

3 December 2001

Discrimination against senior librarians

NSW Administrative Decisions Tribunal

Bonella & Ors v Wollongong City Council 2001 NSW ADT 194

Background

On 29 November 2001 the NSW Administrative Decisions Tribunal [Equal Opportunity Division] handed down its decision in this important case. It was brought by five Wollongong City Council [WCC] female librarians who are members of ALIA. It alleged discrimination by their employer [WCC] in allocation of employee benefits, specifically provision of private use motor vehicle benefits.

The Tribunal has now upheld the complaint. The Council has been ordered to pay each of the five ALIA members \$7500 in damages within 28 days and to immediately rectify its illegal practices by introducing a non-discriminatory motor vehicle policy. The five ALIA members have been granted leave to make further claims to the tribunal if the employer does not do so within sixteen weeks from the date of the judgement.

The decision is, of course, subject to appeal.

ALIA's role

I have worked with the members concerned for six years on this matter. After making formal representations on their behalf and conducting negotiations with the Council's general manager and senior staff, I drafted their formal complaint to the NSW Anti-Discrimination Board, and assisted them in subsequent conciliation proceedings conducted by the Board. When the employer refused to adjust its position, and the matter went to formal litigation, I assisted in obtaining pro bono legal representation for the members and supported them in preparation for the formal proceedings.

History and development of the case

ALIA first became aware of the issue in late 1995. The five female librarians are employed as 'assistant managers' in WCC's library service. At this level most employees across the WCC workforce enjoyed private use motor vehicle benefits. None of the five librarians had access to this benefit, while male counterparts in other work groups gained it more or less automatically. This apparent inequity - or at the very least, inconsistency - was compounded by the fact that WCC operated a highly formalised, points-factor job-evaluation system.

Under it, all jobs were rated in work value terms. As a result of WCC's failure to adopt an even-handed approach to non-cash benefits, including allocation of motor vehicle benefits, the positions occupied by the five female librarians lost relativity with positions rated equal to their own. The effect was to pay people rated equally in work value terms differently in total remuneration terms.

The employees complained formally to the Council. They were given short shrift to put it mildly. They raised the matter with their union which was reluctant to take the matter up in any significant way, appearing to me more concerned about retaining benefits enjoyed by their male members than gaining additional benefits to which these five female librarians were entitled. The librarians then sought help from ALIA.

After reviewing all the paperwork, I took the view that this was an excellent example of the way in which pay inequity [already apparent in cash salaries paid under formal industrial awards, agreements and employment contracts] was often exacerbated by highly selective allocation of other, non-cash benefits. The effect of this is to take what is already a disturbingly inequitable set of cash salary relativities and widen them still further in a total remuneration sense. As such, I considered that this case could be an important element of our pay equity strategy providing an excellent micro-level example to complement our macro-level efforts in respect of the profession as a whole. These broader efforts, of course, soon after found their most effective central focus in the major Pay Equity Judicial Inquiry in NSW. The fact that this particular case of apparent discrimination and pay inequity was also occurring in NSW made it all the more strategically significant.

Accordingly, while ALIA does not automatically involve itself directly in enterprise-level disputation [especially where a trade union has coverage of the workforce], I decided that on this occasion we should provide the strongest possible support to the members concerned by directly challenging the employer's stance. I then wrote to the general manager of WCC [attached] expressing serious concerns about the equity and the legality of the position taken by his organisation.

Shortly after I went to Wollongong and had some rather tense discussions with the general manager and members of his senior staff. I re-emphasised ALIA's concerns and told them bluntly that, in my view, they were breaking the law. I urged WCC to soften its stance, to enter discussions with the five librarians and to reach a sensible compromise. When this was clearly not acceptable I told the general manager that if he persisted, I would have to advise the librarians to pursue the matter through anti-discrimination provisions conferred under the NSW Anti-Discrimination Act of 1977. I said very directly that if this occurred ALIA would support its members and, in my view, WCC would eventually lose, because their position was simply unsustainable in law.

The general manager was not at all impressed by this advice and negotiations broke down. I then wrote again to the general manager, confirming our view that his stance was unlawful [attached]. Soon after this, I wrote a formal complaint and application for relief to the Anti-Discrimination Board for the five librarians and so began the long legal saga, which reached its denouement this week.

