

BEFORE THE FAIR WORK COMMISSION

Fair Work Act 2009 (Cth)

Title of matter: 4 yearly review of modern awards – *Award stage* — *Group 4 awards* – Substantive Issues

Section: s.156

Matter Number: AM2018/18 and AM2018/20

Awards: *Children's Services Award 2010* and *Educational Services (Teachers) Award 2010*

Document: Submissions of the Australian Federation of Employers and Industries (AFEI)

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Background

1. From 6 May 2019 – 9 May 2019, a Full Bench of the Fair Work Commission (the **Commission**), heard claims by United Voice, the Independent Education Union (**IEU**), the Australian Childcare Alliance and others, and two individuals, for variations to the *Children’s Services Award 2010 (Children’s Services Award)* and the *Educational Services (Teachers) Award 2010 (Teachers Award)* in matters AM2018/18 and AM 2018/20, respectively.
2. The Commission issued directions on 9 May 2019 which provided parties the opportunity to file a submission setting out the findings they seek to have made based on the evidence before the Full Bench, and requested that parties identify the relevant extracts from the witness statements/oral evidence upon which the finding is said to be based.
3. While these submissions will address findings which are available on the evidence adduced in these proceedings (including with reference to the respective evidence/material), AFEI reiterates its position that certain findings are inappropriate in light of the absence of evidence in support of various claims. In this respect, AFEI relies on its written submissions of 16 April 2019, and makes further observations in these submissions.

S1 — Responsible Person

The following findings are available on the evidence, concerning the United Voice claim for a responsible person allowance

4. An individual does not have additional legal responsibilities by virtue of being designated as ‘responsible person’:
 - a. The responsibilities, and responsibility holders, for children’s health and safety (Quality Area 2); and Physical Environment (Quality Area 3) are outlined in the Guide to the NQF.¹

¹ 2.14 and 3.17 – Guide to the NQF – Operational Requirements

5. The Director/nominated supervisor of a service will typically fulfil the regulatory requirement to have a 'responsible person.' This finding:
 - a. Is not contested by United Voice;²
 - b. Supported by the United Voice evidence of Ms Wade, who is a Director,³ Nominated Supervisor,⁴ and is 'the Responsible Person when [she] is present.'⁵
 - c. Supported by the United Voice evidence of Ms Warner, who states that 'my Director is the Nominated Supervisor and when she is on site, she is the Responsible Person.'

6. Where the Director is designated as 'responsible person', the Children's Services Award already compensates them for this designation. This is supported by:
 - a. B.1.10 of the Award includes as an indicative duty of the Director: '*responsible for the overall management and administration of the service.*'

7. The responsibilities of a 'responsible person' other than the Director/nominated supervisor, is already covered in the Award's classifications. This is supported by:
 - a. The description of an 'associate director' in B.1.8 – Level 5 as '*responsible for the day-to-day management of the centre or service in the temporary absence of the Director and for management and compliance with licensing and all statutory and quality assurance issues.*'

8. A person who is not a nominated supervisor/associate director, but who performs the role of a responsible person when the nominated supervisor/associate director is absent, does not perform the full ambit of the role of director or associate director. This is supported by:
 - a. Evidence that a responsible person may hold Certificate III qualification only;⁶
 - b. The evidence of Ms Wade, that the temporary responsible person does not hold various responsibilities of a Director, including for example, authority to make decisions for onboarding new staff members, conducting appraisals, and performance management;⁷

² United Voice submissions 15 March 2019 at [86]

³ [8] Statement of Ms Wade

⁴ [23] Statement of Ms Wade

⁵ [24] Statement of Ms Wade

⁶ [30] Statement of Ms Wade

⁷ PN907 – PN914

- c. Responsibilities outlined in B.1.8 (Assistant Director) and B.1.10 (Director) of the Children's Services Award which relate to ongoing operational management responsibilities, such as 'contributing to the development of the centre or service's policies.'
9. There is no basis to award a responsible person allowance to teachers covered by the Teacher Award, as:
 - a. No evidence is provided in the proceedings of employees covered by that Award who are designated 'responsible person;'
10. The quantum of the responsible person allowance sought is disproportionate to the level of responsibility of a designated 'responsible person'. This is supported by:
 - a. The difference in minimum wages for a Level 4 educator under the Childrens Services Award, and an Associate Director under the same Award, is \$0.40 - \$1.18 per hour, whereas the responsible person allowance sought would range from \$3.31 - \$5.51 per hour, depending on the number of places in the Centre.⁸
 - b. The Associate Director is already responsible for *day-to-day management of the centre or service in the temporary absence of the Director* under the Childrens Services Award.⁹
 - c. In addition to day-to-day responsibilities, the Associate Director also has ongoing responsibilities for *management and compliance with licensing and all statutory and quality assurance issues, and contributing to the development of the centre or service's policies.*¹⁰

