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GREG REIFFEL CONSULTING
HUMAN RESOURCES & INDUSTRIAL RELATIONS

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Quote of the Edition

"As I hurtled through space, one thought kept crossing my mind: every part of this rocket was supplied by the lowest bidder". John Glenn

Full Bench Rejects Children's Workers equal remuneration case (& a history lesson)

Application for an equal remuneration order by United Voice and the Australian Education Union [2018] FWCFB 177 (C2013/5139), Hatcher, VP, Dean, DP, Saunders, C. 6 February 2018

In what turned out to be an interesting history lesson on "work value", the FB in this matter rejected the unions' argument that employees covered by a number of awards, including the Children's Services Award 2010 be remunerated the same as levels C10 and C5 in the Manufacturing Award 2010. The unions main argument being the level of qualification required by each group of workers.

The main points were that ultimately the unions failed to provide - via substantiated evidence – that there was any gender disparity. In particular:

- The unions had run its case in 2005 but had not provided any further substantial evidence of any change some 13 years later.
- Whilst "Work Choices" stalled matters, the FB found that the unions had ample opportunity under the Modern Award process to push their agenda.
- Rejected the Manufacturing Award as a relevant comparator, commenting on a 2015 FB decision (C2013/5139 and C2013/6333), which stated:

  "The 'comparative exercise' which is required as a jurisdictional prerequisite to the making of an equal remuneration order…to be carried out between the group of employees to be covered by the proposed order and an identified comparator group has three elements:

  (1) the two groups must perform work of equal or comparable value;
  (2) they must be of the opposite gender; and
  (3) they must be unequally remunerated."

The FB also declared the distinction between what they described as "work value" matter and an application for an equal remuneration order; stating that the unions claim fell more into the former than the latter:

> "The pay equity cases which have been successfully prosecuted in the NSW and Queensland jurisdictions and to which reference has earlier been made **were essentially work value cases**, and the equal remuneration principles under which they were considered and determined were likewise, in substance, extensions of well-established work value principles. It seems to us that cases of this nature can readily be accommodated under s.156(3) or s.157(2). Whether or not such a case is successful will, of course, depend on the evidence and submissions in the particular proceeding."

History buffs read on

"The **1968** Vehicle Industry Award decision of Senior Commissioner Taylor…was a seminal authority as to the considerations relevant to the proper assessment of work value (albeit in a manufacturing context). The Senior Commissioner identified the relevant considerations as being:

1. The qualifications necessary for the job;
2. The training period required;
3. Attributes required for the performance of the work;
4. Responsibility for the work, material and equipment and for the safety of the plant and other employees;
5. Conditions under which the work is performed such as heat, cold, dirt, wetness, noise, necessity to wear protective equipment etc;
6. Quality of work attributable to, and required of, the employee;
7. Versatility and adaptability (e.g. to perform a multiplicity of functions);
8. Skill exercised;
9. Acquired knowledge of processes and of plant;
10. Supervision over others or necessity to work without supervision; and
11. Importance of work to the overall operations of plant.

The development of formal and binding wage-fixing principles in the **1980's** resulted in a codification of the process for the assessment of work value in the Work Value Changes principle…the Work Value Changes principle was as stated in the **Safety Net Review** – Wages – **May 2004**. Paragraph (a) of the principle stated the critical considerations as follows:

> "Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.
>
> In addition to meeting this test a party making a work value application will need to justify any change to wage relativities that might result not only within the relevant internal award structure but also against external classifications to which that structure is related. There must be no likelihood of wage leapfrogging arising out of changes in relative position.
>
> These are the only circumstances in which rates may be altered on the ground of work value and the altered rates may be applied only to employees whose work has changed in accordance with this Principle."

"In the FW Act [**2009**], modern award minimum wages may be varied in or outside of a 4-yearly review…if the Commission is satisfied that this is justified by "work value reasons". That expression is defined…as follows:

> "Work value reasons are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:
>
> (a) the nature of the work;
> (b) the level of skill or responsibility involved in doing the work;
> (c) the conditions under which the work is done".

Commentary

It would appear following this decision that unions will have a hard time proving equal remuneration cases unless they are (much) better prepared. As mentioned in this decision (I paraphrase), the comparator needs to be relevant and one that clearly sets out females are being paid less than their male counterparts for doing the same work.

A trip through remuneration history would not be complete without mention of the "Basic Wage" set by the Sunshine Harvest decision.

The *Harvester* wage was sometimes referred to as the 'living wage' or 'family wage' because the method of fixing it was an attempt at assessing the 'cost of living' of a labouring family. Justice Higgins used a family of a husband, wife, and three children for these purposes.

An annual national wage review now forms part of the Fair Act 2009 (the "Act").

Ex parte H.V. McKay [1907], commonly referred to as the Harvester case, is a landmark Australian labour law decision of the Commonwealth Court of Conciliation and Arbitration. The case arose under the Excise Tariff Act 1906 which contained a proviso that excise would not be payable on products if a manufacturer paid "fair and reasonable" wages to its employees. The Court therefore had to consider what was a "fair and reasonable" wage for the purpose of the proviso.

H.B. Higgins declared that "fair and reasonable" wages for an unskilled male worker required a living wage that was sufficient for "a human being in a civilised community" to support a wife and three children in "frugal comfort", while a skilled worker should receive an additional margin for their skills, regardless of the employer's capacity to pay.

While the High Court of Australia in 1908 held that the Excise Tariff Act 1906 was invalid, the judgment nevertheless continued to be the basis for the minimum wage system that extended to half of the Australian workforce in less than 20 years. The decision was credited as the foundation for the national minimum wage included in the Fair Work Act 2009. Source: Wikipedia.

The factory, which produced the Sunshine Harvester, was in the Melbourne suburb of Sunshine. It is now a shopping complex. Perhaps an allegory for the demise of Australian manufacturing.

Until next time....

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