

FEDERAL COURT OF AUSTRALIA

Community and Public Sector Union, NSW Branch v Northcott Supported Living Limited [2021] FCA 8

File number: NSD 2155 of 2019

Judgment of: **KATZMANN J**

Date of judgment: 20 January 2021

Catchwords: **INDUSTRIAL LAW** — where employees formerly employed by one company as “team leaders” now employed by another, related, company, as “service coordinators”, whether a “transfer of business” occurred within s 311 of *Fair Work Act 2009* (Cth) — whether work performed for new employer is “the same or substantially the same as the work the employee[s] performed” for the old employer”

Legislation: *Fair Work Act 2009* (Cth), Pt 2-8, 6-3A, ss 14(1), 15AA, 311(1), 768BY
Fair Work Amendment (Transfer of Business) Act 2012 (Cth)
Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)
Federal Court of Australia Act 1976 (Cth), s 21
Workplace Relations Legislation Amendment (Independent Contractors) Act 2006 (Cth)

Fair Work Bill 2008 (Cth), Explanatory Memorandum

Cases cited: *AE Terry’s Motors Ltd v Rinder* [1948] SASR 167
CIC Insurance Limited v Bankstown Football Club Limited (1997) 187 CLR 384
Cresswell & Ors v Board of Inland Revenue [1984] 2 All ER 713
Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd (2015) 228 FCR 346
Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers Union (AMU) [2020] HCA 29; 94 ALJR 818; 381 ALR 601; 297 IR 338
O’Neill v Merseyside Plumbing Co Ltd [1973] ICR 96
Project Blue Sky Inc. v Australian Broadcasting Authority

(1998) 194 CLR 355

Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees Union (1979) 42 FLR 331

Division: Fair Work Division

Registry: New South Wales

National Practice Area: Employment and Industrial Relations

Number of paragraphs: 186

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Date of hearing: 9 September 2020

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Solicitor for the Applicant: Community and Public Sector Union - NSW Branch

Counsel for the Respondents: J Darams

Solicitor for the Respondents: Ashurst Australia

ORDERS

NSD 2155 of 2019

BETWEEN: **CPSU THE COMMUNITY AND PUBLIC SECTOR UNION**
SPSF GROUP NSW BRANCH (ABN 11 681 811 732)
Applicant

AND: **NORTHCOTT SUPPORTED LIVING LIMITED T/AS**
NORTHCOTT DISABILITY SERVICES (ABN 65 619 339 098)
First Respondent

THE NORTHCOTT SOCIETY (ABN 87 302 064 152)
Second Respondent

ORDER MADE BY: KATZMANN J

DATE OF ORDER: 20 JANUARY 2021

THE COURT DECLARES THAT:

1. The copied State awards derived from the:
 - a. *Crown Employees Ageing, Disability and Home Care – NSW Department of Family and Community Services (Community Living Award) 2015;*
 - b. *Crown Employees (Public Service Conditions of Employment) Reviewed Award 2009;* and
 - c. *Crown Employees (Public Sector – Salaries) Award 2017*cover the second respondent and employees performing work for the second respondent in the position of service coordinator where those employees were formerly employed by the first respondent in the position of team leader.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

KATZMANN J:

Introduction

1 The dispute in this case arises out of the transfer of disability and allied health services from public to private hands in the transition to the National Disability Insurance Scheme (**NDIS**). It concerns the work of a cohort of employees who formerly worked for the **State** of New South Wales in the Department of Families and Community Services (**FACS**) and then for Northcott Supported Living Limited t/as Northcott Disability Services (**NSL**) and who, when faced with the choice of redundancy or accepting employment with a related company providing disability services — The **Northcott** Society — chose to accept employment with Northcott. Northcott pays each of these employees a salary based on rates fixed by an enterprise agreement. Those salaries are significantly lower than the salaries the employees were paid under the awards that applied to them while they were employed in FACS and at NSL.

2 The dispute is whether a transfer of business for the purposes of Pt 2-8 of the *Fair Work Act* 2009 (Cth) (**FW Act**) occurred when employees performing work for NSL as “team leaders” took up employment with Northcott. If so, they continue to be entitled to the same terms and conditions of employment. The resolution of the dispute depends on whether the work they perform with Northcott is the same, or substantially the same, as the work they performed for NSL.

The legislative scheme

3 Before going any further, it is necessary to refer in more detail to the legislative context in which the dispute arose.

4 Part 6-3A of the FW Act, which was inserted into by the *Fair Work Amendment (Transfer of Business) Act* 2012 (Cth), provides for the transfer of certain terms and conditions of employment where there is a transfer of business from a State public sector employer to a “national system employer”.

5 A “national system employer” is defined in s 14(1) of the FW Act to include “a constitutional corporation, so far as it employs, or usually employs, an individual”. A “constitutional corporation” is a corporation to which s 51(xx) of the Constitution applies. In other words it is a foreign corporation or an Australian trading or financial corporation.

- 6 The mechanism by which the transfer is achieved is through the creation of a novel industrial instrument called a “copied State instrument”, which may be either a copied State award or a copied State employment agreement (s 768AH). If, immediately before the termination by the old State employer of the employment of a transferring employee, a State award (**the original State award**) was in operation which covered the old State employer and the transferring employee, a copied State award is taken to come into operation immediately thereafter and the terms of the original State award are taken to be included in it (s 768AI).
- 7 A copied State instrument applies to the transferring employee in the circumstances described in s 768AM and, by s 768AN, covers that employee and the new employer in relation to the transferring work immediately upon the transferring employee’s employment by the new employer.
- 8 A copied State instrument operates from the time the State terminates the employee’s employment until the end of the default period, which is five years or such longer period as is prescribed by the regulations unless the regulations allow the Fair Work Commission to make an order extending the period (s 768AO).
- 9 Part 2-8 provides for the transfer of enterprise agreements and other industrial instruments if there is a transfer of business from one national system employer to another national system employer.
- 10 The object of Pt 2-8 is to provide, in the event of such a transfer, a balance between the protection of employees’ terms and conditions of employment under enterprise agreements and other industrial instruments and the interests of employers in running their enterprises efficiently (s 309).
- 11 The circumstances in which a transfer of business may occur are described in s 311 in this way:
- (1) There is a **transfer of business** from an employer (the **old employer**) to another employer (the **new employer**) if the following requirements are satisfied:
 - (a) the employment of an employee of the old employer has terminated;
 - (b) within 3 months after the termination, the employee becomes employed by the new employer;
 - (c) the work (the **transferring work**) the employee performs for the new employer is the same, or substantially the same, as the work the employee performed for the old employer;
 - (d) there is a connection between the old employer and the new employer as described in any of subsections (3) to (6).

12 An employee in relation to whom the requirements in paragraphs 311 (1)(a), (b) and (c) are
satisfied is a “*transferring employee*” in relation to the transfer of the business: s 311(2).

13 There was no dispute that paragraphs 311(1) (a) and (b) are satisfied in the present case.

14 Relevantly, s 311(6) provides that there is a connection between the old employer and the new
employer if the new employer is an associated entity of the old employer when the transferring
employee becomes employed by the new employer.

15 Section 313 provides that, subject to an order of the Fair Work Commission under s 318, if a
“transferable instrument” covered the old employer and a transferring employee immediately
before the termination of the employee’s employment with the old employer then, to the
exclusion of any enterprise agreement and modern award, it covers the new employer and the
transferring employee in relation to the transferring work from the time the transferring
employee becomes employed by the new employer. “Transferable instrument” is defined in
s 312. The definition does not include a copied State award. It was uncontroversial, however,
that Pt 2-8 operates with respect to copied State awards.

16 The CPSU’s submissions in this respect were not contradicted. Section 768BY of the FW Act
provides that certain provisions of the *Fair Work (Transitional Provisions and Consequential
Amendments) Act 2009* (Cth) (**FW (TPCA) Act**) apply to copied State instruments.
Relevantly, item 15 of s 768BY(2) provides that Division 4 of Part 3 of Schedule 11 of the
FW (TPCA) Act applies to copied State instruments. The effect of the terms of that Division,
particularly ss 15 and 16, is that the provisions of Pt 2-8 of the FW Act have the same operation
with respect to copied State instruments including copied State awards.

The undisputed facts

17 The following facts are agreed and I make findings accordingly.

18 The NDIS was established through the *National Disability Insurance Scheme Act 2013* (Cth).
As part of the transition to the NDIS, the States agreed to transition out of the provision of
direct disability support services and transfer these services to the private sector.

Transfer of employees from the State to NSL

19 On 2 November 2017, by order made by the Minister under the *National Disability Insurance
Scheme (NSW Enabling) Act 2013* (NSW), in excess of 100 accommodation services (including

the operation of group homes) and the employment of more than 1200 staff were transferred from NSL. NSL was a new entity created for the purpose of effecting the transfer.

20 The State selected Northcott as one of four successful tenderers to which its disability and allied health services would be transferred as part of the transition to the NDIS. The State then transferred ownership of NSL to Northcott.

21 Each of NSL and Northcott is a “national system employer” within the meaning of that expression in the FW Act.

22 The terms of the transfer of employees from the State to NSL were that:

- (1) those transferring employees who were permanent employees would be guaranteed employment for a two-year period (expiring on 4 November 2019);
- (2) the transferring employees would receive a transfer payment from the State of up to eight weeks’ pay;
- (3) during the two-year period the transferring employees would continue to be employed under the same terms and conditions of employment; and
- (4) during that time neither NSL nor Northcott would be permitted to make a new enterprise agreement covering the employees.

23 Immediately before the transfer, the transferring employees appointed as “team leaders” had been covered by a number of industrial awards made by the Industrial Relations Commission of NSW (**State awards**), including:

- (1) the *Crown Employees Ageing, Disability and Home Care - NSW Department of Family and Community Services (Community Living Award) 2015* (**Community Living Award**);
- (2) the *Crown Employees (Public Service Conditions of Employment) Reviewed Award 2009* (**Conditions Award**); and
- (3) the *Crown Employees (Public Sector – Salaries) Award 2017* (**Salaries Award**).

24 The latter two awards set basic terms and conditions. The first contained additional matters.

25 The copied State awards containing the same terms as the State awards are taken to have come into effect from 26 November 2017 and covered and applied to NSL with respect to transferring employees performing work in the positions of team leader.

26 Before the transfer of employees to NSL, the reporting structure utilised by the State included the positions of Manager Accommodation and Respite (**MAR**), Service Support Analyst, Coordinator Accommodation and Respite (**CAR**), Team Leader, Disability Support Worker (**DSW**), and Respite Client Liaison Officer. DSWs reported to a team leader, team leaders reported to a CAR and CARs reported to a MAR. The same reporting structure was maintained by NSL after the transfer.