⁸ As at 1 July 2018. See table in AFEI Submissions 16 April 2019 at [40]

⁹ B.1.8, Children's Services Award 2010

¹⁰ B.1.8, Children's Services Award 2010

S1 Claim for allowances – educational leader

The following findings should be made by the Full Bench concerning the United Voice's claim for an educational leader allowance

11. A person designated as an educational leader exists within a hierarchy whereby it is the nominated supervisor/approved provider who has overall responsibility for ensuring the Centre's compliance with the Education and Care Services National Regulations. This is supported by:
 - a. The Guide to the National Quality Standard, in addressing the approved learning framework, specifies that 'with support from the approved provider and nominated supervisor, the educational leader collaborates with educators in designing an educational program...'¹¹ [emphasis added]
 - b. Witness evidence that the director provides feedback to staff about their interactions with children and staff, and that the educational leader receives feedback from team leaders, an assistant director, and the director, on her own interactions with staff and children;¹²
 - c. Evidence of Ms Mravunac, who is the Director at her service, that she provides assistance and mentorship to the educational leader.¹³
 - d. Witness evidence of the Director/Centre Manager's overall responsibility for the programming,¹⁴ including:
 - i. Making sure policies dictated by the National Quality Framework are considered and integrated into programming and curriculum¹⁵; and
 - ii. Developing and implementing specialised learning plans to support students of different educational needs.¹⁶

¹¹ Guide to the National Quality Framework, at 1.1, p96

¹² See PN305 – PN307 of transcript 20190506

¹³ PN4480, PN4481

¹⁴ PN4482

¹⁵ See [17] of Hennessey Statement, in conjunction with PN285, and PN286 of transcript 20190506

¹⁶ PN296 of transcript 20190506

12. An educational leader may exercise limited independent judgement and limited discretion in identifying the tasks which are appropriate/expected by the employer/expected by the regulator in order to perform their function. This is supported by the evidence of educational leader Ms Hennessey, who:
- a. Undertook a reconciliation plan as part of her role as educational leader¹⁷ in circumstances where she was not aware of whether there was any regulatory requirement for the centre to have a ‘reconciliation plan;’ and she had been specifically asked by the Centre Manager for ‘it’ [the reconciliation plan] to be done¹⁸.
 - b. Received detailed instruction from the Centre Manager for a research task claimed she was asked to undertake. More specifically, Ms Hennessey advised that she was asked ‘*to look into some various methods for doing critical reflection and what makes it useful and functional*’.¹⁹
 - c. In relation to responsibilities for programming, and specialised learning plans, Ms Hennessey acknowledged that these were responsibilities ultimately of the Director, and she considered her responsibility as educational leader to ‘implement and disseminate [them] through the centre.’²⁰
13. Certain aspects of an educational leader’s responsibilities are inherent responsibilities of an educator or senior educator. This is supported by:
- a. Evidence from Ms Hennessey that team leaders, the assistant director, the director, and ‘almost anyone’ provides feedback to staff concerning their interactions with children and staff;²¹
 - b. References to the Children’s Services Award Level 4 and Level 5 classifications at [21]-[22] of AFEI Submissions 16 April 2019.

¹⁷ Hennessey Statement at [18]

¹⁸ PN303

¹⁹ See in response to a question from Mr Arndt

²⁰ PN285, PN286, see also [17] Hennessey Statement.

²¹ PN306, PN307

14. The designation of tasks associated with leading development and implementation of educational programs in a service, whilst codified in the Regulations from 2012, is not a new feature of the industry. This is supported by:
- a. Clause 21.5 of the Childrens Services Award, which already recognises that an individual may be delegated responsibility *'for...the preparation, implementation and/or evaluation of a developmental program for...[a] group of children.'*²²
 - i. The words *'a group of children'* in Cl.21.5 of the Award is not limited to a specific number, or a specific context/environment – such as a room in the Centre.
 - b. Evidence of Ms Hennessey that she considered her responsibility as educational leader as being to *'implement and disseminate [specialised learning programs, for which the Director had ultimate responsibility] through the centre.'*²³
 - c. We also rely on our submissions of 16 April 2019, and references to the Children's Services Award at [21]-[22].
 - d. The terms of the Teachers Award, as outlined in our submissions of 16 April 2019 at [24] –[26].
15. The quantum of the educational allowance sought is disproportionate to the level of responsibility required of a person appointed to that role. This is supported by:
- a. The allowance sought is significantly higher than the differential between a Level 4 and Level 5 under the Children's Services Award.²⁴
 - b. For the purposes of the Children's Service's Award, the indicative duties of a Level 4 include responsibility *'for the preparation, implementation and evaluation'* of programs, in consultation with the Assistant Director or Director.
 - c. Whereas, the indicative duties of a Level 5 include responsibility for co-ordinating and directing the activities of employees who implement and evaluate the programs.²⁵
 - d. In respect of the Teachers Award, the allowance sought is between 57% and 63% of the Director's allowance.

