



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE ROSS, PRESIDENT

s.302 - Application for an equal remuneration order

**United Voice; Australian Education Union
(C2013/5139)**

and

**Independent Education Union of Australia
(C2013/6333)**

Melbourne

9.00 AM, WEDNESDAY, 19 OCTOBER 2016

PN1

JUSTICE ROSS: Could I have the appearances, please, in Melbourne.

PN2

MR H BORENSTEIN: If your Honour pleases, I seek permission to appear with Mr C Dowling for United Voice and the Australian Education Union.

PN3

JUSTICE ROSS: Thanks, Mr Borenstein. In Sydney?

PN4

MS L ANDELMAN: Andelman, initial L. I seek leave to appear for the Independent Education Union.

PN5

MS K EASTMAN: If your Honour pleases, Ms Eastman and Ms E Raper, appearing for the Commonwealth.

PN6

JUSTICE ROSS: Thank you, Ms Eastman.

PN7

MR N WARD: Your Honour, Ward, initial N, with Mr Rocheck, for the Australian Child Care Alliance; Australian Child Care Alliance New South Wales; the Australian Child Care Alliance Victoria Inc; the Australian Child Care Alliance Queensland Inc; the South Australian Child Care Alliance; the Australian Child Care Alliance of Western Australia; New South Wales Business Chamber Ltd; and Australian Business Industrial. I also appear with Ms A Matheson for the Australian Chamber of Commerce and Industry.

PN8

Permission has been sought to appear for the majority of those parties previously and been granted, but I don't think it has been sought and granted for the Australian Child Care Alliance group and I now seek permission.

PN9

JUSTICE ROSS: Thank you, Mr Ward.

PN10

MS J ZADEL: If your Honour pleases, Zadel, initial J, for the Australian Federation of Employers and Industries.

PN11

JUSTICE ROSS: Thank you, Ms Zadel.

PN12

MR J GUNN: Your Honour, Gunn, initial J, for Community Connections Solutions Australia.

PN13

JUSTICE ROSS: Thank you.

PN14

MS R BHATT: Your Honour, Bhatt, initial R, appearing for the Australian Industry Group.

PN15

JUSTICE ROSS: No one else in Sydney? We have from Western Australia on the telephone - - -

PN16

MR P MOSS: Yes. May it please the Commissioner, Moss, initial P, on behalf of the Chamber of Commerce and Industry of Western Australia.

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JUSTICE ROSS: Thank you, Mr Moss. I am sorry about the time. I hadn't appreciated there were any WA parties with an interest in this matter.

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MR MOSS: That's quite okay, sir.

PN19

JUSTICE ROSS: Can I deal firstly with the various applications for permission to appear. Is there any objection to any of those applications? No? I take it they're put on the basis that having regard to the complexity of the matter, it would be dealt with more efficiently if permission were granted. Is there anything anyone else wishes to say in relation to that matter? No? Permission is granted in each instance.

PN20

Mr Borenstein, can I go to your firstly. It seems to me the matters that you have raised in the proposed orders are in two parts. The first deals with - - -

PN21

MR BORENSTEIN: The orders that your Honour is referring to, are they the orders - the proposed minute to order?

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JUSTICE ROSS: Yes. 18 October - - -

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MR BORENSTEIN: Yes.

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JUSTICE ROSS: - - - 2016. Correspondence from Hall Payne.

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MR BORENSTEIN: Yes, your Honour.

PN26

JUSTICE ROSS: They fall into two parts in this way, I think: the first is that you seek leave to amend the application that's presently before the Commission. The second then deals with the proposition that the comparator be dealt with as a threshold issue.

PN27

MR BORENSTEIN: Yes.

PN28

JUSTICE ROSS: Can I deal with the first matter at this stage. The proposed variation to the application, I think was the variation that was attached to the correspondence from your instructor of 28 September. Is that right?

PN29

MR BORENSTEIN: I think so, yes.

