

Summary of Decision

19 April 2021



Equal Remuneration and Work Value Case

Application for an equal remuneration order for early childhood teachers

(C2013/6333)

Application to vary the *Education Services (Teachers) Award* on work value grounds

(AM2018/9)

[\[2021\] FWC FB 2051](#)

Introduction

[1] This decision concerns two applications made by the Independent Education Union of Australia (IEU). The first application was for an equal remuneration order pursuant to s 302 of the *Fair Work Act 2009*, to apply to early childhood teachers employed in long day care centres and preschools who are covered by the *Educational Services (Teachers) Award 2020* (EST Award) (equal remuneration application). The second application was made pursuant to s 158 of the *Fair Work Act*, and sought to increase the minimum salaries for all teachers covered by the EST Award on work value grounds (work value application).

Equal remuneration application

[2] The IEU's equal remuneration application was advanced on the basis that the work of early childhood teachers employed in long day care centres and preschools is the subject of gender undervaluation, in that they do not receive equal remuneration for work which is of equal or comparable value to work performed by other professionals in other industries and by teachers employed in other parts of the education industry. The IEU contended that the undervaluation can be seen by comparing the work performed by early childhood teachers and the remuneration paid to them to the following comparator occupations:

- (1) male teachers employed in primary schools in New South Wales; and
- (2) male professional engineers.

[3] The equal remuneration order sought by the IEU would increase the minimum wages payable to early childhood teachers to the level of government and private primary school

teachers in New South Wales or, alternatively, to the level of the market salary rates payable to professional engineers. This would involve salary increases of about 36% for a graduate early childhood teacher and about 54% for an early childhood teacher at the top of the pay scale.

[4] In order to succeed, an equal remuneration application must demonstrate, in respect of the employees to be covered by the proposed equal remuneration order and an identified comparator group, that:

- (1) the two groups perform work of equal or comparable value;
- (2) they are of the opposite gender; and
- (3) they are unequally remunerated

[5] In respect of the IEU's first comparator group, the Full Bench concluded that although the first and the third of the above conditions were satisfied, the second was not. The Full Bench said that the comparator group selected as the basis for an equal remuneration application must be authentic and not constructed or manipulated to produce an appearance of gender pay inequity when, in substance, no relevant gender pay inequity actually exists. No rational basis was apparent for the extraction of male primary school teachers from the entire workforce of primary school teachers in New South Wales beyond a need on the part of the IEU to construct a male comparator group. The evidence upon which the IEU relied to demonstrate an equality or comparability in the work value of early childhood teachers and primary school teachers dealt with the latter group in an entirely undifferentiated way as to gender.

[6] The Full Bench concluded that, in substance, the comparison being made was really one between a female-dominated workforce consisting of early childhood teachers and another female-dominated workforce consisting of primary school teachers in New South Wales government and Catholic schools. The extraction of male teachers from the latter group for use as a comparator was simply a sleight of hand to avoid the fact that a female-female comparison was being relied upon, and there was no *gender* inequality in remuneration as between early childhood teachers and New South Wales primary school teachers.

[7] In respect of the IEU's alternative comparison with male professional engineers, the Full Bench accepted that professional engineers are predominantly male and are paid significantly higher remuneration than early childhood teachers. However, the Full Bench was not satisfied, on the basis of the evidence presented by the IEU, that the work value of professional engineers was equal or comparable to that of early childhood teachers. The IEU's selection of the entirety of the engineering profession as a comparator group was highly problematic. The profession is highly diverse in terms of the specialised areas in which engineers operate, including as mining, civil, chemical, electrical, electronic, mechanical, industrial and production engineers, as compared to the comparative uniformity in the early childhood teaching profession. There is also a high degree of diversity as to the environment in which engineers perform their work, and as to the remuneration they are paid. This indicates that the work value of the engineering profession is not consistent across its different specialisations and sub-categories, meaning that there is no stable point of comparison and no proper basis to conclude a comparability of work value.

[8] The Full Bench did not accept the IEU's expert evidence which sought to demonstrate equality or comparability in the work value of early childhood teachers and professional engineers using job evaluation methodology, for three reasons. First, use of the methodology depends to a significant extent on a subjective assessment of the requirements of a role from the limited information contained in the position description, and as such is incapable of producing reliable, objective and reproducible outcomes. Second, the use of the classification descriptors for engineers in the *Professional Employees Award* as the reference point was misconceived. The award classification definitions only describe what is necessary to qualify for the minimum levels of remuneration prescribed by the award, and there is no basis to conclude that these classification definitions accurately describe the duties, skills, responsibilities and work environment of all engineers in the engineering profession. Third, the methodology does not take into account the environment in which the work is performed.

