s) | 2015/2158 |
| Re |  |
|  | APPLICANT |
| And |  |
|  | RESPONDENT |
| And | AED Legal Centre  National Disability Services  Secretary, Department of Social Services |
|  | JOINED PARTIES |

# INTERLOCUTORY Decision

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| Tribunal | **Deputy President J W Constance** |
| Date | **5 June 2015** |
| Place | **Sydney** |

The application for an order staying the operation of the decision of the Australian Human Rights Commission is refused.

..............................**[sgd]**..........................................

**Deputy President J W Constance**

Catchwords

PRACTICE AND PROCEDURE – application for stay of a decision – factors relevant to stay order – question of status quo – stay likely to cause uncertainty – application for stay order refused

Legislation

Administrative Appeals Tribunal Act 1975 (Cth) s 42A(1)

Disability Discrimination Act 1992 (Cth) ss 3, 15, 24, 29

Cases

Australian Securities and Investments Commission and PTLZ (2008) 48 AAR 559.

# REASONS FOR ORAL DECISION

**Deputy President J W Constance**

1. On 5 June 2015, I delivered an oral decision refusing an application filed by People with Disability Australia for an order staying the operation of a decision of the Australian Human Rights Commission.
2. What follows is an edited excerpt of the transcript of the proceedings containing my oral reasons for the refusal of the application

# introduction

1. This is an application for a stay of a decision of the Australian Human Rights Commission made under the provisions of the *Disability Discrimination Act 1992* (Cth).
2. The objects of the *Disability Discrimination Act* are set out in section 3. It states in part that that the objects of the Act are to eliminate, as far as possible, discrimination against persons on the ground of disability in the areas of work, the provision of goods, facilities and services and the administration of Commonwealth laws and programs.
3. Section 15 of the Act deals specifically with employment issues. Section 24 deals with goods, services and facilities, and section 29 deals with the administration of Commonwealth laws and programs. These three sections provide, in general terms, that it is unlawful to discriminate on the ground of another person’s disability in each area specified.
4. However, section 55 of the Act provides that the Commission may grant exemptions. After receiving an application for an exemption, the Commission may, by instrument:

... grant to the person or persons to whom the application relates... an exemption from the operation of a provision of Division 1 or 2.

1. Divisions 1 and 2 include sections 15, 24 and 29. Section 55 also gives power to the Commission to grant a further exemption. It provides also that an exemption may be granted subject to terms and conditions and can be granted for a specified period not exceeding five years.
2. Section 56 provides that:

Applications may be made to the Administrative Appeals Tribunal for a review of decisions made by the Commission under section 55.

1. It is that power which brings the matter before this Tribunal.

# background

1. On 29 April 2014, the Commission, exercised its power under section 55 and granted an exemption. The Commission stated:

By this instrument under section 55(1) of the Disability Discrimination Act 1992 (Cth) (Disability Discrimination Act), the Australian Human Rights Commission grants to the Commonwealth and all Australian Disability Enterprises (ADEs) using or proposing to use the Business Services Wage Assessment Tool (the Applicants) an exemption from the operation of sections 15, 24 and 29 of the Disability Discrimination Act.

The exemption is granted for a 12 month period from the date of this instrument and is granted subject to the conditions outlined below.

1. In considering this matter, it is necessary to understand the role of the Business Services Wage Assessment Tool. I quote from the submissions made on behalf of the Secretary which precisely set out the nature of that tool:[[1]](#footnote-1) :

The Business Services Wage Assessment Tool (BSWAT) is a tool that was developed by the Commonwealth in consultation with numerous stakeholders (including unions, disability advocate groups and employers) to be used to assess wages for supported employees with a disability working in Australian Disability Enterprises (ADEs). The BSWAT is currently an approved wage assessment tool in the Supported Employment Services Award 2010 (and was an approved wage assessment tool in the predecessor award).

