



DECISION

Fair Work Act 2009
s.739—Dispute resolution

CPSU, the Community and Public Sector Union

v

Cerebral Palsy Alliance – Accommodation Northern Sydney Ltd T/A Cerebral Palsy Alliance (C2020/2011)

DEPUTY PRESIDENT BOYCE

SYDNEY, 13 MAY 2021

Dispute application filed by Community and Public Sector Union SPSF Group NSW Branch (CPSU) - alleged dispute about matters arising under the Crown Employees Ageing, Disability and Home Care – NSW Department of Family and Community Services (Community Living Award) 2015 (Award) – the Award is a copied State award – whether Award applies to former NSW Family and Community Services (FACs) employees after restructure of business – whether former FACs employees continue to be entitled to the same terms and conditions under the Award that applied prior to the business restructure – application resolved in favour of CPSU.

[1] An application has been made by the Community and Public Sector Union SPSF Group NSW Branch (**CPSU**) for the Commission to resolve a dispute under the *Crown Employees Ageing, Disability and Home Care – NSW Department of Family and Community Services (Community Living Award) 2015 (Award)*. The Award is a “copied State award” as defined by s.768AI of the *Fair Work Act 2009 (FW Act)*.

[2] At the hearing, Mr Tony *Slevin* of counsel, instructed by Mr D Allen, CPSU senior lawyer, appeared with permission for the CPSU. Mr Jamie *Darams* of counsel, instructed by Mr J Hayden, senior lawyer, of Clayton Utz Lawyers, appeared with permission for the respondent, the Cerebral Palsy Alliance – Accommodation Northern Sydney Ltd (**CPA**).¹

[3] There is no contest between the parties as to the jurisdiction of the Commission to resolve this dispute by way of arbitration, in accordance with clause 21 of the Award (as modified by Subdivision E of Part 6-3A of the FW Act, and Schedule 3A of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*).

Background – agreed facts and issues

¹ Permission for each party to be legally represented was not opposed. In granting permission for both parties to be legally represented generally in these proceedings, I had regard to the criteria in s.596 of the FW Act, specifically noting that the legal issues in this matter are complex, and that the matter would be conducted more efficiently with the assistance of legal representation for both parties.

[4] I make the following findings based upon the agreed facts and issues provided by the parties at the hearing:

- (a) On 8 March 2018, 50 Group Homes and seven Respite Services transferred from the NSW Department of Family and Community Services (**FACS**) to the CPA.
- (b) The State of New South Wales passed the *National Disability Insurance Scheme (NSW Enabling) Act 2013 (NSW)* (**Enabling Act**) to, in part, give effect to the transfer of supported accommodation services from the State of New South Wales to private sector employers (such as the CPA).
- (c) The Enabling Act:
 - (i) provided that transferring employees from FACS to CPA be employed in accordance with any relevant statutory provisions, awards, agreements and determinations that would have applied to the employee had the employee not been transferred (s.13(3));
 - (ii) made provision for the relevant NSW Minister to enter into a “transfer agreement” with a non-government employer (s.14(1)) and, by order, transfer the employment of FACS disability services employees (**FACS employees**) to a new employer to give effect to such transfer agreement (s.14(2)). The transfer agreement could make provision for an “employment guarantee period” during which the terms and conditions of employment of employees under an industrial instrument could not be varied and the employee could not be terminated other than on specified grounds (s.14(5)); and
 - (iii) provided that an employee continued to have certain entitlements following the transfer of their employment to a non-government employer (s.15).
- (d) The Implementation Sale Agreement set periods for the operation of the “employment guarantee period” provided for in the Enabling Act as six months for casual employees and two years for permanent employees.
- (e) During the employment guarantee periods the CPA could not change the terms and conditions of employment of those employees who transferred to it from FACS in March 2018.
- (f) The FACS organisational structure which applied to the FACS employees prior to the transfer, was applied by the CPA to those FACS employees following the transfer.
- (g) The structure for Accommodation and Respite had a hierarchy which included the following roles: Manager - Accommodation and Respite, Service Support Analyst, Coordinator - Accommodation and Respite, Team Leader, Disability Support Worker and Respite Client Liaison Officer.