Transition to NSL’s service model and associated restructure

27 On 15 July 2019 Northcott released the “Northcott Supported Living (NSL) Restructure Proposal”. This was a proposal to restructure NSL’s accommodation and respite operations. It involved:

- (1) dissolving NSL and transferring the employment of its staff to Northcott;
- (2) offering DSWs (the majority of the employees of NSL) employment with Northcott on the same terms and conditions on which they were employed with NSL, including the continuation of the relevant copied State awards;
- (3) making the position of team leader redundant;
- (4) offering employees who were employed as team leaders the choice of accepting employment as service coordinators with Northcott under the *Northcott Enterprise Agreement 2016-2018* or taking voluntary redundancies;
- (5) offering employees in the positions of CARs employment with Northcott as “service managers” on the same terms and conditions on which they were employed with NSL, including the continuation of the relevant copied State awards; and
- (6) declaring excess to requirements the positions of the four employees employed as MARs and offering them either redundancies or redeployment to other positions with Northcott.

28 On 31 July 2019 Northcott entered into consultations with the CPSU about the proposed restructure. During the consultations the CPSU expressed the view that the role and position description of team leader under the then current structure was substantially the same as the service coordinator position.

29 On 26 August 2019 Northcott wrote to the CPSU identifying what it considered were the key differences between those roles. The CPSU maintained that the roles were substantially the

same. Northcott was unmoved and on 17 to 18 September 2019 Northcott advised the CPSU and affected employees that it would be proceeding with the restructure.

30 On 23 September 2019 Northcott issued an offer of employment as service coordinator to each of the team leaders at a gross annual salary of \$74,525.00. The letters of offer also advised that:

If you accept this offer, the Copied State Awards that apply to you in your employment with NSL will no longer apply to you. From the date you commence employment with Northcott, the Northcott Enterprise Agreement 2016-2018 (Agreement) will apply to you. The Agreement sets out the terms and conditions of your employment in the Service Coordinator role.

31 On 1 October 2019 the CPSU notified the respondents that the parties were in dispute under cl 21 of the copied State award derived from the Community Living Award and sought an undertaking from the respondents that the restructure would not be implemented until the dispute had been resolved. The respondents agreed not to implement any changes until the parties had had an opportunity to discuss the matter. Discussions took place on 10 October 2019 but the parties failed to reach an agreement. The next day the respondents advised that they would be going ahead with the restructure as planned, with a view to implementing it by 14 November 2019.

32 On 16 October 2019 the CPSU filed an application with the Fair Work Commission to have it deal with the dispute in accordance with cl 21. On 29 October 2019, after an unsuccessful conciliation, the CPSU informed the Commission that it would seek no further assistance and, on 15 November 2019, the respondents informed the CPSU that it would proceed to implement the proposed restructure.

33 On 26 November 2019 Northcott reissued letters of offer to team leaders for the positions of service coordinators. The offers of employment were made at a gross annual salary of \$80,000.00 together with compulsory statutory superannuation contributions. These offers also included:

- salary maintenance at the higher pre-transfer rate for a period of between 4 and 16 weeks based on an employee's continuous service, payable as a lump sum;
- a lump sum payment to reflect the loss in value of annual leave upon transfer of employment to Northcott;
- a lump sum payment in lieu of any accrued extra leave or public holiday leave; and

- in respect of any accrued long service leave at the date of the transfer, provision for employees accessing the leave post-transfer to receive payment at their ordinary salary at the time they take the long service leave or the higher pre-transfer salary where applicable.

34 The annual salary for the position of team leader is between \$98,578.71 and \$100,556.24 for a “Team Leader One Unit” and between \$101,525.27 and \$103,541.16 for a “Team Leader Two Unit”.

35 The annual salary for the position of service coordinator under the Northcott Enterprise Agreement is significantly lower. The range is from \$75,717.53 to \$81,064, but no service coordinator is currently paid at the top of the range.

36 From late November 2019, 56 former team leaders accepted service coordinator positions with Northcott. The remaining 22 chose to accept voluntary redundancies.

Transfer of employees from NSL to Northcott

37 The restructure took effect on 23 January 2020 and those team leaders who had accepted offers of employment as service coordinators (**the transferring team leaders**) began working for Northcott.

The proceeding

38 By its originating application filed on 20 December 2019, the CPSU seeks a declaration that the copied State awards derived from the Community Living Award, the Conditions Award, and the Salaries Award cover Northcott and those employees performing work for it in the position of service coordinator who were formerly employed by NSL in the position of team leader.

39 Additional relief sought in the originating application was abandoned at the hearing.

The issues

40 The parties agreed that the following issues arose for determination:

- (1) whether the copied State awards cover Northcott and its employees performing work as service coordinators by reason of the operation of Part 2-8;

- (2) whether a “transfer of business” has occurred for the purposes of s 311 in the circumstances where team leaders employed by NSL accepted employment with Northcott in the positions of service coordinators, in particular:
- (i) what work the transferring team leaders were performing for NSL immediately before they accepted employment with Northcott (**team leader work**);
 - (ii) what work the transferring team leaders are performing for Northcott as service coordinators (**service coordinator work**); and
 - (iii) whether, for the purposes of s 311(1)(c), the service coordinator work is the same, or substantially the same, as the team leader work.

41 In truth, however, the dispute turns on the single issue of whether the work the transferring employees have been performing and are required to perform as service coordinators is the same, or substantially the same, as the work they performed as team leaders for NSL. If the answer to this question is “yes”, then there was no dispute that the copied State awards cover and apply to Northcott and the relevant transferring employees, and there was a transfer of business for the purposes of s 311.

The evidence

42 The CPSU read affidavits from four former team leaders, now service coordinators: Carlos Alvarado, Tony Buhajiar, Eilise Kennedy, and Margretha Stronkhorst. They also read an affidavit from Graydon Welsh, an industrial officer with the CPSU.

43 Each of the former team leaders accepted Northcott’s second offer of employment without prejudice to his or her right to maintain that the work of a service coordinator is “transferring work” and that the copied State awards continued to apply. Accordingly, each commenced employment with Northcott as a service coordinator on 23 January 2020.

44 Mr Alvarado worked as a team leader in a group home at Bowral from early 2014 and from November 2018 as a team leader in a group home at Mount Annan. He was formerly employed as a DSW.

45 Tony Buhajiar was employed by the State in FACS from 2001 until November 2017 when the transfer to NSL took place. He was first employed as a DSW. In 2010 he became a team leader at a group home in Guildford. In 2014 he became team leader at a group home in Baulkham Hills, where he continues to work as a service coordinator.

46 Ms Kennedy started working for the State in 1987 as a Senior Youth Worker in the Department of Youth and Community Services (later FACS). She became a team leader in 2010, working at a group home in western Sydney where she has remained.

47 Ms Stronkhorst began working for the State in 2003 as a casual DSW in a group home in Emu Plains. From August 2007 to October 2010 she acted in numerous positions in FACS. In October 2010 she was promoted to the position of team leader at a group home in The Ponds and moved to a group home in Baulkham Hills in 2015 where she has remained.

48 Northcott read three affidavits from Aleta Carpenter, its current General Manager of Supported Living; Lisa Grosas, a service coordinator with Northcott, who had formerly worked for a number of years in an acting capacity as a team leader with FACS and NSL; and Ryan Neupane, a service manager for Northcott and former CAR, who had also acted in the role of team leader.

49 Ms Carpenter commenced employment with Northcott in July 2013, about the time that the transition to the NDIS began, and worked at various times in different capacities for both Northcott and NSL. She was responsible for, and had oversight of, the restructure.

50 Ms Grosas was employed by the State in FACS as a DSW from 2006 until moving to Northcott in July 2018. From 2010 until 2014 she acted in the position of team leader on multiple occasions and continuously thereafter until she left the employ of the State. She has been a service coordinator since she started with Northcott.

51 Like Ms Grosas, Mr Neupane had formerly worked for FACS as a DSW before acting in the position of team leader. He started working for FACS in early 2013 on a casual basis and was made permanent in November 2014. He acted in the position of team leader from around early 2015 until mid to late 2016 when he acted as a CAR before being appointed as a permanent CAR in late 2016. He was transferred to NSL and in January 2020 accepted an offer of a position as a service manager for Northcott.

52 All deponents with the exception of Mr Welsh were required for cross-examination. Ultimately, however, there was little if any dispute about the facts, only the conclusions that should be drawn from them.

53 The effect of the CPSU's evidence was that there was little, or no significant, difference between the work of team leader and service coordinator. Northcott's evidence emphasised the differences.

54 The evidence establishes that the work in question, whether as team leader or service coordinator, involved providing services to the disabled in homes in which people with a range of disabilities lived and where they were provided with a range of support. That included management of the day-to-day operation of the homes, leading and supervising direct care workers and also providing support for the residents with daily living, including personal care, administering medication, shopping, cooking, cleaning, managing meals, and the like. It also included accompanying the residents to medical and related appointments and taking them to activities or community outings.

The respective work

The position descriptions

55 It is convenient to begin with the position descriptions for the respective roles.

56 Three iterations of the team leader position description found their way into evidence.

57 The earliest in time was annexed to Ms Carpenter's affidavit. It was approved on 19 May 2010 and was described as the position description for team leader employed by the State (**2010 position description**).

58 The primary purpose of this position was to “manage one or two supported accommodation and respite unit(s) or in home support services to ensure high quality service delivery is provided to persons with a disability in accordance with agency policies and procedures, legislation and allocated resources”. It recorded that DSWs reported to the team leader who, in turn, reported to the CAR. The “work performed” was described as follows (italic script as in original):

The Team Leader provides direction and leadership to Disability Support Workers in the delivery of supported accommodation and respite services to persons with a disability. Units may include in-home support or other innovative supported accommodation models.

The Team Leader will be responsible for managing the day to day operation of the unit(s) and providing direct support and supervision for Disability Support Workers. This will include a mixture of operational management, administration and supervision for the unit(s) as outlined in the Matrix of Duties (available on the [Ageing, Disability and Home Care] Intranet) **as well as direct care support for persons with a disability**. *Note: When directly supporting persons with a disability, the Disability Support Worker position description applies).*

ADHC makes every attempt to ensure that the physical demands of the work are minimised by the use of safe design, manual handling equipment and safe work procedures. However, the position can be physically demanding and may involve long periods of standing/walking. The position also requires an adequate level of physical

capacity and an ability to respond to emergency situations.