The Tribunal's judgement

The Tribunal has held that WCC's general manager unlawfully discriminated against all five ALIA members. The Tribunal has fully upheld ALIA's original submission that this was in effect 'an equal remuneration case'. The provision of private use of vehicles has been confirmed in law as a benefit, and thus as part of remuneration. In that regard, the Tribunal has totally rejected WCC's proposition that private use of a motor vehicle 'is not to be seen as part of a remuneration package of an employee of Council'. In doing so, the Tribunal found that 'any reasonable person' would take the counter view. Private use was found to form part of the remuneration of some Assistant Managers, but not of others. In the Tribunal's judgement, WCC had 'consistently shown itself to be unwilling, or unable, to confront this fact'. Accordingly, its policy was unlawful.

Implications and broader significance

This judgement has important implications for pay equity strategies. It confirms the view put consistently by ALIA that pay equity must be assessed in respect of TOTAL remuneration and not just cash salaries conferred by industrial awards, enterprise agreements or individual contracts. In this regard, as I told the employer at the very outset of these proceedings in 1995, the proper definition of remuneration is that emanating from the International Labour Organisation's Equal Remuneration Convention 100:

'The ordinary basic or minimum wage or salary and any additional emoluments whatsoever, payable directly or indirectly, whether in cash or kind, by the employer to the worker arising out of the worker's employment'.

This confirmation will undoubtedly strengthen leverage for pursuit of pay equity for librarians across Australia and not just in New South Wales.

Conclusion

A great deal of work has gone into this case. But it has clearly been worthwhile. In particular, we have been soundly vindicated in our initial assessment that this matter had implications extending beyond the important matter of fairness for the five members directly affected. And our legal analysis and submission that the employer's policy was unlawful in terms of Section 25 [2] of the Anti-Discrimination Act, which I put personally to the employer six long years ago, has been fully adopted by the Tribunal.

Throughout those past years, Wollongong City Council has rigidly eschewed even the slightest hint of compromise. Frankly, its behaviour has been appalling. In all this time, life has been made generally difficult for the five librarians, their union has been of little real help to them and they have had to show extraordinary determination and persistence to see the matter through to a conclusion. The result they have achieved this week is richly deserved.

For the Board's information.

Phil Teece
Adviser
Industrial Relations and Employment
ALIA National Office

Attachments

[i] Letter to the General Manager, Wollongong City Council 4 December 1995

**Mr RJ Oxley
General Manager
Wollongong City Council
Locked Bag 8821, South Coast Mail Centre
WOLLONGONG NSW 2521**

Dear Mr Oxley

I have been approached by professional members of this association employed as Assistant Managers by Council, about the matter of private-use vehicle allocation.

The members concerned have expressed disquiet at what they see as gender-specific inequity in Council policy in this area. After perusing a range of related documentation, I must say that I share their concerns.

The Australian Library and Information Association [ALIA] is the principal professional association for the library and information association in Australia. It represents the interest of the sector to government and supports the aspirations of individual professionals. ALIA is vitally concerned with both the provision of the highest quality library and information services and with the status of the profession.

In this matter, ALIA regards current arrangements as unsatisfactory in terms of equity and procedural fairness. From perusal of Council documentation it appears to me that two specific aspects need to be separated and reconsidered. These are, firstly, the question of a need to use vehicles in carrying out day to day responsibilities and, secondly, the quite separate matter of private usage. Clearly, the former is a matter of operational policy, while the latter concerns provision of a *benefit*. In other words, it is one thing to argue that a given employee requires a car for day to day duties; it is quite another to increase total remuneration by conferring private use benefits, which by definition are not related to the employee's duties.

As regards its members' need to have full time access to vehicles as part of day to day duties, ALIA would say only that extremely plausible arguments appear to have been put by the Assistant Managers. From my reading of the response they have received, it is quite inadequate in that it simply does not address many of the points they have raised. ALIA would request that all these matters be dealt with properly, in accordance with normal administrative practice – that is, by providing either an acceptance of the arguments put or, alternatively, a satisfactory statement of 'reasons for decision' in rejecting the argument.