CPA restructure

[5] The following facts in relation to the CPA restructure, that led to the filing of this dispute, are not in contest:

(a) The CPA has deleted the former positions of Coordinator - Accommodation and Respite and Team Leader (reflective of a FACS structure) and created a new position of “House Manager” (consistent with the CPA’s structure).

(b) The House Manager roles were advertised, with relevant persons (including former FACS employees engaged in the roles of Coordinator or Team Leader) able to apply. Successful applicants were offered the House Manager role, whilst unsuccessful applicants were considered for suitable alternative roles, or made redundant (as part of a consultation process).

(c) Team Leaders performed 60 percent hands-on direct care, and 40 percent administrative duties. Team Leader direct care hours were included in the relevant care roster for each home. Unlike Team Leaders, House Managers are not rostered for direct care hours. On paper, the only direct care that House Managers are expected to perform is in an emergency, or where they are training other employees in best practice service delivery. There are various other differences between the expectations, duties and responsibilities of a House Manager, as compared to a Team Leader.

(d) There is no suggestion that the CPA was not entitled to undertake the restructure that it has. Rather, the issue is whether the work performed by a former FACS employee in the House Manager role is the same, or substantially the same, as the work performed by a Team Leader (thus giving rise to the continued application of the Award to relevant former FACS employee/s).

Questions to be answered

[6] The questions to be answered by the Commission in the resolution of this dispute are as follows:

Question 1

Will the Award continue to apply to relevant FACS employees following the CPA restructure?

Question 2

If the answer to Question 1 is ‘Yes’, will former FACS employees who are given new positions in the CPA structure continue to be entitled to the same terms and conditions of the Award that applied to them prior to the restructure?

Evidence and submissions

[7] The CPSU relied upon the following evidence in this matter:

(a) Witness statement of Robyn Lang dated 5 August 2020;

- (b) Witness statement in-reply of Robyn Lang dated 14 October 2020;
- (c) Witness statement of Piotr Kulicki dated 5 August 2020;
- (d) Reply witness statement in-reply of Piotr Kulicki dated 8 October 2020;
- (e) Witness statement of Sharny Chalmers dated 5 August 2020;
- (f) Witness statement in-reply of Sharny Chalmers dated 13 October 2020;

[8] The CPA relied upon the following evidence in this matter:

- (a) Witness statement of Timothy Pines dated 18 September 2020;
- (b) Witness statement of Kellie McLean dated 18 September 2020;
- (c) Witness Statement of Matthew Krollig dated 18 September 2020;
- (d) Witness statement of Craig Finley dated 18 September 2020.

[9] The CPA relied upon three sets of written submissions, and the CPSU relied upon seven sets of written submissions.

Decision of Katzmann J of the Federal Court of Australia in *Community and Public Sector Union, NSW Branch v Northcott Supported Living Limited*

[10] On 20 January 2021, her Honour, Justice Katzmann, handed down her decision in *Community and Public Sector Union, NSW Branch v Northcott Supported Living Limited (Northcott)*.² After identifying the issues that arose for determination in those proceedings, her Honour relevantly stated:

“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...”³

[11] The CPSU made the following written submissions in respect of the decision in *Northcott*:

“2. *Northcott* dealt with the question of whether, following a restructure former Team Leaders engaged by Northcott Supported Living Limited, who accepted employment as Service Coordinators for a related entity, continued to be covered by copied State instruments. While in *Northcott* the restructure differed in that it involved Team Leaders being re-employed by a related entity, the question determined by the Court was the same question posed by the Respondent in these proceedings being

² [2021] FCA 8.

³ Ibid at [40]-[41].

whether the work performed by House Managers is *the same, or substantially the same*, as the work performed as Team Leaders (see Northcott at [41]).

