



STATEMENT

Fair Work Act 2009
s.156—4 yearly review of modern awards

4 yearly review of modern awards—*Children’s Services Award 2010 and Educational Services (Teachers) Award 2020* (AM2018/18; AM2018/20)

Children's services

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT SAUNDERS
COMMISSIONER LEE

SYDNEY, 17 JUNE 2022

4 yearly review of modern awards – Children’s Services Award 2010 – Educational Services (Teachers) Award 2020 – outstanding substantive issues.

Background in matters C2013/6333 and AM2018/9

[1] On 19 April 2021, the Full Bench in matters C2013/6333 and AM2018/9 issued a decision¹ (April 2021 decision) concerning 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* (the Act), to apply to early childhood teachers employed in long day care centres and preschools who are covered by the *Educational Services (Teachers) Award 2020* (Teachers Award) (equal remuneration application). The second application was made pursuant to s 158 of the Act and sought to increase the minimum salaries for all teachers covered by the Teachers Award on work value grounds (work value application).

[2] In the April 2021 decision, the Full Bench in relation to the work value application considered that it was necessary to make provision for additional remuneration for any early childhood teacher appointed to the statutory role of Educational Leader. The Full Bench referred to clause 19.3 of the Teachers Award, which at that time provided for a regime of leadership allowances payable to school teachers only, with the Level 1 allowance being applicable to positions of educational leadership. The Full Bench considered that the Level 1 allowance for schools in the smallest category (category C), should also be payable to early childhood teachers who are required to discharge the responsibilities of the Educational Leader under reg 118 of the *Education and Care Services National Regulations*.²

¹ [2021] FWCFB 2051

² Ibid at [658]

[3] In a further decision³ issued on 11 October 2021 (October 2021 decision), the Full Bench stated:

“[75] In respect of the Educational Leader allowance as set out at paragraph [658] of the April decision, the consent position provides for the allowance to be payable to Educational Leaders in addition to any Director’s allowance (where applicable). The proposed variation stipulates that where the position of Educational Leader is shared, the payments may also be shared and in circumstances where a centre operates less than five days a week, the allowance is reduced *pro rata*. In support of the consent position, the IEU submitted that the proposed variation clarifies that where the responsibilities of being Educational Leader are shared with another teacher or teachers, the allowance is similarly shared, however this does not mean that merely because a teacher works part-time hours the allowance is to be paid *pro rata*. It submitted that the full allowance is payable to the person who bears the responsibilities of Educational Leader regardless of their working hours, unless the early childhood facility operates less than five days a week, in which case the allowance is payable on a *pro rata* basis. Should an Educational Leader also be a Director, the proposed consent variation stipulates that they are entitled to both allowances.

[76] The CCSA and CER supported the consent position and the AEU did not object to it.

[77] The AFEI filed a submission opposing the consent position. It submitted that it was unclear why the allowance is stated as \$3,845.14 per annum in the proposed consent variation when applying the national minimum wage increase of 2.5% to \$3,302.46 as set out in the April decision which equates to \$3,385.02. Further, it submitted that part-time employees should get a *pro rata* entitlement as is the case with the director’s allowance pursuant to clause 19.2 of the EST Award.”

[4] The Full Bench accepted the consent position in relation to the quantum of the Educational Leader allowance, referring to their April 2021 decision. The Full Bench stated that clause 19.3(g)(i) of the Teachers Award provides that the quantum of the allowances is based on a percentage of the “standard rate”, which is defined in clause 2 to mean “the minimum annual rate applicable to Level 1 in clause 17.1”. No party suggested that the Full Bench should change the definition of “standard rate” or remove the linkage between the leadership allowances and the “standard rate”, by reason of the new classification structure and its redefined Level 1.

[5] The Full Bench further accepted that there should be a pro-rata adjustment of the allowance for employees acting as Educational Leader who perform the role on less than 5 days per week (whether because they are a part-time employee, or share the role with another employee, or work in a centre that is not open 5 days per week). The Full Bench decided that the pro-rata adjustment should be on a daily basis, since the evidence in the main part of the proceedings did not indicate that teachers are required to act as Educational Leaders on a part-day or hourly basis.

³ [2021] FWCFB 6021

[6] The Full Bench stated that the consent position involves a new clause 19.4 which deals with the Educational Leader allowance. The Full Bench did not consider that proposed clauses 19.4(e) and (f) deal with the pro-rata payment situation with sufficient precision and proposed that these provisions be replaced with the following:

(e) Where an employee is required to act as educational leader for less than 5 days per week, the annual allowance prescribed by clause 19.4(c) will be payable on a pro rata basis calculated by reference to the number of days per week the employee is required to act as educational leader.

[7] Parties were provided an opportunity to file any submissions in response to the views set out in the October 2021 decision. On 1 November 2021, the Full Bench issued a further decision⁴ incorporating additional modifications to the variation determination.

