



IN THE FAIR WORK COMMISSION

Title of Matter: Equal Remuneration Case

Section: s. 302 – Applications for equal remuneration order

Matter Number(s): C2013/5139 and C2013/6333

SUBMISSIONS IN REPLY REGARDING PRELIMINARY HEARING TO DEAL WITH COMPARATOR

1. Pursuant to the directions handed down by the on 21 October 2016, the Chamber of Commerce and Industry of Western Australia (**CCIWA**) provides the following submissions in reply to the the proposal by United Voice and the Australian Education Union (collectively referred to as the **Unions**) to hold a further preliminary hearing to deal with the issue of an appropriate comparator.

Overview of position

2. CCIWA does not support the process advocated by the respective unions.
3. It is the view of CCIWA that the proposed approach would further delay these proceedings, creating additional cost and uncertainty for the participants. Furthermore, the approach does not allow for the respondent parties to understand the whole of the claim proposed by the Unions, and as such limits our ability to effectively defend the claim.
4. Rather we broadly support the approach proposed by the Australian Government Solicitor (**AGS**) in its correspondence of 18 October 2016 as providing an appropriate framework for progressing this matter.

Preliminary matters already determined.

5. On 20 December 2013 the Fair Work Commission (**FWC**) directing all parties to file submissions on the legislative and conceptual framework relevant to these proceedings.

6. Following significant submissions and hearings, the FWC handed down its Equal Remuneration Decision 2015¹ (**Preliminary Decision**) which dealt with the issues in contention and established a set of guiding principles for the determining the applications in question.
7. In particular, the Preliminary Decision gives significant guidance to the parties with respect to the range of factors that should be considered in determining an appropriate male comparator. Therefore in our opinion there is no further need to deal the issue of comparator as a separate issue.
8. CCIWA therefore contends that the Preliminary Decision provides the Unions with the appropriate framework for setting out and dealing with their claim in full, without the need for the parties to deal with further preliminary matters which have already been adequately addressed by the FWC.

Approach encourages further delays.

9. As the Unions have identified in their submissions filed on 26 October 2016, section 577 of the *Fair Work Act 2009 (Cth)* (**FW Act**) states that
“The FWC must perform its functions and exercise its powers in a manner that:
 - (a) is fair and just; and*
 - (b) is quick, informal and avoids unnecessary technicalities; and*
 - (c) is open and transparent; and*
 - (d) promotes harmonious and cooperative workplace relations.”*
10. CCIWA believes that splitting this matter up further will result in unnecessary delays to the finalisation of this matter.
11. The approach proposed appears to be premised on a lack of confidence that the Unions have in the appropriateness of the comparators chosen. By dealing with this matter of comparator separately it would appear that it is the intention of the Unions to seek further amendments to their claim in the event that their choice of comparator is not deemed appropriate. This would potentially provide the Unions with multiple opportunities to refine their applications until they obtain a positive ruling.
12. The drawing out of the matter in this respect would limit the FWC’s ability to deal with these applications in a timely manner.

¹ *Equal Remunerations Decision 2015 [2015] FWCFB 8200*

13. This is particularly relevant given the potential impact that this application has on both the employees and employers engaged in this industry and the uncertainty that it creates.
14. It is the view of CCIWA that this claim has very significant cost implication for businesses operating in the child care industry, and if the claim is successful it would impact upon the viability of many child care centres and the employment prospects of their workers.
15. Whilst these concerns are a matter for further debate, the claim is creating ongoing uncertainty within the industry and there is a general view that the matter should be determined as quickly as possible in order to provide employers with some certainty as to future labour costs. The uncertainty created by applications of this nature may have a chilling effect upon investment decisions by encouraging current and potential businesses operators to defer investment decisions until the issue is resolved or alternatively invest in other industries.
16. In further splitting this matter we believe that the final determination of the applications will be unduly delayed.

Ensuring transparency

17. The proposed approach limits the ability for these applications to be dealt with in an open and transparent manner. This in turn negatively impacts on a fair and just process for the respondents.
18. Given the significance of these applications it is incumbent on, and reasonable to assume that, the respective Unions have substantively prepared for the prosecution of their claims.
19. Support for this assumption can be derived from the ten months it has taken for the Unions to submit amended applications following the handing down of the Preliminary Decision.
20. In hearing the issue of appropriate comparator as a further preliminary matter, the respondents would be hindered in their ability to provide a thorough defence against the claim on the basis that we are unaware of the full nature on the Union's argument and the evidence it seeks to tender in support of the application.
21. We would therefore agree with the comments made by the AGS that given that the preliminary matters have already been addressed, the ordinary process for dealing with applications should now be followed in which the respective Unions file all of their submissions and evidence taking into account the guidance already provided by the FWC in the Preliminary Decision.

Proposed approach does not reduce complexity

22. In recognition of the complexity of this application, the Preliminary Decision has provided guidance which allows the applicants to present their claim in full.
23. It is the view of CCIWA that given the range of matters to be considered this is likely to be a complex process in which the parties would reasonably be expected to provide significant submissions and evidence to support their respective positions.
24. Whilst the FWC is likely to address each of the issues outlined in the Preliminary Decision in turn, we believe that this is most appropriately done in the context of understanding the full arguments.
25. Not only does such an approach ensure the matter is dealt with in a transparent and just process, it will also reduce the time taken by the FWC to deal applications.
26. We do not agree with the assumption made by the Unions that the appropriateness of the proposed comparator is one that can be dealt with quickly and with little evidence.
27. The time required to hear this aspect of the claim is likely to be substantially greater than one day and that the respondents will need a significant period of time by which to respond to the arguments filed by the Unions.
28. CCIWA is concerned that the time required for submissions and evidence to be filed by the respective parties on the issue of comparator alone, the time taken for a decision to then issue, plus additional delay in further presenting submissions and evidence on the remainder of the issues will result in a substantial delay in the final determination of these applications.
29. We therefore submit that the matter should be dealt with in the following manner:
 - a. the applicants should file full written submissions and any evidence upon which they seek to rely in relation to their applications;
 - b. any party supporting the applications should file written submissions in reply and any evidence upon which they seek to rely;
 - c. any party opposing the applications should file written submissions in reply and any evidence that they seek to rely;
 - d. taking into account the material files, the FWC should then set appropriate hearing dates.

30. Given the complexity and significance of this matter, as well as the lack of detail provided in the applications as to the foundations of the claim, we would envision that parties responding to the application will need to be afforded a substantial period of time to address the submissions and evidence tendered. We believe that the timeframes for submission in response should be determined once the applicant's submissions are filed.

2 November 2016

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Chamber of Commerce and Industry of Western Australia