The Team Leader is directly accountable to the Coordinator, Accommodation and Respite and:

- Manages the day to day operations of one or two supported accommodation or respite unit(s).
- Supervises, supports and develops team members to provide services at best practice standard.
- Provides direct support for persons with a disability.
- Manages team rostering, establishment, leave and payroll requirements.
- Participates in the preparation, implementation and monitoring of unit budgets.
- Controls occupational health and safety risks for staff, residents and visitors at the units(s) for which they are responsible.
- Undertakes administrative responsibilities associated with the role, including those associated with quality improvement and monitoring.

(Emphasis added.)

59 The document also described the liaison required, both internally and externally, under the heading “Communication”:

Internally, the Team Leader:

- Interacts with the Coordinator, Accommodation and Respite on a daily basis to discuss resident, service delivery or staff issues and to receive supervision and support.
- Interacts with staff on a daily basis on resident, service delivery, team, administration issues or to provide advice, supervision or support.
- Interacts with District support on a need basis to discuss service delivery and/or best practice.
- Interacts with the Roster Support Unit on an as need basis to discuss team rostering, establishment, leave and payroll requirements.
- Meets with the local management group regularly to discuss local issues; and
- Liaises with the District WH & S Committee to seek advice on WH & S changes to practice and environment.

Externally, the Team Leader:

- Liaises closely with families, residents, guardians, advocates to discuss resident issues; and
- Liaises with other government agencies, health professionals and recreational organisations on an as-needs basis to address specific resident issues or needs.

60 Major challenges faced in the position were described as:

- Ensuring that services are provided to the required quality standards and optimal outcomes are achieved for the persons with a disability, given the diversity of clients and their individual needs and differing skills of the team.
- Building team cohesiveness, given the transient nature of the workforce, rotating shifts and isolation.
- Balancing the provision of management and administration (and direct support or respite client liaison support, if applicable), given competing priorities, with the support of the Co-ordinator Accommodation and Respite and other administrative support functions.
- Maintaining quality records given the turnover of staff, training and their understanding of the importance of record keeping; and
- Influencing the development of a service culture that promotes the development of personal growth for persons with a disability.

61 Under the heading “decision-making”, the position description stated:

The position makes decisions independently regarding the utilisation, management and evaluation of resources within the unit(s) in those areas for which the position is responsible. These decisions include rostering, team management, allocation of overtime and leave, OH & S reporting and actions. Other decisions made independently include: parent negotiation regarding residents/siblings, urgent behaviour management, disposal of residents’ goods/resources and residence equipment. All decisions must be in line with agency policy and guidelines and the relevant legislation.

Decisions relating to resident expenditure, major repairs or purchases above delegation, team management or resident management issues are referred to the *Manager, Accommodation and Respite or District Manager, Accommodation and Respite*.

(Original emphasis.)

62 A role description for the team leader position was approved by FACS in August 2014. A further position description issued in November 2017 (**2017 position description**) replicated in all relevant respects the contents of the 2014 role description.

63 The “primary purpose” of the team leader’s role was described in the 2017 position description in following way:

Leads a team of disability support workers and manage the operations of supported accommodation and respite unit in home support services to ensure delivery of quality person centred services.

64 In contrast to the 2010 position description there was no section entitled “work performed”. In contrast to the Northcott position description for service coordinator, no list of duties was included, nor was a “key objective” identified. Rather, the position description for team leader included “key accountabilities” and “key challenges”, identified “key relationships”, and

described the “role dimensions”. While there was no list of duties, however, and no section directly corresponding to the “work performed” section of the State’s team leader position description, the evidence did not indicate that the work performed as team leader with the State was materially different from the description of the work performed in the State’s position description.

65 The “key accountabilities” were listed as follows:

- Provide leadership, support and supervision to a team of disability support workers, models best practice and facilitates an open and fair team environment.
- Manage the team roster to deliver efficient person centred services in line with the allocated budget.
- Exercise delegations and liaise with the rostering team in relation to the administration of leave and penalty payments.
- Provide individual support services and direct care for people with disability.
- Liaise with parents, advocates and guardians to foster open communication and encourage involvement in the lives of people with disability.
- Manage the day to day operations of the unit including budget monitoring, service payments and compliance with legislative requirements.
- Monitor and address workplace health and safety risks for residents, staff and visitors at the unit to maintain a safe work environment for all.

66 The “key challenges” were to:

- Ensure quality person centred services are delivered to customers with diverse needs from a team of Disability Support Workers with differing skills and abilities
- Build team cohesiveness across a workforce with some transience and 24 hour rotating shifts.
- Balance the competing priorities in the provision of direct care, staff leadership and administration

67 “Key relationships” were described in this way:

Disability Support Workers

- Discuss resident, service delivery, team and administrative issues
- Provide advice, supervision and support

HR and Rostering Team

- Discuss team rostering, establishment, leave and payroll requirements

Operations Managers

- Discuss service delivery and/or best practice

Families, carers, guardians and advocates

- Inform and discuss resident related issues

Other government agencies, allied health professionals and recreational organisations

- Discuss and address specific resident issues or needs.

68 The “role dimensions” were:

- Makes decisions regarding the utilisation and evaluation of resources within the unit(s) including rostering, team management, allocation of overtime and leave.
- Negotiates with parents/families regarding resident needs, urgent behaviour management, disposal of residents’ goods/resources and residence equipment
- Reports and addresses relevant workplace health and safety issues.

This list is indicative only and is subject to change. All employees are required to comply with any reasonable work requests as directed by their employer from time to time.

(Original emphasis.)

69 None of the position descriptions mandated any number of hours of direct care on the roster. But team leaders were rostered to perform a certain number of hours of direct care and a number of hours of administrative tasks, generally speaking in a ratio of 60/40. They worked alongside DSWs and also provided leadership and supervision of, and support to, those workers.

70 Ms Carpenter explained in her affidavit that there are many elements to direct care and responsibilities vary according to the needs of the residents or clients (now called customers). She offered the following examples: showering and dressing a customer; taking the customer to a doctor; cooking for customers; administering medicines; and cleaning the house.

71 Ms Carpenter deposed that the administrative work team leaders were required to do included preparing operational rosters; supervising DSWs; conducting bi-monthly team meetings; staff inductions; communicating with families, carers and guardians; and recording incidents for escalation to a CAR.

72 Ms Carpenter described the team leader position as “in many ways, a hybrid”, combining direct support work when rostered and “work associated with the administrative aspects of the role” when not.

73 The position description for service coordinator was also annexed to Mr Welsh’s affidavit and a copy was enclosed with each offer of employment made to the transferring team leaders.

74 “The key objective of the position” was:

- To be responsible for all operational functions of the program/s and/or customer allocation including but not limited to:
 - Person Centered support to customers, their guardians, and where appropriate family members
 - Support with the activities of daily living
 - Safe and welcoming environment for customers, staff and visitors
 - Development and implementation of staff work schedules/rosters
 - Financial management of the service
 - Sustainable staff support that meets customers' needs and service's expectations
- Provide Practice leadership to staff including:
 - Conducting team meetings
 - One to one supervision
 - Allocating and organising staff
 - Modelling and coaching
 - Quality of life outcomes
- To ensure that the operation of the housing and supported independent living program is consistent with the principles and applications of the NDIS Quality and Safeguarding Framework
- To work with the relevant Managers and Service Manager to develop and implement systems, policies and procedures that comply with legal and funding requirements, manage risk and continuously improve service and to ensure consistency in support and processes across Supported Living
- Actively engage in self reflection

75 The duties were described as follows:

The typical duties of this position include:

1. Develop a detailed understanding about each customer's individual support needs and goals as documented on their NDIS plan
2. Facilitate increased customer input into the daily operation of the service
3. Work with the Service Manager to manage vacancies and customer transition
4. Provide direct support to customers as needed
5. Participate in the recruitment, induction, and supervision of Support Workers, vacancies in accordance with Northcott's policy and procedures
6. Be aware of, value and respect the cultural, religious and linguistic background of each customer and staff member
7. Provide effective supervision and mentoring of staff

8. Participate in 'on call' as per roster
9. Work with the Service Manager to continue the development of service specific systems, processes and procedures and actively participate in on-going review of these documents
10. Liaise with local services and support customers to engage with appropriate day program, health, community and social services
11. Work closely with NDIA and other stakeholders as identified
12. Work within the framework of the NDIS Quality and Safeguards Framework, Privacy Legislation, and other relevant legislation
13. Provide input into the budget planning process and ongoing monitoring of income and expenditure
14. Ensure compliance with all legislative and regulatory standards and requirements within the facility
15. Comply with, report on and actively participate in Northcott's Safety & Injury Management Procedures and Northcott's Work Health and Safety Procedures
16. Complete Monthly Report and participate in ongoing support and supervision meetings
17. Participate in relevant team meetings and personal development/mentor support meetings
18. Provide information, resources and train staff in Northcott's policies and procedures
19. Manage rosters and timesheets for all staff and ensure staff hours are in line with approved budget
20. Assist in maintaining the premises, vehicles and equipment and discuss any issues with the relevant housing provider and facilities manager
21. Ensure customer files are consistently maintained in accordance with procedure
22. Carry out administrative duties as required

This list is indicative only and is subject to change. All Northcott employees are required to comply with any reasonable work requests as directed by their employer from time to time.

(Original emphasis.)

76 Service coordinators report to service managers, a role Northcott accepted was substantially the same as the CAR position.

Northcott's case

77 The NSL Restructure Implementation Document stated that the relevant copied Award would not follow team leaders across to Northcott if they were to accept the new position because the

proposed position was not substantially similar to their current role “including” for the following reasons:

- Not rostered to work direct care shifts/duties, which currently accounts for 60% of time worked. Northcott will backfill current frontline hours with Support Workers.
- There is a higher level of accountability/responsibility in relation to management of service and staff.
- There is no longer a requirement to work a 7 day roster, but rather only work Monday to Friday.

78 Attached to Northcott’s letter to the CPSU of 26 August 2019 was a table listing “the key differences” between the roles of team leaders and service coordinators. A copy of that table is annexed to these reasons.

79 During the course of its consultations with the CPSU, Northcott sent another letter to the CPSU on 10 September 2019 providing a summary of those differences:

In brief, the key differences between the Service Coordinator position and the Team Leader position include the following:

- The proposed operating structure includes changing from a three tiered management structure (MAR, CAR, Team Leader) to two tiers (Service Manager, Service Coordinators). This change results in increased seniority and accountability in the Service Coordinator roles as compared to the current Team Leader roles. There is a shift in focus of the role from an administrative focus to a practice leadership focus.
- The removal of any requirement to provide rostered direct support means that the Service Coordinator will have increased responsibility and additional functions in relation to recruitment and induction of staff, quality and safeguarding support regarding incident reporting, and flexibility to attend training.
- The additional direct support work will be undertaken by Disability Support Workers, reflecting the increased seniority of the Service Coordinator role and reduction in tiers of management.
- Separately to the rostered direct support aspect, Service Coordinators will have increased responsibility and duties relating to rostering, management of casual staff members, liaising with internal and external stakeholders and managing vacancies and transition of customers.