3. The Applicant's primary position in these proceedings is that the restructured position of House Manager continues to be covered by the CLA because the work of House Managers is contemplated by the classification of Team Leader in the Community Living Award (CLA). The Respondent contends that the test is not whether the CLA contemplates the work, but whether the work continues to be transferring work as defined in s768AD(1)(c). That definition raises the question of whether the work the person performs for the new employer is *the same, or substantially the same, as the work the person performed for the old State employer*.

4. The Court in *Northcott* dealt with the expression 'transferring work' in s311(1)(c) of the *FW Act*. Section 311(1)(c) is relevantly identical to 768AD(1)(c). Both turn on whether the work performed before the transfer is *the same, or substantially the same*.

5. In *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 Mason J, with whom Barwick CJ and Jacobs J agreed, said at [11]:

'It is a sound rule of construction to give the same meaning to the same words in different parts of the statute unless there is reason to do otherwise.'

(See also *WorkPac Pty Ltd v Skene* [2018] FCAFC 131; 264 FCR 536 at [106], *Craig Williamson Pty Ltd v Barrowcliff* [1915] VLR 450 at 452; *Hatcher v Cohn* (2004) 139 FCR 425 at [51] per Kiefel J; *Ruykys v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 128 FCR 538 at [27] per Mansfield J; *Social Security, Department of v Copping* (1987) 73 ALR 343 at 347-348 per Jenkinson J with whom Burchett J agreed).

6. In *Northcott* the Court dealt with the meaning of 'the same or substantially the same work' at [144] to [166]. At [162] Katzmann J said that for the purpose of applying the definition:

""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.'

7. The evidence before the Court in *Northcott* was very similar to the evidence before the Commission in these proceedings. This is unsurprising as the Team Leaders engaged by Northcott were also transferred from FACS and subject to the same regulatory regime associated with such transfers. The Service Co-ordinator positions in the Northcott restructure were similar to the House Manager positions in the Respondent's restructure (see Northcott at [74]-[75]). In the same way as the Respondent in these proceedings, Northcott identified as key differences between the

Service Co-ordinators and Team Leaders the removal of a requirement that the employees be rostered to work direct care shifts for 60% of the time worked, and the House Managers higher level of accountability/responsibility as managers.

8. As to the first argument the Court found at [172] that:

‘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.’

9. As to the work performed, the Court found at [174] that 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. This conclusion applies equally to the organisational context here.

10. At [175] Her Honour dealt with the work performed and said:

‘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.’

11. These conclusions apply equally to the current matter. The work of House Managers is no different to the work performed by Team Leaders. Team Leaders were frontline managers despite being required to perform direct care work on a monthly roster. Team Leaders, like House Managers, were the only supervisory employees working in the homes. They acted as managers in those homes. They had supervisory responsibilities with respect to staff. They were involved in the preparation of rosters. They liaised with internal and external personnel. They inducted new staff. They were involved in the recruitment process for support workers; only the extent of that involvement has increased for House Managers. When they were undertaking direct care as team leaders on the roster, they worked alongside support workers. They were expected to lead by example. The reallocation to House Managers of some of the tasks previously carried out by CARS did not change the essential character or nature of the work they performed as Team Leaders.

12. At [176] – [182] Her Honour dealt with a proposition that Team Leaders were not managers as they performed a ‘hybrid’ of direct support work and administrative work. The proposition was rejected as the Team Leader position description included statements that the purpose of Team Leaders was leading a team of disability workers, managing operations and providing quality person centred services. Key accountabilities in the Team Leader position descriptions included providing leadership, support and supervision to a team of disability support workers, modelling best practice and facilitating an open and fair team environment. These matters suggested that it was misleading to describe Team Leaders as other than managerial. The conclusion applies equally in the current proceedings. The Team Leader position descriptions being the same. The Commission would be fortified in coming to the same conclusion in these proceedings given the cross examination of the Respondent’s witness, Ms McLean, which confirmed that the Team Leader’s Position Description applied equally to the House Managers (Transcript, 21 October 2020, Kellie Marie McLean at PN1044-PN1358).