The BSWAT has two components that assess the productivity and competency of supported employees. The competency component and a productivity component are scored separately with the results combined to determine an overall pro-rata wage rate. Concerns were raised about the competency component of the BSWAT after a decision of the Full Federal Court in Nojin and the Commonwealth of Australia (2012) 280 FCR 1. The Department of Social Services and other interested parties have been engaging in the process in the Fair Work Commission (FWC) to develop a new productivity only wage assessment tool. That process is continuing.

1. The assessment tool was developed in 2003. In the notice issued by the Commission on 29 April 2014, the Commission noted that there were 194 Commonwealth-funded Australia Disability Enterprises and that they employed approximately 20,000 people with disability. At the time that the notice was issued, approximately half of those employees were assessed using the Business Services Wage Assessment Tool.
2. The Commission outlined the considerations that had been taken into account in reaching the decision dated 29 April 2014. These considerations were dealt with in some detail under the heading “Reasons for decision”. The Commission considered necessity and the reasonableness of the exemption. Under the heading *“Reasonableness of the exemption”*, the Commission considered both the arguments for and against the exemption, including the possible effects of any changes on the financial viability of Australian Disability Enterprises.
3. The Commission also considered the alternatives that were immediately available and referred to the Supported Wage System. There are arguments raised against using that system. The Commission then concluded:[[2]](#footnote-2)

Having considered all of the above arguments, the Commission considers that while either tool could be used, on balance the SWS should be preferred, at least as an interim measure, as:

1. Its use would be in compliance with both the Award and the Disability Services Standards, whereas the productivity component of the BSWAT would not.
2. It is already used in both open and supported employment and the BSWAT productivity component is not.
3. In conclusion the Commission stated:[[3]](#footnote-3)

On balance, the Commission considers that it is not reasonable to grant an exemption for three years given the ongoing discrimination and the existence of an alternative tool that is able to be used immediately. However, having considered the submissions, the complexity of the financial circumstances of the ADEs, the nature of the services provided by the ADEs and the number of assessments that need to be conducted, the Commission considers that an exemption for a 12 month period is reasonable. Limiting the exemption period to 12 months will allow the Applicants time to transition to a new tool whilst ensuring the discriminatory impacts on ADE employees is minimised.

The Commission also considers that it is not appropriate to conduct new assessments with the BSWAT (as it has been found to be discriminatory) and has therefore concluded that the exemption should be granted in part only. That is, the Commission has decided to grant the exemption only to allow the payment of wages to ADE employees who have already had an assessment conducted with the BSWAT and where that assessment is current.

The Commission then proceeded to set out conditions on which the grant of an exemption was made subject.

1. On 30 April 2015, the Commission issued a Notice of Grant of a Temporary Exemption. It stated:[[4]](#footnote-4)

By this instrument under section 55(1) of the Disability Discrimination Act 1992 (Cth) (Disability Discrimination Act), the Australian Human Rights Commission grants the Commonwealth and all Australian Disability Enterprises (ADEs) using or proposing to use the Business Services Wage Assessment Tool (BSWAT) (the Applicants), an exemption from the operation of sections 15, 24 and 29 of the Disability Discrimination Act.

1. Although that was referred to as what the instrument granted, in fact, when read as a whole, the decision clearly imposed conditions. Under the heading “Decision of the Commission”, it is stated that:[[5]](#footnote-5)

... the Commission has decided to grant a further exemption for a period of four months, or until such time as a decision is made with respect to the Primary Application, whichever is sooner.

1. In paragraph 24 of the notice, the Commission again imposed the conditions that had been imposed 12 months earlier. The circumstances that brought about the issue of this further exemption are set out in the notice, which states relevantly:[[6]](#footnote-6)

On 21 April 2015 the Commonwealth applied for a temporary exemption for 12 months to ensure the transition from the use of the BSWAT to an alternative tool approved by the Fair Work Commission is able to continue in an orderly manner and to provide reassurance to people with disability working in ADEs and their families and carers (Primary Application).

On 21 April 2015 the Commission advised the Commonwealth that it would not be possible to make a decision on the primary application by 29 April 2015 and that once the current exemption expired, there would be no exemption in place.