80 It is apparent from the table attached to the August letter that the most significant difference between the two positions was that, in contrast to team leaders, who were rostered to work 91 hours a month (an average of 4.5 hours a day, assuming a 5-day week) providing direct support to clients, service coordinators were not to be *rostered* for any direct support. It was envisaged that this would provide greater flexibility or versatility, freeing up the service coordinator to

take on additional managerial tasks which the constraints of working on a roster inhibited or precluded.

The work actually performed

The evidence of the transferring team leaders

81 The evidence of transferring team leaders called by the CPSU, however, was to the effect that the work they carried out as service coordinators was not markedly different from the work they carried out as team leaders. Cross-examination of all these witnesses was brief. The descriptions of the work they performed were not challenged. Nor was any evidence led from anyone with direct experience of their work which would call it into question.

82 The Mt Annan group home in which *Mr Alvarado* has worked for over four years is a high medical needs home. There are five “clients” all of whom have severe intellectual disabilities and multiple diagnoses including epilepsy, cerebral palsy, autism spectrum disorder and obsessive compulsive disorder. Four of the clients are non-verbal and the other is partially verbal.

83 Mr Alvarado deposed that for the last six years his working day has been “more or less the same”. He said that as a service coordinator his work is divided between providing support to customers, managing staff and regular stakeholders, and undertaking administrative work — just as it was when he was a team leader. He said that, while the administrative work varied from day to day, both as service coordinator and team leader, his duties generally included checking emails, creating and implementing care plans for clients, managing the house budget, credit card and petty cash and the like, liaising with key external and internal stakeholders including families, support coordinators, occupational therapists, physiotherapists and psychologists, “Behaviour Support” and “Head Office”. Both as service coordinator and team leader, his duties included creating and managing the operational roster for the group home and sending the roster to “Roster Support”, where it is uploaded onto the Northcott data base known as “Carelink”. He also contributed to the master roster.

84 Mr Alvarado acknowledged that his administrative duties had increased. He attributed this to the requirement to “constantly update and monitor Carelink”, a task which takes an additional one to two hours a day. Contrary to the position description for service coordinator, however, he said that he does not upload the roster onto Carelink and had not heard that he would be doing so.

85 Mr Alvarado's practice was to undertake administrative duties in the morning, then assist staff with the following tasks: preparing lunches for clients in accordance with their care plans, feeding clients, and cleaning up afterwards. He described this work as "active support and practice leadership" necessitating his presence "on the floor", "working face to face" as he did as team leader.

86 Mr Alvarado deposed that, as the team leader for his group home, he "supervised and directed staff in providing care to our clients including for when staff were administering client care plans and medication". He performed those same duties as service coordinator.

87 Annexed to Mr Alvarado's affidavit was a copy of his Outlook calendar from April 2020 which records several hours each working day of "Practice Leadership, Active Support, Role Modeling (*sic*)" (**Practice Leadership**). He explained in oral evidence that this involves "active support, actively supporting workers and also their clients" in the common areas of the house and included preparing breakfast, administering medication, and observing staff prepare breakfast and administer medication. In the first week (which began on 30 March and in which he worked four days) he undertook a total of 18.5 hours of Practice Leadership (6.5+3+4+5), averaging 4.63 hours a day. In the second week, in which he also worked four days as it incorporated Good Friday, 17.5 hours were devoted to Practice Leadership (2.5+3+5+7), an average of 4.38 hours a day. In the third week, which was also a four-day week, a total of 18 hours were devoted to Practice Leadership (5+4+4.5+4.5), an average of 4.5 hours a day. Mr Alvarado was on leave the following week. In the last week, beginning 27 April 2020, he undertook a total of 18.5 hours Practice Leadership (3+4.5+4.5+3+3.5), an average of 3.7 hours a day.

88 In oral evidence Mr Alvarado testified that there were other occasions on which he would have to provide hands-on support, both as a team leader and a support coordinator. He said that in his unit there were two clients with severe epilepsy and if they have a seizure at any point during a shift he would have to provide extra support in the form of administering first aid. Also as both team leader and service coordinator he would attend medical appointments with clients; provide information to, and receive information from, the clinician; and drive the clients to and from the appointments.

89 In his first affidavit Mr Alvarado addressed the role comparison provided by Northcott in its August letter to the CPSU. He observed that the service coordinators have the same level of responsibility for the group home they were hired to manage and both could choose to manage

more than one home. He said that, although “Service Coordinators are not technically rostered on for any direct support”, he provided direct support in “day to day tasks” and, both as team leader and as service coordinator, he provided role modelling and coaching. He added that as a team leader, when new staff started at a group home, he would roster them on to “shadow” him for one morning and one afternoon shift and, if more training was required, he would roster them with him for “more shadowing”. He said that not being rostered for direct support does not change the level of support he provided to clients and staff. He explained:

I was able to organise my schedule based on client needs. Most meetings, training and other appointments are scheduled weeks in advance and a Team Leader could organise the roster so that another permanent staff member could work their shift instead. There are very few “last minute” appointments. Under the previous structure, DSWs rarely worked the exact same shifts every week to month and instead they were hired to work a set number of hours per month. Therefore, there was a lot of flexibility with staffing to match operational needs. Under the Northcott structure, this flexibility does not exist as DSWs, or their equivalent, work the same shifts every week and therefore scheduling around appointments and meetings can be difficult.

90 Furthermore, Mr Alvarado said that under the previous structure there was much more flexibility in rosters which allowed for participation in recruitment “especially as recruitment panels are usually scheduled four weeks in advance”. He explained that this gave him plenty of time to adjust his roster to accommodate the panels and added that as team leader he actually had more input into the recruitment process than he does now. He said that as service coordinator he does the same induction for new staff as he did as team leader with the “shadow shifts”.

91 Mr Alvarado acknowledged that there were some differences. He noted that casuals now report to him whereas they had formerly reported to a CAR or service manager. And as a service coordinator he has had to prepare reports/appraisals for casuals which has increased his workload. On the other hand, he said that, both team as leader and service coordinator, he was and has been required to supervise and train casual staff.

92 Mr Alvarado deposed that he carried out all the tasks involved in practice leadership when he was a team leader and reiterated that, with the Monday to Friday roster and the set roster for DSWs, service coordinators actually have less, not more, flexibility than they had as team leaders.

93 Mr Alvarado also said that “the dynamic of working with internal and external stakeholders”
between team leaders and service managers has not changed since he became a service
coordinator.

94 Although being on call was an additional responsibility, not required of team leaders,
Mr Alvarado said that he received no additional remuneration for being on call.

95 Finally, Mr Alvarado said that he had no experience in developing or managing client transition
plans either as a service coordinator or team leader as there were no vacancies in the group
homes he managed. But when he worked as a DSW the team leader of his unit would develop
and implement client transition plans with the CAR.

96 There are currently four clients at the Baulkham Hills group home in which *Mr Buhajjar*
continues to work, all with multiple diagnoses including moderate intellectual disability,
epilepsy and ADHD. They are often violent and threaten self-harm and two have behavioural
support plans.

97 Mr Buhajjar described his daily routine as “more or less the same” since he started at the
Baulkham Hills group home as a team leader seven years ago.

98 Mr Buhajjar deposed that he spends most of his day on the floor providing direct support and
assisting staff with client care. As there is usually only one staff member rostered on at a time
and four clients to service, he often has to help out on the floor. He said he sees “client
engagement” as “a key part” of his job. In the morning he assists clients to get ready for their
day programs, helps prepare meals in accordance with meal plans and supervises meal times,
and provides mentoring and demonstrates procedures to staff.

99 He supplied copies of his Outlook calendar entries from the week commencing 27 April 2020
to the week commencing 25 May 2020 recording the breakdown of his working day. They
showed that he performed “Practice Leadership” for a total of 32 hours (an average of 6.4 hours
a day) in the first week, 40 hours in the second week (an average of 8 hours a day) and 36 hours
in the third week (an average of 7.2 hours a day). In the fourth week the calendar shows he
was on annual leave the first two days and engaged in Practice Leadership for a total of 20.5
hours (5+7.5+8) (an average of 6.84 hours a day over a three day week). In the fifth week the
calendar shows him engaged in providing Practice Leadership for a total of 40 hours — eight
hours a day each day. Time spent in “Practice Leadership”, he explained in his evidence,
indicates time spent on the floor with clients, supervising and training other staff.

100 As a team leader, Mr Buhajiar completed the master roster for the group home and, as service coordinator he has continued to do so. Once it is completed, he sends it to his service manager who, in turn, sends it to rostering support to upload to Carelink. Like Mr Alvarado, he has not been advised that uploading the roster to Carelink would be part of his job as a service coordinator.

101 When he was completing the roster as a team leader, he would take into account the staff leave and roster casuals accordingly. As the head of the group home, casuals have always reported to him. Before the onset of the COVID-19 pandemic, he was solely responsible for filing any vacant shifts.

102 Both as a team leader and a service coordinator, Mr Buhajiar deposed that he provided and continues to provide “role modelling, supervision and coaching to staff”. He said “this is difficult as there is usually only one other staff member on shift with me and we are usually both providing direct support to clients”. He said that what Northcott refers to as “Practice Leadership” is “what I feel like I have been doing as part of my job as a Team Leader for the last seven years”. He said he felt that it has always been his “role and responsibility to ensure staff provide the highest levels of support and care to our customers”. He said that that has always been achieved through direct support and supervision of staff by a team leader.

103 As a team leader, Mr Buhajiar completed the induction of all staff coming into his group home and has continued to do so as service coordinator.

104 As he did as team leader, he continues to perform administrative duties in between his time on the floor. He estimated that he spent around 60 to 70% of his time with staff and customers and 30-40% doing administrative work. He said he also works on the roster filling in any last-minute vacant shifts.

105 The only additional responsibility that he has had as service coordinator is that he is now on the “on-call roster”.

106 The home in which *Ms Kennedy* works is a high medical/behavioural needs unit. There are five clients, two of whom are permanently confined to wheelchairs and two of whom use a wheelchair outside the home. Four have behaviour intervention plans and two have a dual mental health diagnosis.