[9] The Full Bench said that it did not intend to suggest that there was no basis for comparison between early childhood teachers and engineers, and noted that both are professional groups requiring a 4-year bachelor's degree and the application of the knowledge and skill acquired through study and ongoing professional learning. However, the degree of diversity in the engineering profession, and the very limited evidentiary material before the Full Bench concerning the work, skills, responsibilities and working environment of engineers, made it impossible for the conclusion to be reached that early childhood teachers perform work of equal or comparable value to that of their equivalents in the engineering profession, taken as a whole.

[10] Because the Full Bench was not satisfied that the prerequisite in s 302(5) of the *Fair Work Act* for the making of an equal remuneration order was satisfied on either basis advanced by the IEU, the IEU's application for an equal remuneration order was dismissed.

Work value application

[11] In its work value application, the IEU contended that there have been significant changes since 1996 in the work value of teachers covered by the EST Award, including early childhood teachers, that have not been taken into account in the fixation of minimum wage rates for such teachers. The IEU identified three major categories of change in this respect: increased professionalism that has given rise to higher quality teachers, an increase in the complexity of teachers' work, and substantially more intense and demanding work. The IEU's claim was for the pay scale in the EST Award to be adjusted to, first, remove inappropriate internal compression at the higher pay levels and, second, increase wages by 17.5 percent. Alternatively, the IEU sought a flat 25 percent increase to the current award rates.

[12] During the hearing of the work value application, the Full Bench heard extensive evidence from a large number of witnesses, including expert witnesses, school teachers, early childhood teachers, and operators and directors of early childhood education and care centres. It also received a very large volume of documentary evidence and examined material relevant to the history of the industrial regulation of teachers.

[13] The Full Bench concluded that it was satisfied that an adjustment to the minimum rates of teachers covered by the EST Award is justified by the following work value reasons:

- (1) The rates for teachers under the EST Award and its federal predecessors have never been fixed on the basis of a proper assessment of the work value of teachers nor are they properly fixed minimum rates. In particular, the rates of pay do not recognise that teachers are degree-qualified professionals and accordingly do not have an appropriate relativity with the Metal Industry classification structure.
- (2) There have been substantial changes in the nature of the work of teachers and the level of their skills and responsibility since 1996. This constitutes a significant net addition to their work value which has not been taken into account in the rates of pay in the EST Award.

[14] In respect of the second of the above conclusions, the Full Bench found that change in the work value of teachers since 1996 occurred in four main areas:

- (1) Additional training requirements for entry into the profession.
- (2) Increased professional accountability associated with registration requirements, standardised testing and greatly increased expectations concerning reporting and being accessible to parents and families.
- (3) Greater complexity of work resulting from a shift to outcomes-based education and differentiated teaching, with associated requirements for greater documentation and analysis of individual educational progress.
- (4) Teaching and caring for a more diverse student population including, in particular, additional needs children.

[15] The Full Bench's detailed findings in relation to the four main areas of work value change include that:

- a four-year degree or a two-year postgraduate qualification is now the standard qualification for entry into the teaching profession;
- the introduction of national registration requirements for teachers and the associated requirements concerning compliance with professional standards and professional development have meant that teachers are now accountable for the continuation of their professional employment to external regulatory authorities in a way that did not generally exist prior to 1996;
- the effect of the introduction of standardised testing in schools has been to make publicly transparent the outcomes at individual schools and thereby expose the teachers of the tested students to a degree of scrutiny and pressure to improve performance that did not exist before 1996;
- an analogous effect has occurred in early childhood education, in that teacher performance in delivering the Early Years Learning Framework (EYLF) is reflected in

the publicly-available ratings of each service in the first quality area of education program and practice under the National Quality Framework (NQF), and this has raised professional expectations of early childhood teachers;

