FAIR WORK COMMISSION

Fair Work Act 2009

Section 302 – Application for an Equal Remuneration Order

Application by United Voice and Australian Education Union

Matter Nos: C2013/5139 and C2013/6333

SUBMISSIONS OF UNITED VOICE AND AUSTRALIAN EDUCATION UNION IN SUPPORT OF THEIR APPLICATION TO HOLD A PRELIMINARY HEARING TO DEAL WITH THE COMPARATOR ISSUE

Introduction

1. By their Amended Application dated 28 September 2016 (**the Application**) United Voice and the Australian Education Union seek the making of an equal remuneration order, pursuant to s 302 of the *Fair Work Act 2009* (Cth) (**the Act**), within the Children's Services and Early Childhood Education Industry (as defined in Annexure B of the Application).

2. United Voice and the Australian Education Union now seek, as part of the determination of the Application, the holding of a preliminary hearing to determine whether certain classifications in the *Manufacturing and Associated Industries and Occupations Award 2010* are suitable comparators in the Application for the purposes of s 302 of the Act.

The preliminary matter

3. By its decision in the *Equal Remuneration Order – Jurisdictional Decision* [2015] FWCFB 8200 (***Equal Remuneration Decision 2015***) the Full Bench stated at [290]:

> "In summary, in order for the jurisdictional pre-requisite for the making of an equal remuneration order in s 302(5) to be met, the Commission must be satisfied that an employee or group of employees of a particular gender to whom an equal remuneration order would apply do not enjoy remuneration equal to that of another employee or group of employees of the opposite gender who perform work of equal or comparable value. This is essentially a

comparative exercise in which the remuneration and the value of work of a female employee or group of female employees is required to be compared to that of a male employee or group of male employees. We do not accept that s.302(5) could be satisfied without such a comparison being made. Section 302(5) could not be satisfied on the basis that an employee or group of employees of a particular gender are considered not to be remunerated in accordance with what might be considered to be the intrinsic or true value of their work."

4. United Voice and the Australian Education Union now submit that a proper comparator for the Diploma Level and Certificate III classifications under the *Children's Services Award 2010* are the C5 and C10 classifications (respectively) under the *Manufacturing and Associated Industries and Occupations Award 2010* with relevant and consequential adjustment for the other classifications.

5. The above comparator was established as appropriate by the decision of the Full Bench of the Australian Industrial Relations Commission (constituted by then Vice President Ross, Senior Deputy President Marsh and Commissioner Deegan) in applications to vary the *Childcare Industry (Australian Capital Territory) Award 1998* and the *Children's Services (Victoria) Award 1998*: see print PR954938, 13 January 2004.

6. In that decision the Full Bench determined that the Diploma classification should be linked to the C5 classification in the *Metal, Engineering and Associated Industries Award, 1998 – Part 1*[1] (***Metal Industry Award***) (the relevant predecessor of the *Manufacturing and Associated Industries and Occupations Award 2010*) and the Certificate III classification should be linked to the C10 classification in the Metal Industry Award. That assessment was made in the context of the Commission having "regard to the skill responsibility and the conditions under which the work is performed"[2] and by considering "comparable classification levels"[3] and considering the "conditions under which the work of child care workers is performed".[4]

7. United Voice and the Australian Education Union contend that those findings are apt to meet the test in s.302(1) and (2) of the Act.

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[1] AW789529 Print Q0444
[2] Print PR954938, 13 January 2004 at [370]
[3] Print PR954938, 13 January 2004 at [371]
[4] Print PR954938, 13 January 2004 at [372]

8. Since that decision the C5 and C10 classifications have been paid at the same minimum hourly wage as the Diploma Level and Certificate III classification.

9. Further, and consistent with paragraph [290] of the *Equal Remuneration Decision 2015* as cited above, United Voice and the Australian Education Union contend that employees who perform work in a long day care centre or pre-school covered by the Awards the subject of the Application are overwhelmingly female and employees employed under the *Manufacturing and Associated Industries and Occupations Award 2010* are overwhelmingly male.

10. The Application, at paragraphs [46] – [56] and consistent with the above, sets out the manner in which United Voice and the Australian Education Union assert the comparator issue.