13. The Applicant submits that, so far as it is necessary to do so, the Commission would find that the work performed by Team Leaders is *the same, or substantially the same*, as the work performed by House Managers. Consequently, the copied State awards continue to apply.”⁴

[12] In its supplementary submissions, the CPA submitted that the same legal question answered in *Northcott* is to be answered in these proceedings, namely, the proper interpretation of the phrase “the same or substantially the same [work]” (as found under s.311(1)(c) and s.768AD(1) of the FW Act).⁵ However, the CPA also submitted that whilst I should generally follow *Northcott*, I am not strictly obliged to do so.⁶

[13] I do not accept that I am able to depart from the decision in *Northcott* to the extent that it has construed (broadly) the meaning of the phrase “the same or substantially the same [work]”. Rather, I consider it to be a binding precedent that I must apply in these proceedings.⁷

[14] In view of the foregoing finding, my task in this dispute is to analyse the facts in this matter consistent with the interpretation of the phrase “the same or substantially the same [work]” as determined by Katzmann J in *Northcott*. In this regard, her Honour relevantly found:

“[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

⁴ CPSU Supplementary Submissions, 28 January 2021, at [2]-[13].

⁵ Note definition of “transferring work” under s.12 of the FW Act.

⁶ CPA Supplementary Submissions, 5 February 2021, at [2](c), citing *Victorian Hospitals Industrial Association v Health Services Union* (2008) 173 IR 120, at [18].

⁷ CPSU Supplementary Submissions In Reply, 11 February 2021, at [5] (citing *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and Others v Unilever Australia Ltd*, unreported, PR940027, AIRC, 31 October 2003, per Munro J, Drake SDP, and Larkin C), at [136]-[138]), and [7]. In making my finding as to *Northcott* being a binding precedent, I equally reject the CPA’s reliance on *Victorian Hospitals Industrial Association v Health Services Union* (2008) 173 IR 120, at [18] (cf. CEPU Supplementary Submissions in Reply, 11 February 2021, at [6]).

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’.⁸

Consideration of evidence

[15] Mr Timothy Pines, General Manager, gave evidence as to the differences between the Team Leader and House Manager roles, as follows:

(a) Team Leaders were rostered for “planned” direct or hands-on care. House Managers are not rostered to perform any direct care; however, they may perform direct care from time to time (e.g. in an emergency).

(b) The House Manager role incorporates the supervisory and managerial responsibilities of both Coordinators and Team Leaders. As Mr Pines states:

“Put at a higher level, the Team Leader position was essentially a hands-on disability support worker role with some administrative and supervisory duties. The House Manager role on the other hand is a true managerial position.”⁹

(c) Team Leaders performed their administrative tasks under the instruction of, or with the assistance of, a Coordinator. This includes maintaining operational rosters, organising appointments for clients, and supporting direct care staff via supervision. The difference with the House Manager role is that the “House Manager has full responsibility in relation to:

⁸ *Community and Public Sector Union, NSW Branch v Northcott Supported Living Limited* [2021] FCA 8, at [161]-[164]. Whilst her Honour is referring to s.311 (and s.309) of the FW Act at paragraph [161], I apply the same reasoning to s.768AD(1)(c) of the FW Act.

⁹ Exhibit R1, Pines Statement, at [21].