PN30

JUSTICE ROSS: That correspondence makes some corrections in relation to the position of the second applicant, the AEU, as well. What I'm not clear about is I've got a handwritten strikeout in the letter of 18 October from your instructors removing the AEU from that. I'm not clear, is the amendment to the application that you seek put on behalf of United Voice and the AEU?

PN31

MR BORENSTEIN: It is, your Honour. I'm sorry, I'm not sure what your Honour is referring to with the handwritten - - -

PN32

JUSTICE ROSS: Yes.

PN33

MR BORENSTEIN: I've got a copy of a letter dated 28 September from - - -

PN34

JUSTICE ROSS: No, I'm talking about the 18 October letter. I'm sorry, Mr Borenstein. We received - this is in relation to the correspondence of 18 October.

PN35

MR BORENSTEIN: Yes.

PN36

JUSTICE ROSS: We received a subsequent email from Mr Forsyth from Hall Payne indicating that the proposed directions were only advanced on behalf of United Voice. Is the position this: the application to amend the application before the Commission for the equal remuneration order is put on behalf of both United Voice and the AEU?

PN37

MR BORENSTEIN: That's right.

PN38

JUSTICE ROSS: But the propositions that deal with the hearing of what you've described as a threshold issue, I think - - -

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MR BORENSTEIN: Yes.

PN40

JUSTICE ROSS: - - - of the suitable comparator, they're advanced on behalf of United Voice only at this point?

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MR BORENSTEIN: But without opposition from the AEU.

PN42

JUSTICE ROSS: Okay. All right. Thank you, Mr Borenstein. Can I deal then with the application to amend - or to grant leave to file an amended application in the form attached to the Hall Payne correspondence of 28 September. Now, bear in mind here I'm only dealing with that application for leave to amend. I'm not dealing with the other issue at the moment. That is, the question of whether there should be a threshold hearing on the comparator point.

PN43

I've received correspondence from the AGS indicating, in brief, that they have no objection to the application for leave to amend, but they oppose the threshold hearing proposition. In relation to the application for leave to amend, is there any opposition to that? From any party in Sydney? No? WA?

PN44

MR MOSS: No, your Honour.

PN45

JUSTICE ROSS: All right. Leave to amend is granted, Mr Borenstein. In relation to the other matter - that is the comparator hearing - can I put it this way: I don't want to waste your time because I don't think there is much point in me deciding that issue. I think that's a matter for the Full Bench constituted to hear the question, but I wonder whether the time might be used productively.

PN46

Either you can outline why it is you seek it and you can hear from the other parties as to their respective positions; outline briefly what it is. Then I would be interested in the views of the parties as to how that matter might be determined. That is, whether it proceeds to the one-day hearing that you propose or not.

PN47

Look, can I offer this suggestion: it may be that you reduce to writing why you say it should take that course and then any interested party would be given an opportunity to file in writing their position in respect of the matter, then I would refer all those submissions to the Full Bench as constituted to deal with it. It would then be a matter to decide whether they want to hear from you further or whether they want to deal with it on the papers. That is, whether there is a hearing or not. How do you propose to - - -

PN48

MR BORENSTEIN: Your Honour, we're not committed to one course or the other. This is a proposition which obviously everybody will have a view about.

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JUSTICE ROSS: Yes.

PN50

MR BORENSTEIN: And the Full Bench obviously needs to hear from everybody. Written submissions are as good a way as any to at least outline the parties' positions and we don't oppose that course, if that's the course that is decided upon. We have endeavoured in the amended application, in the paragraphs which we've added, to explain the line of reasoning which has led us to make this application.

PN51

As to why this particular issue should be dealt with as a preliminary matter, in the barest of summaries our position is firstly that in a sense it's responsive to the previous jurisdictional decision which the Full Bench made where it expressed its view about the approach that had previously been taken in the application. That has been taken on board and an attempt has been made to respond to that.