11. For the above reasons United Voice and the Australian Education Union assert that the C5 and C10 classifications under the *Manufacturing and Associated and Occupations Award 2010* are a suitable comparator in the Application for the purposes of s 302 of the Act. They now seek, as part of the determination of the Application, the holding of a preliminary hearing to determine whether those comparators satisfy paragraph [290] of the *Equal Remuneration Order – Jurisdictional Decision*.

More Efficient, quicker and cheaper

12. United Voice and the Australian Education Union submit that the holding of such a preliminary hearing would be more efficient and save the parties and the Fair Work Commission time and expense.

The relevant provisions of the Act

13. Section 577 of the Act obliges the Fair Work Commission to perform its functions and exercise its powers in a manner that is "fair and just" and is "quick, informal and avoids unnecessary technicalities".

14. Further, s 581 of the Act provides that the President is responsible for ensuring that the Fair Work Commission performs its functions and exercises its power in a manner that is "efficient".

15. In *Coal and Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78; [2011] FCAFC 54 at [25] Justice Buchanan stated that "the members of FWA have a statutory mandate to get to the heart of matters as directly and effectively as possible".

16. Section 589 of the Act provides that the Fair Work Commission may make decisions as to how, when and where a matter is to be dealt with.

The most efficient, quickest and cheapest approach to the preliminary matter

17. United Voice and the Australian Education Union, by the preliminary matter, are endeavouring to meet the requirement, set out above, of paragraph [290] of the *Equal Remuneration Order – Jurisdictional Decision*.

18. The preliminary matter, as proposed by United Voice and the Australian Education Union, relies upon the previous determination of the Full Bench of the Australian Industrial Relations Commission as to the appropriate comparison between positions under the *Children's Services Award 2010* and the *Metal Industry Award*. For that reason it does not require the calling of evidence upon which an assessment of work value may normally be undertaken.

19. The preliminary hearing would avoid the potential for a long and complex and potentially unnecessary hearing.

20. United Voice and the Australian Education Union anticipate that the preliminary matter can be dealt with in a hearing of one day, without the need for extensive evidence.

21. For those reasons United Voice and the Australian Education Union submit that the preliminary hearing would be more efficient, timely and cost effective.

New and unsettled jurisdiction

22. Section 302 of the Act commenced operation on 1 July 2009. Unlike the equal remuneration order provisions in the *Workplace Relations Act 1996* (Cth), s 302 uses the expression "work of equal or comparable value" (as defined in section 302(2)).

23. Since its introduction there have been a limited number of applications made under s.302. In the *Equal Remuneration Order – Jurisdictional Decision* the Full Bench

discussed and considered the *SACS Case No 1*[5] and the *SACS Case No 2*.[6] The Full Bench respectfully disagreed in a number of respects from those decisions.

24. The preliminary hearing enables the Fair Work Commission to carefully determine an approach to the comparator issue under s 302 of the Act that has not before been advocated.

Misplaced criticism that the preliminary matter assesses comparators in a vacuum

25. By its correspondence to the Fair Work Commission dated 18 October 2016 the Commonwealth complains that it is not possible to determine "appropriate comparators in a vacuum where not all of the respective classifications are considered and without the benefit of evidence upon which a proper assessment of work value can be undertaken".

26. That criticism misses the essential nature of the preliminary matter. The preliminary matter does not require an assessment of all of the evidence comparing the work value of the *Children's Services Award 2010* classifications with the *Metal Industry Award* classifications. To the contrary, the preliminary matter asserts that they are appropriate comparators because they have already been assessed as such by the Full Bench of the Australian Industrial Relations Commission. If United Voice and the Australian Education Union are correct in their assessment of the preliminary matter it is not necessary to undertake a work value assessment of the work of the respective classification. That is the point of the preliminary hearing and the reason it is more efficient, timely and cost effective.

Conclusion

27. In all the circumstances set out above United Voice and the Australian Education Union submit that the Application be fixed for a hearing, with an estimate of one day, to determine the preliminary matter.

Date: 26 October 2016

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[5] *Re Equal Remuneration Case* (2011) 208 IR 345
[6] *Re Equal Remuneration Case* (2012) 208 IR 446