107 *Ms Kennedy* deposed that the administrative tasks she carries out as a service coordinator are “essentially the same” as she carried out as a team leader. They include financial management

including NDIS funding and client financial management, rostering budget allocations, and managing house operating expenses. She also completes the master roster for the house. As both a team leader and a service coordinator, she has filled leave replacements and rostered casuals. Once she completes this roster, she sends it to her service manager who sends it on to rostering support to upload to Carelink. Like Mr Alvarado and Mr Buhajiar, she has not been told that uploading the roster to Carelink would be part of her job as a service coordinator.

108 As both a team leader and as a service coordinator, Ms Kennedy said that she had developed the transition plans/matching grids for vacancies in group homes.

109 As a team leader Ms Kennedy managed and trained staff, covered breaks and staff changeovers, provided direct care and manual handling, behaviour intervention and support, and housekeeping. She continues to provide these services as service coordinator. She also oversees “all facets of client care as well as liaising with the client’s family and medical/specialist intervention”. She completes staff inductions for new staff. She is responsible for filling any shifts where a staff member has called in sick or there is no-one to take a shift. If the shift cannot be filled, she will do the work herself. She said that she would fill a vacant shift herself at least twice a week.

110 As a team leader Ms Kennedy’s role had always included liaising with external clinicians as well as finance, recruitment, families, official community visitors, Work, Health and Safety, the NDIS and others.

111 Ms Kennedy said that, before the transfer from the State to NSL team leaders were expected to spend 60% of their time at work on the floor and devote 40% of their time to administrative duties. After the transfer in November 2017, however, she said that this matrix of duties rarely occurred in practice and supported her statement with Outlook calendar entries. She also said that, as there are currently five positions in the group home that need to be filled, she is spending even more of her time on the floor providing direct client care. She acknowledged that the role of a service coordinator involved “a bit more administrative work”, which she partly attributed to the need to upload documents onto Carelink, and they were also expected to do more training with staff including medication assessments and Work Health and Safety training.

112 In re-examination Ms Kennedy also gave evidence, without objection, that both as team leader and service coordinator she would sit on recruitment and interview panels.

- 113 The Baulkham Hills home in which *Ms Stronkhorst* has worked for five years is a high needs unit with five clients. Its residents include one person with Tourette’s syndrome and epilepsy, two who have bipolar disorder, one with an acquired brain injury, and one with Down syndrome, who is autistic and blind. Ms Stronkhurst described the behaviour of one of these clients as “very disruptive”.
- 114 Like the other CPSU witnesses, Ms Stronkhorst deposed that her day to day duties had changed little since she became a service coordinator. She maintains a 30/70 split between administrative duties and working on the floor. Her daily tasks include assisting the clients on the floor with their needs such as administering medication and meals, creating and implementing treatment plans, and liaising with the clients, their families and medical staff about their care. She also manages the budget and banking for the home and pays the bills. Further, she manages staff. That includes creating rosters, covering staff handovers, and filling any vacant shifts either by finding someone to cover the shift or working the vacant shift herself. Ms Stronkhorst said that the administrative workload has increased with the need to upload incident reports, client plans and the like onto Carelink. While she supervised and mentored staff as required when she was a team leader, she said that under Northcott’s Practice Leadership plan she will be mentoring and training staff who have been working effectively in the same position as DSWs for over 25 years.
- 115 Ms Stronkhorst described the work of a service coordinator as “very hands on”, that is to say providing direct care to clients. She said that she was informed by one of her line managers that she was to cover for staff while they are on a lunch break and if they arrive late for work or need to leave a shift early. While she well understood the rostering principles, if there is an “unexpected cancellation” she will cover the shift until a staff member can come in. When filling a vacant shift, she said she was “hands on” and when providing practice leadership she would also “help out” and mentor, coach and role model. There are occasions, too, when as a service coordinator she would provide direct care to clients because, for example, they were unwilling to attend day programs to which the support workers were taking other clients.
- 116 Ms Stronkhorst also annexed to her affidavit a copy of extracts from her Outlook calendar. These entries spanned a period of three and a half months. They were the subject of some cross-examination, but it was brief. It was not suggested that they did not support the statements she had made in her affidavit.

117 Despite the assertion in the Northcott Restructure Proposal that “comprehensive training” would be provided to the team leaders to “upskill” them, each of these witnesses gave evidence that they had received little additional training before taking up their positions as service coordinators. While some additional training has been provided since then, it could scarcely be described as “comprehensive”.

118 Mr Alvarado deposed that the only training he received from Northcott on the role of a service coordinator was during a training day on 15 January 2020. He said that, during the training day, there was a PowerPoint presentation on “a day in the life” of a service coordinator which listed some of the activities of a service coordinator, including cooking, cleaning, personal care, appointments, transport and customer interaction. The presentation, which was annexed to his second affidavit, also contained information on the objectives and expectations of the role. Additionally, the staff received generic training modules on leadership development, performance management, and work, health and safety. Mr Alvarado said he had not received training in relation to uploading rosters onto Carelink, although it was part of the position description for job. He also said that he had not received training on the recruitment process for new staff, despite being expected to be involved in this process as a service coordinator.

119 In oral evidence, Mr Alvarado conceded that he had received some additional training on 28 July 2020. But he said that this training was provided to all Northcott staff and related to building a “success profile” for support workers. Mr Alvarado also testified that he had recently received some online training. He said that this included training relating to COVID-19, training on a new software system introduced by Northcott, and a second module relating to the “success profile” training he had received on 28 July.

120 Mr Buhajiar made no mention in his affidavit of having received training after he transferred to the employment of Northcott. At the hearing he said that he had undertaken the first training session in relation to Northcott’s “2020 Vision” but had missed the second.

121 Ms Kennedy deposed that she had not received any additional training on the role of a service coordinator other than at the training day in January 2020. Despite service coordinators being expected to provide medication and manual handling training for new staff, Ms Kennedy said that service coordinators had not been accredited to do so. Ms Kennedy testified that she had received “lots” of online training in July 2020, but it was mostly in relation to COVID-19. She said that she had also undertaken an NDIS training package and training on “success profiles”. She explained that the latter training related to Northcott’s “2020 Vision”. She said she had

undertaken two online modules as part of this training, and was expected to undertake a third on the day after the hearing. The training comprised videoconferences with a trainer who gave staff examples of “success profiles” for their teams.

122 Ms Stronkhorst attended training for on-call procedures on 15 January 2020 where she was provided with a mobile phone and told that all service coordinators would be on-call at least one week per year. But she deposed that, unlike some of her colleagues, she has not received any training on the role of a service coordinator although Northcott had told her that transitioning team leaders would receive additional training for the different tasks that they would be expected to perform as services coordinators. As examples, Ms Kennedy noted that, although service coordinators were expected to provide manual handling training and medication training for other staff, they had not received any training in this themselves. Ms Stronkhorst was not questioned on the subject in cross-examination.

The evidence of the Northcott witnesses

123 *Ms Carpenter* attributed the lack of training to the advent of the pandemic.

124 Ms Carpenter provided the following description of service coordinators:

Service Coordinators were based at the accommodation and responsible for service delivery, recruitment, induction and supervision of support workers, practice leadership, incident and complaints management, rosters and timesheets, preparation of SIL quotes, engagement with families and carers, and quality and safeguarding. Service Coordinators report to a Service Manager.

125 Ms Carpenter emphasised the differences between the expectations and responsibilities of the team leader and service coordinator roles. She noted that service coordinators are not required to work evening or weekend shifts. She said that practice leadership was “very different” from the direct support required of team leaders. In contrast to service coordinators, she said that team leaders would only have “limited capacity” to carry out staff inductions and supervise staff when they were rostered to provide direct care. Unlike service coordinators, she said that team leaders had no responsibility for training or supporting casual staff. Before the restructure, casuals reported to CARs. She said that the roster is compiled on the basis that all direct care needs are met by support workers. She expressed the opinion that, if a service coordinator said they were spending 30-40% of their time doing direct care, that would be an indication that they did not understand the requirements of the role.

126 *Ms Grosas* said that the direct care she provided to customers included showering, toileting, assistance with incontinence wear, meal preparation, taking customers on outings and to appointments, and “facilitating customers’ community access”. While rostered to provide direct care as a team leader, she performed the same tasks as the DSWs.

127 As a team leader, she performed a variety of administrative duties. They included preparing the master roster and developing the operational roster; undertaking rostered supervision of DSWs; and conducting informal staff management processes. They also included mentoring and coaching of, and modelling to, DSWs, which she likened to the practice leadership she is expected to provide as a service coordinator, although she said it was a much smaller part of her work as a team leader. She said she was responsible for managing the house budget, including petty cash, and for occupational health and safety in the house, including house maintenance and preparation of incident reports. She also managed minor complaints from family members about customers’ care and was responsible for preparation of some customer plans, including nutrition and mealtime management plans.

128 *Ms Grosas* deposed that not having to work according to a roster gave her greater flexibility and her work was “much less structured”. She said that, as a service coordinator, she did not regularly or commonly perform direct care but occasionally covered direct care shifts when, for example, a DSW called in sick and the position was unable to be filled by a casual or other Northcott worker or one supplied by an agency. As a service coordinator, *Ms Grosas* conducts inductions for new support workers as she did as a team leader but she said that she has more responsibility for ongoing training and support now, although she did not specify what that meant. As a service coordinator, *Ms Grosas* is also responsible for preparing the master and operational rosters and remains responsible for running the informal staff management process she conducted as team leader. Now, however, she has additional responsibility for formal performance management and grievance processes previously undertaken by CARs.

129 As a service coordinator, *Ms Grosas* continues to have responsibility for writing incident reports and, if an incident raises quality and safeguarding concerns and further information is required, she will be contacted by the quality and safeguarding team. She said that this was “similar to the process” in place when she was a team leader. Now, however, she has responsibility for managing more complex incidents and complaints which were formerly escalated to CARs.

130 As a service coordinator, she is also required to be on the on-call roster.

131 In cross-examination Ms Grosas disclosed that, when acting as a team leader, she generally worked alongside other disability support workers when rostered to provide direct care herself. She said that she provided advice and direction to those workers where necessary or requested. She agreed that, from time to time, as a service coordinator she needed to cover direct care shifts and that she might have to step in to assist with direct care if a particular difficulty arose or an incident occurred.

132 As a CAR, Mr Neupane deposed that up to seven team leaders reported directly to him. He said that, in the event of an incident occurring in a house within his area of responsibility, team leaders were required to “input” the incident into “the electronic system” but generally forwarded the details to him to report and deal with. He said team leaders who reported to him made only “very basic decisions about the house, such as changes to the daily (or “operational”) roster, decisions about the routine of the house, customers’ plans and medical appointments”. More complex decisions were escalated to him. He said he prepared the master roster with “input” from the team leader who prepared the operational roster. He also said that Supported Independent Living (SIL) quotes were required for submission to the National Disability Insurance Agency. That involved two documents: a roster of care and a SIL profile. The team leaders prepared the SIL profile but only verified the roster of care which he prepared.