- (i) management of staff including mentoring and coaching, performance management, supporting competencies of staff in the area of complex health and behaviour support of clients, regrading of direct support workers, development of performance improvement plans as required, recruitment and on-boarding of new staff;
- (ii) workplace health and safety management of the group home that includes staff and clients;
- (iii) quality and safeguard audit responses, and ensuring the services provided are in line with NDIS quality and safeguard standards;
- (iv) data management using the client management system to record, report and investigate client incidents and any relevant employment relation issues that may pertain to client neglect in care; and
- (v) official community visitor responses.”¹⁰

[16] Similar evidence was also provided by CPA witnesses Ms Kellie McLean (Manager – Accommodation and Respite); Mr Matthew Krollig (House Manager); and Mr Craig Finley (House Manager).¹¹

[17] Cross-examination of the CPA’s witnesses revealed that:

- (a) Team leaders had at least some say and involvement in rostering, albeit House Managers carry a greater level of decision-making in relation to rosters in the homes that they are responsible for.¹² The same applies to the budgets for each home.
- (b) Whilst House Managers have more involvement and scope of decision-making concerning recruitment, disciplinary procedures and the termination of direct care workers, such matters must still be undertaken in accordance with CPA’s policies, procedures and processes.¹³ Team Leaders also had some input into staffing requirements, mainly via recommendations to Coordinators (who equally needed to follow and apply CPA’s policies, procedures and processes).¹⁴
- (c) Team leaders engaged in the supervision and mentoring of direct care workers, albeit House Managers carry greater and more direct responsibilities in this regard.¹⁵
- (d) Team Leaders and House Managers both interact with staff and clients on a daily basis, to more or less degrees.¹⁶

¹⁰ Ibid at [22].

¹¹ Exhibit R2, McLean Statement, at [9] to [13]; Exhibit R3, Krollig Statement, at [13] to [17]; Exhibit R4, Finley Statement, at [10] to [22].

¹² Transcript, 20 October 2020, PN367-PN370, PN384-PN386, PN448-PN449, PN454-PN456, PN466-PN469, PN474, PN559-560, PN563, PN570, PN580, PN763-PN766, PN774-PN777; Transcript, 21 October 2020, PN1013; PN1026; PN1461; PN1465; PN1471-PN1472; PN1477; PN1480 (and compare PN1481-PN1486); PN1494-PN1499.

¹³ Ibid PN350.

¹⁴ Ibid PN401-PN404, PN410-PN421, PN599-PN601.

¹⁵ Transcript, 21 October 2020, PN1079-PN1085; PN1217; PN1325; PN1328; PN1487

(e) Coordinators provided varying levels of onsite and offsite support to Team Leaders, depending upon how much time the Coordinator could allocate to each home, and the skill level and experience of the Team Leader concerned. Such support continues to be provided to House Managers by their Manager – Accommodation and Respite, and by other specialist departments or divisions of CPA.¹⁷

(f) Team Leaders have the same or similar responsibilities to House Managers in relation to quality, integrated and client focused service delivery; CPA's goals for excellence and continuous improvement; working in accordance with legislation, and CPA policies and procedures; workplace health and safety; and working with the resources provided.¹⁸

(g) There is no question that House Managers will provide direct care, albeit on an unplanned basis, as and when required.¹⁹ This is similar to Team Leaders when performing administrative duties (i.e. not formally on the direct care roster), who may be required to assist a client and/or disability support worker.²⁰

(h) Team Leaders dealt with visitors and external stakeholders, as do House Managers.²¹

(i) Team Leaders were not placed upon the on-call rosters like former Coordinators. House Managers work an on-call roster (i.e. on-call to deal with certain kinds of incidents that occur during the hours that the House Manager is not at work).

Submissions of the parties

[18] The CPA submits that:

(a) The Award will only apply to a CPA employee whose employment transferred from FACS to CPA and who performs work which is substantially the same as the work he or she performed for FACS.²²

(b) The evidence identifies that the work of a House Manager is fundamentally different to a Team Leader, both in terms of the nature and purpose of each role, and the day-to-day work of each role. The Team Leader role is the disability services equivalent of a leading hand who spends a significant amount of time "on the tools" with some additional supervisory functions. In contrast, the House Manager role is a true leadership role, required to provide leadership, mentoring, coaching and performance and conduct management of direct care workers. By way of example:

¹⁶ Ibid PN1181.