- there has been a significant enlargement in the scope of parental interaction with teachers, mainly because of their accessibility via email and other online modes of communication, and a concomitant addition to the degree of accountability on the part of teachers to parents;
- in the period 1996 to date, there has been a major shift in focus of education towards outcomes-based curricula which are less focused on the delivery of prescribed content and more focused on setting broad benchmarks of student achievement which are observable and assessable, and this has required a differentiated teaching method which is focused on the learning of the individual;
- there has been a substantial increase in the need to obtain data concerning student performance from testing, to analyse this data, and to adjust teaching programs on the basis of this analysis, as a means to achieve prescribed outcomes, and this requires a degree of sophistication and precision in the delivery of teaching to meet individual students' needs that was not previously required;
- similarly, in early childhood education, the best practice for teachers under the EYLF that has developed involves a “cycle of learning” involving observation of children’s learning and development level, an assessment of how each child’s learning has progressed and can be improved with the EYLF outcomes in mind, the design and planning of learning experiences in play and discovery consistent with the assessment, the implementation of planned learning experiences using intentional teaching, the making of further observations, and critical reflection as to achieved progress towards the EYLF outcomes;
- such teaching is focused on the needs of individual children in that it is highly responsive and adaptive to the displayed interests and behaviour of individual children; and
- the work of teachers has become more demanding and requires greater skill and responsibility because of the need for teachers to respond to a more diverse student population in the context of the more individualised approach to teaching, particularly in relation to the “mainstreaming” of additional needs children.

[16] The Full Bench considered what adjustment to the minimum rates in the EST Award is appropriate to ensure that they properly reflect the work value of teachers. It did not consider that either variation proposed by the IEU would result in a rate structure that properly reflects the work value of teachers because it involved the retention of yearly increments in pay, inappropriately sought to unwind the compression of relativities caused by flat amount wage increases awarded in Safety Net Reviews and Annual Wage Reviews from 1993 through to

2010, and involved pay increases which would overcompensate for the work value considerations which the Full Bench identified.

[17] The Full Bench considered that a new classification structure should be developed in which the key classification would be that of Proficient Teacher, aligned with the Level C1(a) rate in the Metal Industry classification structure, and in which the other classifications would be based on the career levels in the Australian Professional Standards for Teachers. The Full Bench considered that the following classification and pay structure would properly reflect the work value of teachers under the EST Award:

Classification	Criteria	Weekly salary - preschools and schools \$	Annual salary - preschools and schools \$	Weekly salary - long day care centres \$	Annual salary - long day care centres \$
Level 1	Graduate teacher with provisional or conditional accreditation where applicable	1,141.20	59,545	1,186.80	61,927
Level 2	Teacher with proficient accreditation or equivalent	1,247.30	65,085	1,297.20	67,688
Level 3	Teacher with proficient accreditation after three years' satisfactory service at Level 2	1,357.90	70,854	1,412.20	73,688
Level 4	Teacher with proficient accreditation after three years' satisfactory service at Level 3	1,468.40	76,623	1,527.20	79,688
Level 5	Teacher with Highly Accomplished/Lead Teacher accreditation	1,579.00	82,392	1,642.20	85,688

[18] The Full Bench also considered that the provision of an annual allowance of \$3,302.46 for early childhood teachers appointed to the statutory position of Educational Leader would be justified on work value grounds.

[19] The Full Bench did not state any final conclusion concerning whether a variation to the EST Award to introduce the pay structure identified above was necessary to achieve the modern awards objective in s 134(1) of the *Fair Work Act* or would be consistent with the minimum wages objective in s 284(1) of the Act. It considered that it was not in a position to make findings in respect of paragraphs (f) and (h) of s 134(1) and paragraph (a) of s 284(1), having regard to the evidence before it concerning the cost of the IEU's claim and the effects the grant of the claim would have on the viability, profitability and prices of employers in the early childhood education and care sector, particularly for-profit employers.

[20] Accordingly, the Full Bench considered that the appropriate course was to afford interested parties the opportunity to adduce further evidence and make further submissions which respond to the modifications to the remuneration structure in the EST Award which the Full Bench considered to be justified by work value reasons, and which address s 134(1)(g) and (h) and s 284(1)(a), before it made findings concerning whether the variation of the EST Award to give effect to those modifications is necessary to achieve the modern awards objective and would be consistent with the minimum wages objective. The Full Bench said that such further evidence and submissions might, among other things, usefully deal with the following matters:

- what the operative date of the variation should be if it is made;
- whether any phasing-in arrangements should apply; and
- the capacity of the Commonwealth Government and State and Territory Governments to assist in funding the wages of early childhood teachers.

[21] After interested parties have had an opportunity to peruse the decision and consider its contents, the Full Bench will list a directions hearing in the matter and determine the appropriate procedural course for the final disposition of the proceedings.

This statement is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission's reasons.