133 In his affidavit Mr Neupane identified the following differences between the roles of team leader and service coordinator:

- service coordinators are not rostered to do a certain number of hours of direct care and administrative tasks and therefore have greater flexibility about how and when they carry out their work;
- service coordinators do not provide direct care; that is carried out exclusively by DSWs;
- team leaders were not required to mentor DSWs; that role was performed by CARs;
- incidents and complex incidents previously escalated by team leaders to CARs are now required to be handled by service coordinators;
- internal complaints formerly escalated to CARs are now managed by service coordinators;
- staffing and human resource issues, including performance management, were not managed by team leaders but are managed by service coordinators;

- unlike service coordinators, team leaders did not have ultimate responsibility for preparing the roster;
- service coordinators are required to prepare both the SIL profile and the care roster;
- service coordinators are required to make more complex decisions about their houses than team leaders were; and
- unlike team leaders, service coordinators are required to be on the call roster.

134 In cross-examination, however, Mr Neupane conceded that, “if necessary”, when working as a team leader alongside a DSW he would give the DSW advice or direction in relation to the performance of the support tasks. He also conceded that team leaders were expected to provide mentoring, supervision and advice to DSWs. Mr Neupane accepted the accuracy of the position descriptions. He understood it was part of the team leader’s role to mentor disability support workers but said that he struggled to find the time to do this when he was an acting team leader. He also agreed that in the event of an incident or injury to a resident, as the senior person in the group home he would need to respond to it and provide “guidance and the like”. He agreed that service coordinators are expected to spend the majority of their time with staff and customers rather than working on administrative tasks. He also agreed that service coordinators perform direct care tasks for the purpose of coaching and modelling appropriate methods. Moreover, he conceded that service coordinators continue to provide direct care in the following circumstances:

- in the case of a medical emergency;
- where a support worker is required to see a doctor or needs a break for any reason;
- where there is conflict between a client and a support worker; and
- where the support workers are otherwise occupied.

135 Indeed, Mr Neupane went so far as to concede that it was common for supervisory staff present at a group home to step in to provide direct care. When asked for examples he replied:

Well, when there is a – an incidents, between the customers to customers, in that time, the environment was not expected. So then we – we were required to isolate the customers into the two different locations, making sure that their safety is paramount. And that when we have two staff working, then one staff would take one particular customers to one room and other staff would take other customers to different room. And in that time, if somebody is asking for the assistance for the toilet – can I go the toilet. If the toilet customer is asking for that, then I would step in and I would take that customer to the toilet. Because primarily, their safety is more important, because if they are involved in the physical alternations, then we simply cannot leave them by

themselves unsupervised.

...

There would be – there would be instances, the – the residents in the group homes, they would refuse to take their support provided by the support worker. There could be, in the past history – we would not know what would – could have happened between the customers and the staff, then, at any point, the residents may refuse to take their support. That time, to make sure that the customer is getting the support as he needs, then the CARs or the service coordinators would step in and provide support to the customer.

Is the work of the service coordinator substantially the same as the work of the team leader?

The respondents' submissions

136 The respondents submitted that the reference in s 311(1)(c) to the work being “the same, or substantially the same” “imports something akin to a quantitative assessment”. Construing “substantially the same” in this context, they argued, suggests that there needs to be “a close correlation” between the respective work or that only “limited or minor changes” could be made before the work could be considered “transferring work”.

137 Later, they submitted that what was required was both a quantitative and qualitative assessment of the functions, duties and responsibilities of the employees for their different employers and a consideration of the broader context in which the work is performed, including the structure and organisation of the respective businesses.

138 They argued that the work was not substantially the same for the following reasons.

139 First, they pointed to the fact that the transferring employees were no longer required to carry out direct care “as an ordinary and regular part of their duties”, emphasising the words in the “work performed” section of the 2010 position description that the team leaders would be “responsible for ... a mixture of operational management, administration and supervision for the unit ... as well as direct care support for persons with a disability”. They relied on the evidence that approximately 60% of their time as team leaders was spent providing direct care. In contrast, they submitted, although service coordinators “do and will need to provide direct care from time to time”, they are only expected to do so “as a last resort, after other options of having that work undertaken are exhausted”. The respondents argued that the removal from the roster freed the transferring employees from the requirement to provide direct care and enabled them to focus exclusively on the practice management, managerial and administrative

tasks required of them. For this reason, they contended that there had been “a substantial change to the nature of the work”.

140 Second, the respondents pointed to the fact that team leaders could be and were rostered to work evening, afternoon and weekend shifts in every 28 day roster period and paid a composite salary to compensate them for it. This, they argued, represented “a significant structural difference” between the work of team leader and the work of service coordinator.

141 Third, the respondents submitted that the service coordinator role is predominantly aimed at providing “practice leadership” rather than the direct care.

142 Fourth, the respondents submitted that the work of the service coordinator is undertaken in a different organisational structure with a different emphasis.

143 I accept that the duties required of the service coordinator are not identical to those performed by the team leaders. There are some differences. For the reasons that follow, however, I reject the respondents’ submissions.

The meaning of “the same or substantially the same work”

144 In order to answer the statutory question, it is first necessary to consider what is meant by the phrase “*the same, or substantially the same work*” for the purposes of s 311(1)(c) of the FW Act..

145 I was informed by the parties that the meaning of the phrase has not been the subject of judicial consideration. I was also informed that it was not used in the predecessor legislation, the *Workplace Relations Act 1996* (Cth) (**WR Act**). It was common ground that little was to be gained by considering the same or similar expressions in different contexts, since the interpretation of the expression depends very much on the context and purpose of s 311.

146 It is trite that, in order to discern the meaning of any word or phrase in a statute, one begins with the text but the text must be read in its context and that includes the legislative history and the statutory purpose or intention: see, for example, *CIC Insurance Limited v Bankstown Football Club Limited* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ). Purpose is particularly important since s 15AA of the *Acts Interpretation Act 1901* (Cth) requires that the interpretation that best achieves the statutory purpose is to be preferred over any and all other possible interpretations.

147 As the CPSU submitted, by the inclusion of the words “*or substantially the same*” to qualify the work, the text makes it clear that an employee may be a “transferring employee” even though the work may have changed to some extent.

148 I referred above to s 309 which describes the object of Pt 2-8.

149 The CPSU submitted that the purpose of s 311 is to protect the terms and conditions of employment of the transferring employees. It argued that other provisions of Pt 2-8, specifically those in Div 3, are intended to provide for the employers’ interests in the efficient operation of their enterprises. They include s 319(1), which gives the Fair Work Commission power to make orders, including that a transferable instrument does not, or will not, cover the new employer and its transferring employee. In making such an order the Commission is required to take into account, amongst other things, whether the transferable instrument would have a negative impact on the productivity of the new employer’s workplace and whether the new employer would be significantly disadvantaged economically if it were covered by the transferable instrument covering the new employer: s 319(3). Similarly, s 320(2) gives the Commission power to vary a transferable instrument for certain purposes, including “to enable the transferable instrument to operate in a way that is better aligned to the working arrangements of the new employer’s enterprise”. The matters to be taken into account in making such an order are the same as those to be taken into account in considering whether an order under s 319(1) should be made: s 320(4).

150 It is true that, based on a plain reading of the text, some provisions of Pt 2-8 appear to be directed towards one object of s 309 more than another. But I do not accept that only one of the objects mentioned in s 309 is relevant to the interpretation of s 311. Section 309 applies to the whole of Pt 2-8.

151 It is clear from s 309 that the Parliament was concerned to strike a balance between potentially conflicting interests. In like circumstances, Gleeson CJ remarked in *Carr v The State of Western Australia* (2007) 232 CLR 138 at [5] that the rule of interpretation in s 15AA may be of little assistance. His Honour went on to observe that “the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object”. So the question is not what the purpose is, but how far the legislation goes in pursuit of that purpose or object (at [7]). The court must rely on the text, construed according to such principles of interpretation as “provide rational assistance in the circumstances of the particular case” (at [6]).

152 In determining the meaning of the phrase — “*the same, or substantially the same work*” —the legislative history provides some limited assistance.

153 While the phrase may not have been used in the predecessor legislation, a virtually identical phrase appeared in Pt 22 of the WR Act — albeit in a different, though not entirely unrelated, context. Part 22 was inserted into the Act by the *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006* (Cth) and came into force on 1 March 2007. Part 22 introduced a suite of provisions to prohibit and penalise sham contracting and was self-evidently intended to protect terms and conditions of employment. Section 902, for example, prohibited an employer from dismissing, or threatening to dismiss, an employee for the sole or dominant purpose of engaging the employee as an independent contractor to perform “*the same work, or substantially the same work*” under a contract for services. Section 903 prohibited a person who employed, or at any time had employed, an individual to perform particular work from knowingly making a false statement with the intention of persuading or influencing the individual to enter into a contract for services under which the individual would perform, as an independent contractor, “*the same work, or substantially the same work*” for the person. Sections 902 and 903 were re-enacted in the FW Act as ss 358 and 359. These provisions appear in Div 6 of Pt 3-1 of the Act.

154 It is true that the phrase used in s 311(1)(c) is not identical, but the difference is inconsequential. It is merely a product of the grammatical construction of the paragraph. I was not taken to any authority dealing with the construction of s 358 or 359 or its antecedents. But in *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346 at [95] the Full Court (North, Barker and Bromberg JJ) held that there could be “no doubt” that Div 6 of Pt 3-1 “seeks to address the same mischief as that addressed by Pt 22 of the WR Act”. The Full Court also held that “these provisions should be regarded as remedial and beneficial despite their penal nature”.

155 In accordance with “the primary object of statutory construction”, s 311(1)(c) must be construed in a way that is consistent with the language and purpose of all the provisions of the FW Act, including ss 358 and 359: see *Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]–[70] (McHugh, Gummow, Kirby and Hayne JJ).

156 It has rightly been said that “‘substantial’ is not a word with a fixed meaning in all contexts”: *AE Terry’s Motors Ltd v Rinder* [1948] SASR 167 at 180 (Mayo J). The online edition of the *Macquarie Dictionary* (accessed 6 January 2020) offers 10 different meanings, none of which

seems to hit the mark. The closest would appear to be “of or relating to the essence of a thing; essential, material, or important”. In *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees Union* (1979) 42 FLR 331 at 348 Deane J observed that “[t]he word ‘substantial’ is not only susceptible of ambiguity: it is a word calculated to conceal a lack of precision”. As it was said of the adjective, so it may be said of the adverb.