ALIA is far more concerned, however, by the issue of private vehicle usage as a benefit. I note that, along with most industry sectors, New South Wales local government bodies advertise senior vacancies very much in terms of total remuneration. Advertisements specifically refer to private use of motor vehicles as elements of salary packages. This is, from ALIA's viewpoint, perfectly reasonable and in keeping with normal business practice. For such an approach to be fair, however, there must be strict consistency in allocation of all elements of total remuneration, including private use of vehicles. If there is not, then clearly the whole framework for wage relativity is compromised.

Prima facie, it appears to ALIA that grace and favour arrangements applying to private use of vehicles by Council's senior staff raise the spectre of unreasonable discrimination between particular groups of employees. Current policies appear to run counter to notions of equal pay for work of equal value, which are now fundamental elements of Australia's industrial relations law and practice. The issue of manipulation of remuneration via mechanisms unrelated to relative work value is, of course, at the centre of the current industrial dispute involving CRA and the ACTU which has resulted in such poor publicity for that company in recent weeks. Conceptually similar issues are suggested by Council's lack of even-handedness in respect of private vehicle usage.

Put simply, there is no justification for employees whose relative work value and salary have been set by application of agreed industrial standards to be then disadvantaged, vis a vis staff with similar levels of responsibility, by inconsistent provision of non-salary components of total remuneration. In this regard, ALIA would remind Council that the legal concept which must be respected is equal pay for work of equal value, not simply for equal work. 'Equal pay' in this context must mean equal total remuneration. Thus, for example, an Assistant manager in the Library Division who has an established work value relativity with an Assistant manager in another division is entitled to have that relativity maintained in respect of total remuneration, not just in terms of cash salary.

Given these facts, I am concerned that the matters raised by ALIA's members have been treated in a somewhat cavalier fashion. If they remain unable to achieve prompt and genuine consideration of their position, I shall be advising them that the matter should be taken up formally, as both an industrial issue and a legal matter involving gender-specific discriminatory practices. In this latter regard, the appropriate avenue for complaint would be the New South Wales Ant-Discrimination Board. This, of course, will not be necessary if Council takes the reasonable course by seriously addressing the members' concerns against the background of this submission.

Could I urge you to ensure that this occurs as a matter of urgency

Yours sincerely

Phil Teece
Manager, Personnel & Industrial Services
ALIA National Office

[iii] Letter to the General Manager, Wollongong City Council 19 January 1996

**Mr R Oxley
General Manager
Wollongong City Council
Locked Bag 8821
South Coast Mail Centre NSW 2521**

Dear Mr Oxley,

I refer to my letter of 4 December 1995 and the meeting held in Wollongong today to discuss it.

The Association now notes your reaffirmation of Council's position on non-cash elements of total remuneration, as applying to Assistant Managers. ALIA wishes you to be aware of our continuing serious concerns with that stance.

Council's policy as articulated at today's meeting is unlawful in the Association's view. Specifically, I re-emphasise our difficulty with two particular aspects of that policy. Firstly, Council continues to assert that private-use motor vehicle privileges and other non-cash employment-related benefits will not be taken into account in relating rewards to the outcomes of job evaluation. Secondly, Council maintains its position that, for purposes of ensuring equal remuneration for work of equal value, remuneration will be restricted purely to cash salary.

Since today's meeting concluded, I have been informed that similar concerns are held by the trade union exercising industrial coverage of Council's workforce. I understand that the union's concerns were also exacerbated as a result of their separate meeting held with you later today. As a consequence, the issue has now developed to the point where in formal terms an industrial situation exists.

In these circumstances, the Association would hope the matter will now receive serious attention inside your organisation. Indeed, perusal of my earlier correspondence will confirm that this was from the outset our preferred course. In particular, the Association would hope that Council might now seriously address itself to the details of staff concerns, rather than simply deny their legitimacy by regarding staff unhappiness as having been artificially manufactured by external agents.

In the Association's view, sensible and open discussions within organisations always represent the best course for resolution of staff disquiet. The workforce almost always seeks this approach first. It is only when there is a lack of real dialogue that employees feel compelled to resort to external mechanisms as the only avenues through which genuine grievances can be brought to a head.

In this matter, the Association will continue to provide support to its members. In addition, we shall continue to respond positively to any request for assistance, liaison and co-ordination from the Municipal Employees' Union. The Association would expect that affected employees will shortly achieve satisfactory improvements in their situation as a result of the industrial process now in train.