¹⁷ Transcript, 20 October 2020, PN591, PN716, PN725-PN727, PN763, PN862-PN863, PN869, PN876-PN877, PN883; Transcript, 21 October 2020, PN1055-PN1061; PN1174-PN1180; PN1183-PN1185; PN1191; PN1195; PN1196; PN1213; PN1492; PN1501-PN1504; PN1509.

¹⁸ Transcript, 20 October 2020, PN570, PN587, PN885; Transcript, 21 October 2020, PN1064-PN1075.

¹⁹ Transcript, 21 October 2020, PN1086-PN1118.

²⁰ Transcript, 20 October 2020, PN389, PN850-PN851.

²¹ Transcript, 21 October 2020, PN1207-PN1208; PN1505.

²² CPA Submissions, 18 September 2020, at [12]. I do not understand this to be in contest.

(i) Sixty percent of Team Leaders' work is “hands on” caring work, whereas House Managers will not perform hands-on work at all, except in an emergency or when coaching new direct support workers.

(ii) House Managers have a greater level of responsibility than Team Leaders, including in relation to managing unit budgets (they have significant responsibility in relation to the operating budget for the relevant group home), employee relations (including in recruitment, on boarding, supervision, performance and conduct management) rosters, liaison with stakeholders including families and government agencies (including being responsible for complex family complaints) and compliance.

(iii) To the extent Team Leaders performed administrative tasks, they did so with extensive support from Coordinators - whereas House Managers are alone responsible for the administrative and managerial work previously done by Team Leaders and Coordinators.²³

[19] The CPSU (relevantly) made the following submissions:

“In any event, the concept of the ‘work’ of an employee is concerned with the functions of the employee rather than the precise set of duties undertaken on a day-to-day basis. An examination of the ‘work’ of an employee is not limited to his or her precise duties, the relative time taken undertaking particular duties or the manner of performance of work. The work of an employee may be the same, or substantially the same, even if some new duties are undertaken, some old duties are lost or the composition of the working day is changed so long as the broad nature of the work remains the same or similar.

For example, as the High Court observed in *PP Consultants Pty Limited v Fulltime Sector Union of Australia*,²⁴ a bank employee may be found to be performing substantially the same work after being transferred to operate a bank agency within a pharmacy notwithstanding that certain banking functions were no longer undertaken and the employee performed some work in the pharmacy business.²⁵ In another example, enrolled nurses and assistants-in-nursing were found by the Industrial Court of Queensland to perform substantially the same work notwithstanding that the nurses commenced to perform new duties, including domestic duties such as the serving of meals and gathering of soiled linen.²⁶ The emphasis must be on the substance of the work and not merely an accounting of particular duties.

The evidence of all employees who were engaged in the Team Leader role is that the House Manager role involves performing the work performed by Team Leaders. There may be some differences in emphasis, with some saying the balance between administrative work and care work has changed and others that they have greater responsibilities associated with the new role, but the work remains the same, or substantially the same, as that performed in the Team Leader role.

²³ Ibid at [15] to [17].

²⁴ (2000) 201 CLR 648.

²⁵ Ibid, at [7].

²⁶ *Queensland Nurses' Union of Employees v Churches of Christ in Queensland* (2000) 100 IR 120 at 123-124.

The CPSU submits that the dispute should be resolved by the Commission making it clear that the CPA restructure did not involve a change in the award regulation applying to the former FACS employees employed by the CPA.²⁷

Consideration

[20] The meaning of the term “work” is to be construed broadly. The nature and character of the employment being considered is the focus (and context), rather than the particular duties an employee was undertaking, or will or may be called upon to undertake. Work performed by an employee will be the same or substantially the same even if some new duties are undertaken, some duties formerly undertaken are not undertaken anymore, or the composition of the working day is changed – as long as the nature and character of the work performed remains the same or substantially the same.²⁸

[21] In my view, the evidence as to the differences between the Team Leader role, and the House Manager role, boil down to matters such emphasis, expectations, performance criteria, responsibilities (including the scope of decision making, and the scope of involvement in budgets and rostering),²⁹ support levels previously provided by Coordinators to Team Leaders, and the prevalence of direct care work.³⁰