157 Then there is the question of what is meant by the noun “work” as it appears in s 311(1)(c). The word is not defined in the Act. It follows that it is intended to have its ordinary meaning. But the meaning can vary. Some fifteen meanings are listed in the *Macquarie Dictionary*. Relevantly, they include:

1. Exertion directed to produce or accomplish something; labour; toil.
2. That on which exertion or labour is expended; something to be made or done; a task or undertaking;
3. Productive or operative activity.
- ...
6. employment; a job, especially that by which one earns a living.

158 On this question some guidance is offered by the Explanatory Memorandum to the Fair Work Bill 2008 (Cth). As Gageler J recently remarked, having regard to their provenance and the circumstances in which they were created, explanatory memoranda for Government bills introduced into the Parliament can ordinarily be taken by the courts as reliable guides to the policy intentions underlying Government-sponsored legislation: *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers Union (AMU)* [2020] HCA 29; 94 ALJR 818; 381 ALR 601; 297 IR 338 at [71]. The Explanatory Memorandum to the Fair Work Bill indicates that Parliament intended that a broad approach is to be taken to the meaning of “work” in the paragraph and that a narrow, technical construction is to be eschewed.

159 The Explanatory Memorandum at [1217]–[1218] relevantly states:

1217. Under paragraph 311(1)(c), the transferring employee must perform the same, or substantially the same, work for the new employer as she or he performed for the old employer. **It is intended that this provision not be construed in a technical manner.** It recognises that, in a transfer of business situation, there may well be some minor differences between the work performed for the respective employers. However, **the requirement is satisfied where, overall, the work is the same or substantially the same – even if the precise duties of the employees, or the manner in which they are performed, have changed.**

1218. Further, although paragraph 311(1)(c) is framed in terms of the work undertaken by an individual employee, **in many instances a transfer of business occurs and a group of employees is engaged by the new employer. In this circumstance, it may be possible to categorise the work more generally.** For example, if the old employer runs a supermarket and sells the supermarket to the new employer, **the work might be characterised generally as retail work in a supermarket. The fact that an employee may have stacked shelves for the old employer but now works on the checkout for the new employer would not stop the employee from being a transferring employee.**

(Emphasis added.)

160 In closing argument, counsel for the respondents accepted that s 311(1)(c) should be construed in a non-technical manner.

161 I conclude that, in the balance between the objects in s 309, the primary purpose of s 311 is to protect the terms and conditions of employment under the relevant industrial instruments and prevent their avoidance in the event of a transfer of business to “an associated entity”. Having regard to that purpose, a narrow approach to the meaning of “work” is not called for.

162 “Work” in the context of s 311 refers to the nature or character of the employment, rather than the particular duties the employee was undertaking or will or may be called upon to undertake. It is abundantly clear from the Explanatory Memorandum that that was the legislative intention. This interpretation serves the legislative purpose. As a matter of principle, focusing on the substance of the work, rather than the particular duties that may or may not be required or performed at any particular time, would not unduly interfere with the interests of employers in running their enterprises efficiently.

163 It follows that I accept the CPSU’s submissions that the work performed by a transferring employee for the new employer may be the same, or substantially the same, even if some new duties are undertaken for the new employer, some duties formerly undertaken are no longer required, or the composition of the working day has changed, as long as the nature or character of the work remains the same or substantially the same.

164 It defies common sense to think that a different construction was intended. After all, as the CPSU argued, duties can (and often do) change during the life of a single contract of employment without altering the fundamental nature of the work. Northcott itself recognised as much in its position descriptions, noting that the list of duties was “indicative only” and “subject to change”.

165 A good example of such a case is *Cresswell & Ors v Board of Inland Revenue* [1984] 2 All ER 713 (Walton J). In that case a number of clerical assistants and tax officers employed by the Board of Inland Revenue objected to the introduction by the Board of the computerisation of the PAYE scheme which would have the effect that calculations formerly carried out by tax officers would be done by computer, all necessary documentation following an individual change of coding would be sent out automatically and, where there was a universal review of coding, all necessary alterations and notifications would be made or given automatically. The employees contended that the introduction of the computerised system would amount to such a change in the nature of their jobs that they were being asked to perform work under wholly different contracts without their consent. The employees' contention was emphatically rejected by the court. At 721 his Honour said that "there can really be no doubt as to the fact that an employee is expected to adapt himself to new methods and techniques introduced in the course of his employment", although, "in a proper case the employer must provide any necessary training or retraining".

166 In *Cresswell*, Walton J referred to *O'Neill v Merseyside Plumbing Co Ltd* [1973] ICR 96. In that case an employee who had been working for the best part of 25 years as a gas fitter and was directed to work at a hospital site as a general plumber argued unsuccessfully that the purported transfer to work of a different kind than that to which he was accustomed made his job redundant.

Consideration

167 Applying this analysis to the facts of the instant case, the work the transferring employees perform as service coordinators is best characterised as a frontline management in a group home in which supported care and services are provided to the disabled. Although their duties have in some respects changed, overall the work they are performing and are required to perform is substantially the same as the work they were performing as team leaders for NSL.

168 Team leaders were and service coordinators are the senior employees working in group homes. Team leaders were and service coordinators are the sole supervisors of support workers with immediate responsibility for the delivery of care to the employer's clients or customers. Although the team leaders have additional responsibilities as service coordinators, most of their administrative and management responsibilities are the same as those they had previously. They remain "responsible for managing the day to day operation of the unit(s) and providing direct support and supervision for Disability Support Workers". The fact that when they

commenced employment with Northcott they were relieved from the constraints of the roster and most of the direct care was, and continues to be, performed only by support workers did not change the essential character of their work. Nor did any of the other matters upon which Northcott relies. As the position description for service coordinator indicates, the typical duties of the position include “provid[ing] direct support to customers as needed”.

169 Ms Carpenter deposed that the only time a service coordinator should perform direct care is if all other options for completing the work have been exhausted. She went on to say:

A gap in the roster could arise, for example, if a support worker calls in sick or a customer does not attend day programs. Before stepping in to perform direct care work, the Service Coordinator is expected to contact casuals, the rostering team, agencies and other managers to attempt to find someone to cover the shift, or ask a support worker to stay back. If the Service Coordinator exhausts avenues and cannot find anyone available, a Service Coordinator may then need to assist to provide support. That is because we operate in an environment where if all else fails, we cannot leave customers without support.

170 While this was no doubt the ideal, the evidence established that this regimen was not always followed. Nor, having regard to the exigencies, could it have been. For example, a “customer” having an epileptic fit, a psychotic episode, or just needing assistance to go to the toilet could not be left to his or her own devices while the service coordinator sits in the office trying to find a replacement for the support worker.

171 Even if the matters upon which Northcott relies are considered together, it makes no difference. Team leaders could have been called upon to undertake the additional tasks required of them as service coordinators. The additional tasks were all well within the team leader position description. Equally, they could have been relieved of roster duties. There was nothing in the team leader position description which would have prevented that. Indeed, the position description made no mention of team leaders working according to a roster.

172 The fact that the transferring employees no longer undertake shift work is immaterial. The work is substantially the same regardless of when it is performed.

173 Ms Carpenter deposed that under the Community Living Award the remuneration for team leaders was set at an amount that included remuneration for providing direct care to customers on three afternoon shifts, two evening shifts and one weekend shift during each 28-day roster period. That is true. But this circumstance has no bearing on the application of s 311(1)(c).

174 Contrary to the respondents' submission, there has been no significant change to the organisational context in which the transferring employees carry out their work. At all relevant times at least, Northcott has been a disability services provider providing accommodation, respite and in-home services to people with disabilities. The changes to funding arrangements brought about by the introduction of the NDIS did not alter that. In any event, those funding arrangements were in place when the employees were working as team leaders for NSL.

175 As team leaders the transferring employees were frontline leaders or managers, despite the fact that they were also required to perform direct care for a certain number of hours in accordance with a monthly roster. Like the service coordinators, they were the only supervisory employees working in the homes. In both positions they acted as managers in those homes. In both positions they conducted team meetings. In both positions they had supervisory responsibilities with respect to casual staff. In both positions they were involved in the preparation of rosters. In both positions they liaised with internal and external personnel. In both positions they inducted new staff. In both positions they were involved in the recruitment process for support workers; only the extent of that involvement has increased. When they were undertaking direct care as team leaders on the roster, they often worked alongside support workers. In doing so, as Ms Carpenter admitted in cross-examination, they were expected to model best practice. Both as team leaders and service coordinators, they were and are expected to lead by example. The reallocation to service coordinators of some of the tasks previously carried out by CARS did not change the essential character or nature of the work of the former team leaders.

176 The respondents relied on Ms Carpenter's description of the team leader role of "a hybrid" of direct support work when rostered and "work associated with the administrative aspects of the role" when not. But this description was misleading. It overlooked both the central importance of the managerial and leadership features of the team leader's work and the direct care required of service coordinators.

177 It will be recalled that "the primary purpose" of the team leader role, according to the position description, was to "[lead] a team of disability support workers and manage the operations of supported accommodation and respite unit or in home support services to ensure delivery of quality person centred services". The primary purpose of the service coordinator role is no different.

178 It will also be recalled that, in the "key objective of the position" appearing in the position description of service coordinator, practice leadership was defined as including conducting

team meetings; one to one supervision; allocating and organising staff; modelling and coaching; and quality of life outcomes. The equivalent duty in the list of duties was listed at point 7:

Provide effective supervision and mentoring of staff.

179 Similarly, the first of the “key accountabilities” in the position description for the team leader position which was in force immediately before the transfer was:

Provide leadership, support and supervision to a team of disability support workers, models best practice and facilitates an open and fair team environment.

180 It is tolerably clear from the evidence that “modelling” means role modelling or leading by example. Training materials issued by Northcott included the following description of “a day in the life” of a service coordinator:

Coordinator will already be aware of which part of the day their support is most required.

Greet team and customers on entry role model minimal fuss with putting items away (not in common areas) sign in and **step straight into assistance.**

- Cooking - Personal care - Documentation - Customer interaction

- Cleaning - Appointments -Transport - Equipment Maintenance

Try to hold back opinions, rather seek to understand how and why things are done, **work alongside team to support customers with daily living and working on strategies. Offer support where required.**

In quiet and down times support for teams can be completed such as rostering, Emails, Monitoring shift reports, Plans are up to date, Working within budget – Petty cash, Liaising with stake holders. Staff supervision, team meetings and performance managing.

(Emphasis added.)

