

## SCHCADS award pay point progression is no longer automatic.

The recent federal court decision in *Thompson v Arbias Limited*<sup>1</sup> has shifted the application of pay point progression under the *Social, Community, Home Care and Disability Services Industry Award 2010* [MA000100] (SCHCADS).

In the different classification levels of the award there are pay points. There are several specific provisions in the award that reference at which pay point an employee must commence on and how progression through pay points is dealt with, in respect of certain of the classification levels.

### Clause 13

There is a general pay point progression clause which deals with progression through pay points for all levels of employees, in each stream of the award. This clause was the subject of a recent federal court case determined in October 2020.

#### *13.3 Progression*

- (a) *At the end of each 12 months' continuous employment, an employee will be **eligible for progression** from one pay point to the next within a level if the employee has demonstrated competency and satisfactory performance over a minimum period of 12 months at each level within the level and:*
- (i) *the employee has acquired and satisfactorily used new or enhanced skills within the ambit of the classification, if required by the employer; or*
  - (ii) *where an employer has adopted a staff development and performance appraisal scheme and has determined that the employee has demonstrated satisfactory performance for the prior 12 months' employment.*
- (b) **Movement to a higher classification will only occur by way of promotion or re-classification. (Emphasis added)**

This clause is often mistakenly interpreted to mean that employees are entitled to automatic progression to the next pay point each 12 months if an employee has:

- demonstrated satisfactory performance over the last 12-month period; and
- acquired and used new relevant skills; or
- been judged to have performed satisfactory through the employer's appraisal scheme.

The Federal Court has recently determined that this is not the correct interpretation of how this clause operates. There is an eligibility to be considered for pay point progression which is not an entitlement. The employer has discretion whether to promote or re-classify an employee to a higher pay point – this is the effect of Clause 13 (b).

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<sup>1</sup> *Thompson v Arbias Limited* [2020] FCCA 2829 (20 October 2020)

The determination was based on clause 13 use of the words ‘eligible for progression’ rather than ‘entitled to progression’ and the two phrases have very different meanings.

*“... properly construed, cl 13.3(a) of the Modern award does not create an automatic entitlement to progress from one pay point to another merely because the criteria which it provides are satisfied. Satisfaction of those criteria are a necessary but not sufficient basis upon which any entitlement depends. .... However, to construe cl 13.3(a) to effectively substitute the term entitled in place of eligible would be to effect a fundamental change to the clause. It would also strip the requirement of cl 13.3(b) of content.... it is clear that cl 13.3(b) provides the mechanism for triggering progression between pay points. (Emphasis added)*

The court has clearly determined that it would not be the intention of the Award that employers covered by it – many of whom operate on a not-for-profit-basis – would have to progress employees through pay points automatically every 12 months, as this could severely affect the organisation’s financial viability. Rather, progression should be at the discretion of the employer (once employees had first demonstrated competency, etc as a minimum requirement).

In conclusion

The Federal Court compared the exercise of discretion under the SCHCADS Award as being like that when an employer has the discretion to pay an employee a bonus. Courts have previously found that such discretion cannot be exercised arbitrarily or unfairly.

It is important that employers should therefore ensure that any decisions regarding pay point progression are taken fairly and rationally. This should also be documented. It may be prudent to implement a policy that deals with the exercise of such discretion.

Jobs Australia will continue to monitor any changes to the SCHCADs award and provide Newsletter updates to Members.

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