²² Cl. 21.5, Children's Services Award 2010

²³ PN285, PN286, see also [17] Hennessey Statement.

²⁴ As at 1 July 2018. See table in AFEI Submissions 16 April 2019 at [29]

²⁵ B.1.8, Children's Services Award 2010

- e. The Director's allowance is paid to teachers who are performing the full role of a Director, which includes responsibility for the overall management and administration of a service.²⁶

S29 - Non-contact time

The following findings should be made by the Full Bench concerning the United Voice's claim for additional non-contact time

- 16. Continuity of staff on a day-to-day basis is important for building secure relationships with children, and plays a significant role in promoting their learning and development. This is supported by:
 - a. Element 4.1.2 of the NQF – Continuity of Staff, which requires that 'every effort is made for children to experience continuity of educators at the service.'²⁷

- 17. There is insufficient evidence to conclude, as a general rule, that educators do not have sufficient time to complete their tasks with the amount of non-contact time already provided in the Award. This is supported by:
 - a. The evidence of Ms Bea, that when she received the minimum 2hrs non-contact time, she was able to complete her necessary duties in that period;²⁸
 - b. The very limited union evidence filed concerning contact time; and²⁹
 - c. The lack of prescription for non-contact time in the regulations.

- 18. Should a particular task which cannot be completed during 'contact time' require more than 2hrs' work per week, Centres may exercise prerogative in re-distribution of duties (as an alternative to allocating additional non-contact time). This is supported by:
 - a. The evidence of Ms Hennessey. When Ms Hennessey did not have time to complete an application process for additional funding during non-contact time, this was completed by the Director.³⁰

²⁶ As at 1 July 2018. See table in AFEI Submissions 16 April 2019 at [31]

²⁷ Guide to the NQF, Element 4.1.2

²⁸ PN481, PN482

²⁹ There is only evidence from 4 lay witnesses.

³⁰ [27] Statement of Hennessey

S14 – Training clause

The following findings should be made by the Full Bench concerning the United Voice’s claim for payment for training courses

19. There is no basis to insert this clause into the Children’s Services Award, as no evidence was produced in the proceedings which supports a finding that employees are required to pay for training courses that their employer has directed them to attend.

S -19 Laundry allowance

20. There is no basis to vary the Children’s Award as proposed, as no evidence was provided in the proceedings which could support an evidentiary finding that employees were neither paid the laundry allowance nor had laundry facilities available to them. This is supported by:
 - a. The evidence of Ms Bea, who accepted that there were laundry facilities available to her.³¹

S-20 – Sunscreen and hats allowance

21. There is no basis to vary the Children’s Award as proposed, as no evidence was provided in the proceedings which could support an evidentiary finding that employees were required to purchase their own hats.

S30 – Annual leave

The following findings should be made by the Full Bench concerning the United Voice’s claim for additional paid leave during a Christmas close down

22. There is no basis to insert this clause into the Children’s Services Award, as no evidence was provided in the proceedings which could support an evidentiary finding.

³¹ PN428-429.

Definition of teacher

The following findings should be made by the Full Bench concerning the IEU's claim regarding the definition of a teacher

23. A director should not be covered by the Teaching Award merely by virtue of the fact that they hold a teaching qualification. This is supported by:
- a. The definition of teacher in the Teachers Award, which states that a teacher is 'a person employed as such' who delivers, and performs duties incidental to delivering, an educational program;
 - b. The evidence of Ms Wade and Ms Farrant, who, despite holding a teaching qualification, are both employed as directors and do not perform teaching duties or work directly with children as part of the their role as director.³²
 - c. The qualifications listed in in B.1.10 of the Children's Services Award which have been identified as relevant to the role of a Director includes 'a relevant Degree' or other such qualifications deemed by the employer to be appropriate.

Minimum payment for casuals

The following findings should be made by the Full Bench concerning the IEU's claim for minimum payment for a casuals

24. There is no basis to vary the Teachers Award as proposed, as no evidence was provided in the proceedings which could support an evidentiary finding.

³² PN937, PN3259-3261