On 22 April 2015 the Commonwealth made an application for an interim exemption from the period between the expiry of the original exemption on 29 April 2015 and ‘the date on which the Commission publishes its determination in relation to the application of 21 April 2015’ (Interim Application).

1. On 5 May 2015, the Tribunal received an application from the Applicant, People with Disability Australia, for a review of the decision which granted the exemption for four months or until a decision on the application for the further exemption. At the same time, the Applicant applied for a stay of the decision of the Commission. That is the decision of 30 April 2015.

# legislation

1. The power of the Tribunal to stay a decision which is under review is set out in section 41 of the *Administrative Appeals Tribunal Act 1975* (Cth). Section 41(2) provides:

The Tribunal may, on request being made, as prescribed, by a party to a proceeding before the tribunal (in this section referred to as the **relevant proceeding**), if the Tribunal is of the opinion that it is desirable to do so after taking into account the interests of any persons who may be affected by the review, make such order or orders staying or otherwise affecting the operation or implementation of the decision to which the relevant proceeding relates or a part of that decision as the Tribunal considers appropriate for the purpose of securing the effectiveness of the hearing and determination of the application for review.

[emphasis in the original]

# Submissions of the Applicant

1. The Applicant set out in detail its arguments in support of the application in both a statement of grounds and detailed submissions in support of those grounds. Those submissions were supported by one of the other parties, the AED Legal Centre.
2. In summary those grounds are:
3. that the Commission exceeded its power in making the decision it did as it argued that it has no power to entertain or determine applications for “interim temporary exemptions”;
4. that the decision results in a contravention of a modern award being the Supported Employment Services Award 2010;
5. that the decision is not correct in law as it operates contrary to the obligation of the President of the Commission, in accordance with section 46PW(3) of the *Australian Human Rights Commission* *Act 1986* (Cth), to refer complaints of alleged discriminatory acts under an industrial instrument to the Fair Work Commission to be dealt with.
6. It was also argued that the Commission had denied the Applicant procedural fairness as it had not provided the Applicant with any opportunity to be heard prior to the decision being made, that it demonstrated bias, and that the decision was not based on logically probative evidence.
7. It was further argued that the decision was prima facie not preferable in that it was not in accordance with the objects of the *Disability Discrimination Act*. In addition, it was argued that it was not preferable in that the Commission had basically followed an inappropriate procedure and inappropriate tests in coming to that decision and in failing to give sufficient consideration to a number of factors.

# consideration

1. When I turn to consider the application for an order staying the decision under review, it is to be noted that the Tribunal has adopted a broad approach in interpreting the provisions of section 41 and, in particular, in exercising the power given to it by section 41(2). This broad approach was confirmed by the Full Federal Court in *Australian Securities and Investments Commission and PTLZ* (2008) 48 AAR 559.
2. Whilst it is clear that a broad approach is to be adopted and is appropriate, it is also to be noted that the section 41(2) makes particular reference to the Tribunal considering what is appropriate:

... for the purpose of securing the effectiveness of the hearing and determination of the application for review.

1. In many decisions exercising this power, the Tribunal generally has considered the merits of the application, any prejudice to the parties and/or others, the public interest in the grant of or refusal to grant a stay, the question of whether or not the review application will be rendered nugatory if a stay is not granted and also whether it is appropriate to preserve the status quo.
2. The Applicant has strongly argued that the application prima facie has merit. I accept that there are arguments which need to be considered as to why there should not have been a further exemption of four months.
3. This includes arguments put on behalf of the AED Legal Centre that the Commonwealth appears to have not exercised control of Australian Disability Enterprises and that it should have been aware from the quarterly reports that action was required to ensure that the enterprises complied with the timetable set by the Commission in April 2014. Further, it was put that there is a lack of evidence as to the claimed financial effects on the enterprises.
4. However, these arguments are for resolution by the Tribunal on the basis of the material before it at the time of the final hearing. It is not a matter for me to decide at this stage on what is clearly not all of the material that the parties wish to put before the Tribunal. Other arguments that have been put as to procedural issues, such as the lateness of the application for a further exemption and the lack of consultation, go to the procedures adopted by the Commission.
5. As I pointed out during the hearing of this application, it is important to remember that the Tribunal stands in the shoes of the original decision maker and makes a fresh decision. Many of the alleged shortcomings in the procedures which gave rise to the reviewable decision may not be relevant to the making of a fresh decision by the Tribunal.
6. A further argument was advanced that it was beyond the power of the Commission to make “an interim exemption”. There is reference to such an interim procedure in the reviewable decision where the Commission said:[[7]](#footnote-7)