181 This was followed by a description of what was meant by “leading by example”:

- **Be involved as much as possible** whatever time is available during the day be it 10 minutes or 3 hours **supporting staff and customers.**
- Utilise time to coach / mentor staff in development areas especially staff new to Northcott for at least the first month (see induction)
- Build a rapport and relationship with the customers to understand the needs that would usually be directed down the formal channels by engaging on a day to day basis.
- Increase in building positive interactions and desired behaviours demonstrating to staff Northcott values and excellent customer service.

(Emphasis added.)

182 These descriptions accord with the evidence of the CPSU’s witnesses and are at odds with some of the evidence given by Ms Carpenter. They are markedly similar to the work they performed as team leaders.

183 It will be recalled that the team leaders undertook little additional training before they commenced employment as service coordinators. Indeed, it appears from Ms Carpenter’s evidence that Northcott considered that they could walk straight into the job and receive training when it was convenient. Furthermore, Ms Carpenter conceded in cross-examination that the training program Northcott planned to provide the transferring employees was part of its ongoing leadership training for all its leaders. That includes those who were employed by NSL as CARs and whose work admittedly did not change. And Ms Carpenter testified that it had been provided in the past to team leaders.

184 Contrary to the CPSU’s submission, however, the fact that the team leaders were considered to possess the necessary skills, experience and qualifications for the service coordinator positions and were not required to undergo training before they were offered the positions with Northcott does not support the conclusion that the work involved was substantially the same, any more than the work of a judge can be said to be substantially the same as the work of a practising lawyer. It is entirely neutral. But the fact that some training was planned or contemplated does not derogate from the conclusion that the work the transferring employees perform as service coordinators was fundamentally or substantially the same work they had been performing as team leaders. These days “upskilling”, further training or continuing education is commonly provided to employees without affecting the nature of their work or descriptions of their jobs.

Conclusion

185 For the purposes of s 311(1)(c) of the FW Act, the service coordinator work is substantially the same as the team leader work. Consequently, I find that there has been a transfer of business under s 311 of the Act and that the copied State awards continue to cover Northcott and those employees of NSL who were team leaders and who are now employed by Northcott as service coordinators.

186 The Court has the power to grant the relief the CPSU sought: *Federal Court of Australia Act 1976* (Cth), s 21. The respondents did not contend that a declaration should not be made or

that the form of the proposed declaration was inappropriate. It would certainly not be futile to do grant declaratory relief and there appear to be no other discretionary reasons which would militate against it. In all the circumstances, the declaration the CPSU requested should be made. Having regard to s 570 of the FW Act, which limits the Court's power to award costs in a matter arising under the Act, it was common ground that, regardless of the outcome, there should be no order as to costs.

I certify that the preceding one hundred and eighty-six (186) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Katzmann.

A handwritten signature in black ink, consisting of stylized initials 'JK' followed by a large, sweeping flourish.

Associate:

Dated: 20 January 2021

Annexure

Northcott’s table of “key differences” in roles of team leader and service coordinator

| Responsibilities | Team Leader | Service Coordinator |
|-------------------------|--|--|
| Responsibility | <p>Manages the day to day operations of a supported accommodation or respite unit.</p> <p>A Team Leader is required to work 91 hours of rostered direct support hours per month and 61 hours on administration responsibilities.</p> | <p>Responsible for the operational functions of a number of programs or customers (receiving IHC support).</p> <p>The number of programs or customers the Service Coordinator is responsible for is determined by the Service Manager.</p> |
| Rostered Direct Support | <p>Required to work 91 hours per month of rostered direct support.</p> <p>Rostered as a staff member on shift.</p> <p>Limited flexibility to change direct support hours into staff leadership support hours as the Team Leader works on rostered shifts and any changes to the rostered shift must be made in accordance with the rostering principles and with agreement from other rostered staff to change shifts.</p> <p>A Team Leader may perform some limited staff induction, coaching and training while undertaking rostered direct support.</p> | <p>Not rostered for any direct support on the roster.</p> <p>Provides direct support in the context of role modelling and coaching of disability support workers.</p> <p>Not rostered as the staff member on shift.</p> <p>Works flexible hours according to the needs of the staff and customers. Can change hours of work as required.</p> |
| Recruitment/Induction | <p>Team Leaders have minimal capacity to participate in recruitment due to requirement that they work rostered direct support hours.</p> <p>Many Team Leaders do not have any involvement in the recruitment process or interviews.</p> <p>Where a Team Leader is involved in a recruitment process, their involvement is usually limited to participating in interviews where their rostered direct support hours allow.</p> <p>Team Leaders have limited (or no) capacity to undertake staff</p> | <p>The Service Coordinator liaises directly with the recruitment team to fill the vacant support worker position.</p> <p>The Support Coordinator completes the relevant form in ESS (Position Modify / Position Add).</p> <p>Recruitment contacts the Service Coordinator directly to discuss the advertisement of the position and recruitment process.</p> <p>Service Coordinator is involved in the selection of applications, scheduling and participation in the interview process.</p> |

| | | |
|---------------------------|---|---|
| | <p>induction due to being rostered to provide direct support on the roster.</p> <p>The Coordinator/Manager participates in the selection of applications and undertakes most interviews.</p> | <p>Service Coordinator undertakes staff induction as he or she has the flexibility to schedule an allocated period of time (4 hours) for the initial induction.</p> <p>Service Coordinator works with the staff member on shift to role model and coach in providing the appropriate level of support.</p> |
| Rostering | <p>Norcott policies prevent the Team Leader inputting the roster into Carelink or making changes to the roster as they are paid from Carelink.</p> <p>The Team Leader submits the operational roster to the Coordinator/Service Manager two weeks before the roster period. It is then forwarded to rostering, who input the roster into Carelink and make changes.</p> <p>Fills short term shifts.</p> | <p>The Service Coordinator is not prevented from accessing Carelink, and therefore, is responsible for inputting the master roster into Carelink.</p> <p>The Service Coordinator can also make changes in the operational roster as necessary.</p> <p>The Service Coordinator is responsible for filing “fictitious” vacant shifts prior to the commencement of the operational roster.</p> <p>The Service Coordinator is responsible for filling all leave replacements.</p> <p>CST assist in filling vacancies that the Service Coordinator is unable to fill.</p> <p>The Service Coordinator can ask CST to fill short term unplanned vacant shifts.</p> |
| Casual staff | <p>Reports to Coordinator in the current structure.</p> <p>Casual staff appraisals are developed with Coordinators who may not be familiar with the casual staff member.</p> <p>Restricted in providing role modelling and coaching to casual staff as rostered staff on shift and required to provide direct support to customers.</p> | <p>Reports directly to a Service Coordinator.</p> <p>Can roster casuals on the roster as required.</p> <p>Provides role modelling and coaching to casual staff on shift.</p> <p>Provides supervision and conduct staff appraisals for casual staff.</p> |
| Admin/Practice Leadership | “Admin” | <p>“Practice Leadership”</p> <p>Service Coordinators do not spend almost all of their time in the office</p> |

| | | |
|---|---|--|
| | <p>61 hours per month of rostered admin support.</p> <p>The admin hours may be part of a direct support shift.</p> <p>To ensure Team Leaders work their contracted hours within the award conditions, these hours are not flexible and may not be able to be changed to meet the needs of the staff, customers or services. For example, to attend a meeting with a behaviour support practitioner to discuss a BSP review.</p> <p>Regular staff supervision does not always occur due to the Team Leader working on shift.</p> <p>A Team Leader works 19 days per month and may work 4 days a week due to 10 hour shifts.</p> <p>May not have the capacity to return emails, phone calls as they may be rostered on shift to provide direct support and may need to wait until admin hours to complete these tasks.</p> <p>Difficult to provide additional coaching and support outside of supervision.</p> <p>Where a Team Leader is only working a limited variety of shifts. They may not have the opportunity to work alongside their staff.</p> <p>Maybe over reliant on support staff to complete administration type tasks.</p> | <p>doing paperwork, problem-solving on the telephone or in meetings. They become ‘practice-leaders’ teaching, guiding and leading their staff in providing person-centred active support to the people they serve. This means they spend most of their time with their staff, coaching them to provide good support.</p> <p>Service Coordinators work flexible hours, Monday to Friday.</p> <p>These hours can change to meet the needs of the staff, customers or service. This may include staff induction, meeting with specialists, families and other service providers.</p> <p>Staff receive regular supervision focused on practice.</p> <p>Service Coordinators have the capacity to return emails and phone calls in a timely manner due to the fact that they are not required to work direct rostered hours.</p> <p>Service Coordinators have the capacity to schedule at least 4 hours of staff induction to ensure all new staff are familiar with each customer’s plans and procedures.</p> <p>Service Coordinators are able to provide <i>additional</i> and targeted coaching and support as the hours are flexible.</p> |
| <p>Quality and Safeguarding support</p> | <p>Possible delays in incident reporting (into Riskman) as reduced capacity to enter into Riskman as may be rostered onto direct support hours Riskman in “admin” hours</p> <p>May not have the capacity to provide debriefing with staff following an incident due to being rostered on to provide direct support.</p> | <p>Have the capacity to report and respond to incidents in a timely manner.</p> <p>Have the capacity to be flexible to provide debriefing and support to staff and customers as required.</p> |

| | | |
|---|---|---|
| Training | Award terms and conditions do not allow for short notice changes in the roster. E.g. to attend training. | Service Coordinators hours are flexible and are able to attend unplanned training, meeting etc. as required. |
| On Call | Do not participate in the On Call roster. | Participate in the on call roster |
| Working with/liaising with internal and external stakeholders | <p>The Coordinator/Manager (and not the Team Leader) is responsible for liaising with interal/external stakeholders. This includes recruitment, finance, Quality and Safeguarding, WHS, and Behavior Support.</p> <p>A Team Leader's capacity to participate in meetings and discussion with internal and external stakeholders is impacted by inflexibility of the Team Leader working the 91 hours of direct support.</p> | <p>The Service Coordinator liaises directly with internal and external stakeholders.</p> <p>They involve and inform the Service Manager as required.</p> <p>The Service Coordinator has the flexibility to schedule a discussion/meeting with a stakeholder as they are not on a roster. For example, to participate in a critical incident investigation.</p> <p>Demonstrates customer focus by meeting internal and external customer needs in a timely and courteous manner.</p> |
| Vacancy management and customer transition | The Coordinator/Manager (and not the Team Leader) develops the transition plan and liaises with internal and external stakeholders. | <p>The Service Coordinator is responsible for developing the transition plan with the support of the Service Manager and CLC as required.</p> <p>The capacity to develop the transition plan and liaise with internal and external stakeholders is impacted by the inflexibility of the Team Leader working the 91 hours of direct support.</p> |