[22] Whilst some of the work performed by House Managers may not be the ‘same’ as the work performed by Team Leaders, I conclude that the work performed in each of the two roles is substantially the same when one compares (on the evidence) the nature and character of the work being undertaken (i.e. there is no “black and white” in terms of the delineation of duties performed within each role, or between the two roles).³¹ The needs of the service being provided by the CPA to its clients, including the care being delivered, do not change based upon whether a home has a Team Leader, or a House Manager (or whether a Team Leader seeks support and guidance from a Coordinator, or a House Manager seeks support and guidance from their manager). Although I accept that each of the roles are different, both roles still require the incumbent to manage the operation of an accommodation and respite home, and ensure the delivery of high quality accommodation and care to clients. Each role is supported by CPA management, however, a House Manager is given greater authority, autonomy and responsibility to individually manage their home (but still within the bounds of CPA’s policies, procedures, legislation and allocated resources, as have been applicable to Team Leaders).

²⁷ CPSU Submissions In-Reply, 14 October 2020, at [12]-[15].

²⁸ Summarising *Community and Public Sector Union, NSW Branch v Northcott Supported Living Limited* [2021] FCA 8, at [161]-[164].

²⁹ Transcript, 21 October 2020, PN1339-PN1346; PN1362-PN1373.

³⁰ Exhibit R1, Pines Statement, at [23] to [26]; Exhibit R2, McLean Statement, at [9] to [13]; Exhibit R3, Krollig Statement, at [13] to [17]; Exhibit R4, Finley Statement, at [10] to [22]; Exhibit CPSU 5, Lang Statement, at [17]-[20]; Exhibit CPSU 6, Exhibit CPSU 6, Lang Reply Statement, at [5] – [8], [12], [14], [18]-[19], [23]-[24] (I note Ms Lang’s evidence is in the context of her transitioning from Team Leader to House Manager (Transcript, 20 October 2020, PN542), however, her evidence as to her work as a Team Leader, in comparison to her identified work as a House Manager after the transition period, is relevant to the nature and character of the work performed in both roles). Transcript, 20 October 2020, PN229-PN230, PN342, PN429, PN432, PN435, PN484-PN487, PN781-PN797, PN811-PN812, PN900-PN902. Compare Exhibit CPSU 1, Chalmers Statement, 5 August 2020, Annexures SC-01, SC-02, SC-06, SC-07 and Exhibit R1, Pines Statement, Annexure TP-01.

³¹ Transcript, 20 October 2020, PN481, PN817.

[23] It follows from the foregoing conclusion that I must find (as a matter of fact and law) that the Award continues to apply to relevant FACS employees who have been engaged by the CPA as House Managers following the restructure. It equally follows, given there is no basis at law to conclude otherwise, that former FACS employees who have been engaged in the new House Manager roles will continue to be entitled to the same terms and conditions of the Award that applied to them prior to the restructure.

Disposal of proceedings

[24] I find that the answers to the questions posed by the parties in resolution of this dispute, by reference to the law and evidence set out in this decision, are as follows:

Question 1: Will the Award continue to apply to relevant FACS employees following the CPA restructure?

Answer: Yes.

Question 2: If the answer to Question 1 is ‘Yes’, will former FACS employees who are given new positions in the CPA structure continue to be entitled to the same terms and conditions of the Award that applied to them prior to the restructure?

Answer: Yes.



DEPUTY PRESIDENT

Appearances:

Mr Tony *Slevin* of counsel, instructed by Mr D Allen, CPSU senior lawyer, appeared for the Community and Public Sector Union SPSF Group NSW Branch (Applicant).

Mr Jamie *Darams* of counsel, instructed by Mr J Hayden, senior lawyer, of Clayton Utz Lawyers, appeared for the Cerebral Palsy Alliance – Accommodation Northern Sydney Ltd (Respondent).

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