The Commission considers that the grant of an interim exemption is necessary to maintain the status quo and provide certainty of obligations for the applicants and employees pending the Commission's decision with respect to the Primary Application.

1. In my view, a fair reading of the decision under review makes it perfectly clear that the power that was exercised was the power given by section 55 to grant a further exemption.
2. An argument was very strongly put that there is a need, as is clearly the case, to balance the interests of the supported employees and those of the various enterprises. It was put that the employees have been subject to discrimination and that the effect of the decision under review is to extend the period in which that discrimination continues.
3. It was put that there has been an expectation that the discrimination would end at the expiration of the 12 month exemption; that is on 29 April 2015. However, that expectation must always have been qualified by the knowledge that the provisions of the Act do allow for a further exemption.
4. I have considered the status quo. It was argued on behalf of the Applicant that the normal situation or the status quo is that the employees are entitled not to be subject to discrimination. Nevertheless, when I consider the status quo at the time the decision was made, I am satisfied that the status quo is that the Australian Disability Enterprises were subject to an exemption.
5. To decide otherwise in my view would create a great deal of uncertainty for all concerned. If I was to grant the stay requested there would be the prospect that the enterprises were exempt until 29 April 2015. There may have been a very short period in which they were not exempt until the decision under review was made on 30 April 2015. They then would remain exempt until my decision today, if I was to grant the stay, and they would then not be exempt from the time the stay came into effect.
6. That may change at any time, depending on the Commissioner's decision on the application for a further exemption. It may also change at the time of the final decision of the Tribunal which I propose to be dealt with as quickly as possible. In my view, the uncertainties for both the employees and for Australian Disability Enterprises that such a situation would create should not be entertained.
7. I also take into account that, if I was to decide today to grant a stay, it would in effect render a final decision of the Tribunal of very little, if any, effect. Allowing for reasonable time for the parties to prepare for a final hearing, it is virtually impossible that the hearing could be held before July. Allowing for time for the decision to be considered and published, it would only be a matter of weeks before the decision under review would cease to have effect in any event; that is, at the end of August 2015.
8. Of course in the meantime, the Commission may have made its decision which may bring to an end the present exemption in any event. I have therefore concluded that it is not in the best interests of the parties, of the employees, or of the enterprises that the stay be granted. I have also taken into account that there is a public interest in certainty of public administration and the scenario that I have outlined would certainly not give that certainty.

# interlocutory decision

1. The application, lodged on 5 May 2015, for a stay of the decision under review is refused.

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| I certify that the preceding 41 (forty -one) paragraphs are a true copy of the edited oral reasons for the decision herein of Deputy President J W Constance |

..........................**[sgd]**..............................................

Dated

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| Date(s) of hearing | **4 June 2015** |
| Date final submissions received | **4 June 2015** |
| Applicant | **P French** |
| Respondent | **M Lindley** |
| Solicitors for the Secretary | **H Dejean; Australian Government Solicitor** |
| AED Legal Centre | **K Wilson** |
| National Disability Services | **K Langford** |

1. Submissions filed on behalf of the Secretary, Department of Human Services (3 June 2015), paragraph 1. [↑](#footnote-ref-1)
2. Paragraph 37. [↑](#footnote-ref-2)
3. Paragraph 38. [↑](#footnote-ref-3)
4. Paragraph 1. [↑](#footnote-ref-4)
5. Paragraph 7. [↑](#footnote-ref-5)
6. Paragraphs 4-6. [↑](#footnote-ref-6)
7. Paragraph 14. [↑](#footnote-ref-7)