PN52

Secondly, as the previous decision demonstrates, this is a new area in the legislation and it's not an area that has been settled in terms of authority on how it should work. There is obviously a divergence of views between the first SACS case and the recent decision, and we have now put forward another way of approaching the matters that we think is suitable and appropriate under the legislation.

PN53

We see that this is a matter which - this issue can be dealt with in relatively short compass, perhaps with some evidence but we wouldn't anticipate a great deal of evidence because you'll see the way in which we at least put our case in-chief is based on an assessment that has already been made by the Full Bench. Now, others might have a view about that and others might say, well, you need more and we're happy to hear about that. To the extent that that can be accommodated, obviously it should be.

PN54

We see that as being a much narrower and more confined and more targeted hearing than a general application. I had the good fortune of being involved in the SACS case and it was a very long case, and with a lot of evidence going to all sorts of issues; a very expensive exercise for the Commission and all the parties that were involved. It would be, in our view, a substantial shame if one had to go through a whole process only to find that the first hurdle you had to jump was the wrong hurdle.

PN55

We say that there is a strong argument for saying, well, it's a new area. This is a new approach to establishing a comparator in a difficult situation generally. If you want to use the legislation this way, it should be beyond the wit of the parties to deal with it as a finite issue. Then if the union is successful, all the other evidence will at least be targeted by reference to the decision which the Commission makes.

PN56

In the broadest of terms, that's why we say it is the most efficient way of dealing with a very potentially complex and very large piece of litigation. As to bringing the position of the parties to the Full Bench, as I said, we don't have any opposition to it going in writing.

PN57

JUSTICE ROSS: All right. Thanks, Mr Borenstein. Can I just go to the parties in Sydney. I don't think I need to hear from the Commonwealth, inasmuch as it's apparent from the correspondence that the Commonwealth opposes the preliminary hearing proposition. I just want to get the views of the other parties as to whether or not they're opposed to that. You don't need to deal with why at this stage. I just want to know where you sit on it.

PN58

MS EASTMAN: Your Honour, may I just jump in and make a comment?

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JUSTICE ROSS: Yes, certainly, Ms Eastman.

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MS EASTMAN: I think we're very much assisted by the explanation that our learned friend has just given. One of the concerns of the Commonwealth was the permission - - -

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JUSTICE ROSS: Sorry, you're just drifting in and out.

PN62

MS EASTMAN: Right. One of the concerns the Commonwealth had is set out in that correspondence - and I'm not aware whether the other parties have seen that correspondence. It was the concern of the Commission being asked, in effect, to consider a hypothetical question. We were very mindful of paragraph 291 in the Commission's November decision in terms of what ultimately falls to an application in relation to identifying the appropriate comparator.

PN63

It seems from my learned friend that there probably is a need for some identification of relevant facts on which that question might be approached and the Commonwealth wouldn't oppose the course suggested by your Honour that the parties set out in writing their respective positions in relation to that question so that it may ultimately be determined by the Full Bench. Thank you, your Honour.

PN64

JUSTICE ROSS: Thanks, Ms Eastman. Mr Ward?

PN65

MR WARD: I think your Honour is asking a simple question, which is whether or not our clients oppose the process that is being advocated by the applicant. Can I indicate that we do oppose it. We will be arguing, when we get the opportunity, that it is in fact an improper process, so we will be opposing the process.

PN66

JUSTICE ROSS: All right. Any others?

PN67

MS ZADEL: Your Honour, Zadel, initial J, for the Australian Federation of Employers and Industries. In as far as we have considered the directions, we would oppose the second part to deal with the comparator as a threshold issue for the reasons already set out by the Commonwealth.

PN68

JUSTICE ROSS: All right. Thank you.

PN69

MS ANDELMAN: Your Honour, for the Independent Education Union, we don't oppose the proposed directions. We see merit in resolving this threshold question. It's a short point that can be dealt with at the outset. For our position, we're considering our application on comparators. Depending on the outcome of the questions posed by UV, we may need to amend our application.