[8] Clause 19.4 was amended to read as follows:

19.4 Wage-related allowances—educational leader

(a) Clause 19.4 applies only to a teacher in the children’s services and early childhood education industry.

(b) The allowance is based on a percentage of the standard rate.

(c) An educational leader’s allowance of \$3845.14 per annum will be paid to an employee who is required to discharge the responsibilities of the educational leader under Regulation 118 of the National Regulations.

(d) The educational leader’s allowance is payable in addition to any director’s allowance payable under Clause 19.2.

(e) Where an employee is required to act as educational leader for less than 5 days per week, the annual allowance prescribed by clause 19.4(c) will be payable on a pro rata basis calculated by reference to the number of days per week the employee is required to act as educational leader.

Background in matters AM2018/18 and AM2018/20

[9] On 10 June 2020, a Full Bench issued a decision⁵ (June 2020 decision) in which the Commission determined a number of claims to vary the *Children’s Services Award 2010* (Children’s Services Award) and the Teachers Award (collectively, the awards).

[10] In the June 2020 decision, the Full Bench stated:

“9.4 Other matters

⁴ [2021] FWCFB 6038

⁵ [2020] FWCFB 3011

[554] During the course of the proceedings we invited the parties to comment on whether the claims for an Educational Leader Allowance overlap with the proceedings in C2013/6333 and AM2018/9. Those proceedings are before a differently constituted Full Bench which has reserved its decision.

[555] We do not propose to determine two of the claims before us, at this time. These claims are the claims in respect of an **Educational Leader Allowance** and a **Responsible Person Allowance**. These claims will be listed for Mention after the Full Bench in C2013/333 and AM2018/9 has handed down its decision.”

[11] On 19 October 2020, the Full Bench issued a further decision⁶ (19 October decision) and variation determination⁷ varying the Teachers Award, operative 1 November 2020. On 28 October 2020, the Full Bench issued a further decision⁸ (28 October decision) and variation determination⁹ varying the Children’s Services Award, also operative on 1 November 2020.

[12] In the 19 October decision, the Full Bench stated:

“As noted in the *June 2020 decision*, the claims for an Educational Leader Allowance and a Responsible Person Allowance will be listed for mention after the Full Bench in C2013/333 and AM2018/9 has handed down its decision.”¹⁰

[13] These two claims were advanced by the United Workers’ Union (UWU) in respect of both awards. They are as follows:

- (i) a claim to introduce a new allowance for employees assigned to be the Educational Leader at a service (Educational Leader Allowance); and
- (ii) a claim to introduce a new allowance for employees assigned to be the Responsible Person at a service (Responsible Person Allowance).

[14] I. and E. Arrabalde (the Individuals) advanced claims in similar terms to those advanced by the UWU for an Educational Leader Allowance and a Responsible Person Allowance.

[15] In a decision¹¹ issued on 24 November 2021 (the November 2021 decision), the Full Bench stated:

“[53] On 19 April 2021, the Full Bench handed down a decision in C2013/6333 and AM2018/9 (the Equal Remuneration and Work Value Case). The Full Bench has called for further submissions and the matter remains on foot. We confirm that the above two claims will be listed for Mention after the Full Bench in those matters hands down a final decision.”

⁶ [2020] FWCFB 5531

⁷ PR723627. A correction to determination was issued on 27 October 2020, PR723865.

⁸ [2020] FWCFB 5766

⁹ PR724049

¹⁰ [2020] FWCFB 5531 at [58]

¹¹ [2021] FWCFB 6053 at [53]

Next steps

[16] These two outstanding substantive matters in AM2018/18 and AM2018/20 have been referred to us for determination.

Educational Leader Allowance

[17] As earlier explained, the Full Bench in matters C2013/6333 and AM2018/9 has now handed down its decision, making provision for additional remuneration for any early childhood teacher appointed to the statutory role of Educational Leader in the Teachers Award.

[18] In the November 2021 decision, the Full Bench stated that it was “prepared to accept that the role of an Educational Leader is the same under both Awards”.¹² It is our *provisional view*, that the allowance inserted into the Teachers Award by the Full Bench in AM2018/9 should be inserted into the Children’s Services Award so that persons undertaking the role of Educational Leader under each award have an equivalent entitlement.

[19] The issue of the translation of the quantum of the allowance is a matter which will need to be determined. Parties are requested to file submissions in relation to the *provisional view* above by **4:00 pm AEST on 15 July 2022**. The matter will then be listed for further mention.

Responsible persons allowance

[20] The claim relating to the responsible persons allowance will be listed for mention before the presiding member at **9:30 am AEST on 27 June 2022**.



VICE PRESIDENT

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¹² Ibid at [65].