Should that not eventuate, however, it will be for those employees as individuals to determine what action they might take through established channels of review, to challenge what in their and the Association's view is a failure by Council to ensure adequate standards of legal compliance. In this eventuality, the Association would, of course, assist them to the fullest extent.

Yours sincerely

Phil Teece
Manager,
Personnel and Industrial Services
National Office

[iii] Workwatch Column, inCite February 1996

Phil Teece

Manager, personnel & industrial relations -February 1996

The equal pay principle

With the Australian Council of Trade Unions now embarking on important test cases, we can expect equal pay to be a focus for industrial relations attention in the months ahead. Many say 'not before time'.

Research studies continue to warn of negative outcomes for women under enterprise bargaining. One way to reduce these dangers is through stronger efforts to implement the equal pay for work of equal value principle, included in Australian law through the 1994 Industrial Relations Reform Act. With that in mind, it is probably timely to reflect on some of the inequities which still exist - and on just what the equal pay principle involves.

The concept of equal pay for equal work was adopted in Australia more than twenty years ago. Since then differential rates in awards for men and women doing the same jobs have largely disappeared. But women have continued to earn less than men overall. The Industrial Relations Reform Act took the concept further by adopting the text of the international Equal Remuneration Convention. This aims to eliminate all pay differences which are based on gender, whether directly or indirectly. And in this context it is most important for employees and their organisations to understand that 'remuneration' is defined very widely. It does not mean only that award wage rates must be the same. Under the law, remuneration is 'the ordinary basic or minimum wage or salary, and any additional emoluments whatsoever, payable directly or indirectly, whether in cash or kind'.

As well, the law now clearly goes beyond the notion of equal pay simply for the same work. The Act emphasises that the meaning of equality now turns on objective comparison and evaluation of the content of jobs being done by men and women. It clearly envisages that proper job appraisals will be conducted to make genuine comparisons. These are not restricted to women and men in the same organisation or occupation or to people using the same skills or techniques.

Recent cases that I have been handling for ALIA members highlight a general ignorance of these legal developments in some organisations. There are still glaring examples of inconsistent and unfair allocation of non-cash elements of total remuneration, for example. Managers need to understand that fair salary systems must address all of the

components of reward. Policies which do not take account of all benefits are simply unlawful, given the definition of remuneration which now prevails. And various other established practices which produce unequal outcomes for particular groups, especially women, are most likely to be illegal too. Far too often managers continue to believe that only behaviour can produce discrimination. Obviously, inappropriate behaviour (such as sexual harassment, for example) can often create direct discrimination.

But for organisations, the effect of policies are more often the basis for findings of discrimination. This is indirect discrimination. It is not the intention which matters here. Rather, the outcomes are the issue. It is most important to recognise that indirect discrimination is every bit as much against the law as the more dramatic and obvious cases of direct discrimination.

Some workplace practices were established many years ago, when legal standards and social values were vastly different. To continue them unthinkingly means organisations risk falling foul of contemporary law. Many such policies and practices may not appear obviously discriminatory until they are examined specifically for their effect on women or other groups. Then the illegality soon becomes apparent.

As good a definition of indirect discrimination as there is came from Chief Justice Bowen in the Federal Court when he described it as: 'practices which are fair in form and intent but discriminatory in impact and outcome' (Department of Foreign Affairs and Trade v Styles, 1989). Prudent managers will be taking action now to ensure their policies do not fail within this description.

As members of one of the most highly feminised occupations, librarians may rest assured that the Association will be vigorously pursuing cases where indirect discrimination is still evident in remuneration systems. In particular, ALIA will strongly oppose the tendency for some organisations to allocate non-salary benefits (such as motor vehicles) inconsistently after job evaluation has supposedly established objective relativities. This simply makes a mockery of fair comparability.

The issue of equal remuneration for work of equal value is a vital one for librarians, and not just for the majority who are women. In the highly feminised employment categories historical inequities affect all members, regardless of their gender. Action to ensure that pay equality involves all elements of remuneration and benefits constitutes a major step in the quest for improved equity.

ALIA will be looking closely at initiatives which can be taken in the equal pay area. Members seeking support or wanting to discuss the subject generally should contact me on (02) 6285 1877 or e-mail phil.teece@alia.org.au

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<http://www.alia.org.au/incite/1996/02/workwatch.html>