PN70

I can flag that the Independent Education Union's case is much bigger and a more complicated case which will not be able to be heard in one day, but we think the first step is for United Voice to pursue its claim and once that discrete question has been answered, then we will finalise our position.

PN71

JUSTICE ROSS: Anyone else in Sydney? No? All right. Western Australia?

PN72

MR MOSS: Thank you, your Honour. Yes, we would also oppose the proposed approach adopted by United Voice.

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JUSTICE ROSS: All right. Thank you. I think the easiest way to deal with the matter is to ask the applicant to put in writing the reasons in support of the proposed course of action. Would one week be sufficient time, Mr Borenstein?

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MR BORENSTEIN: Yes, your Honour.

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JUSTICE ROSS: All right. If that can be filed within seven days. All the material will be posted onto the web site. We will contact each of you to make sure that you have the details of how to access it. I'm not sure if the site is still active or whether it went dormant after the last decision, but in any event all the correspondence will be posted to that. Any other party with an interest in the proceedings will then have seven days from 4 pm next Wednesday to file anything they wish to say in response to the material filed by the applicant. The applicant will then have three days in which to file any reply to that.

PN76

That material will then be forwarded to the Full Bench and they will advise you as to whether or not they propose to resolve that issue on the papers about the procedure to be adopted or whether they seek a short oral hearing to hear from you about it. You should proceed on the basis that it will be decided on the papers, so put what you wish to say in your written response. Are there any questions about any of that?

PN77

Can I clarify the dates for you. Mr Borenstein, you would have until 4 pm on 26 October to file the material. Any interested party wishing to file a response should do so by 4 pm on 2 November. Then anything in reply, Mr Borenstein, by 4 om on Monday, 7 November.

PN78

MR BORENSTEIN: That's an unholy day, your Honour.

PN79

JUSTICE ROSS: 7 November. Why is that?

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MR BORENSTEIN: That's the day before Cup day.

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JUSTICE ROSS: Is it? I thought Cup day was on the 1st.

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MR BORENSTEIN: Is it the 1st? I'm sorry.

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JUSTICE ROSS: Yes.

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MR BORENSTEIN: I withdraw that.

PN85

JUSTICE ROSS: No, I wouldn't have made that mistake, Mr Borenstein. I wouldn't want to put you in that position.

PN86

MR BORENSTEIN: No.

PN87

JUSTICE ROSS: Are there any questions about those directions or any questions about the process? Mr Borenstein, anything from you?

PN88

MR BORENSTEIN: No.

PN89

JUSTICE ROSS: Anything from any party in Sydney? No? From WA?

PN90

MR MOSS: No, your Honour.

PN91

JUSTICE ROSS: All right. Can I just ask the Independent Education Union - I was a little unclear about what you were putting. Are you suggesting that you support the United Voice proposition that the preliminary question be determined first and, once that preliminary question is determined, you will consider your position in relation to your application? Is that the essence of it?

PN92

MS ANDELMAN: yes, your Honour.

PN93

JUSTICE ROSS: All right. What will you do if the Full Bench decides not to deal with it as a threshold question? Are you still looking at an amendment to your application?

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MS ANDELMAN: I think there will just need to be some minor amendments in terms of dates and a few minor things, but the issue of comparators may need to be revisited based on the Full Bench decision.

PN95

JUSTICE ROSS: Right, okay. Thanks very much for your attendance and I'll wait to hear from you in relation to the proposition that is being advanced.

PN96

MR BORENSTEIN: Your Honour, before you adjourn - - -

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JUSTICE ROSS: Yes, Mr Borenstein.

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MR BORENSTEIN: Do you need to order or direct that there be a transcript of today?

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JUSTICE ROSS: No, I'll do that in any event. All transcript in relation to these proceedings will be posted on the web site and be available to any interested party. Thanks, Mr Borenstein. I will adjourn.

ADJOURNED INDEFINITELY

[9.20 AM]