

## Article Information

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## Are you discussing pay with your employees? The importance of pay equity in the workplace

***A recent decision of the Victorian Court of Appeal highlights the importance of providing all employees with reasonable opportunities to discuss remuneration. [\[1\]](#)***

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### Background

In 2009, Christina Tsikos was employed by Austin Health as an orthotist/prosthetist and was promoted to manager of the Orthotic/Prosthetics Department the following year. Throughout her employment, she was paid at the rate set out in the applicable enterprise agreement.

She managed 14 employees, 10 of whom were male. Out of these 10 male employees, six were paid above the rates specified in their enterprise agreement, and they were all classified at a level higher than their roles actually attracted.

One of the employees who reported to Ms Tsikos was paid significantly more than her (and paid well above the relevant rate in the applicable enterprise agreement). His rate was higher because he (Mr Spalding) was originally employed in a different specialised role, however that role had since been discontinued.

Ms Tsikos asked management no less than six times between 2011 and 2014 to negotiate her remuneration, however, management blocked these requests. In 2018, Ms Tsikos wrote an official letter summarising these past requests, noting the significant pay gap between her and her male colleagues.

Consequently, Ms Tsikos commenced proceedings, alleging that she had been unlawfully discriminated against on the basis of her age and sex, as a consequence of having been denied the opportunity to negotiate her remuneration and receive higher remuneration than that which was contained in the applicable enterprise agreement.

### Decision

Ms Tsikos commenced proceedings in Victorian Civil and Administrative Tribunal (VCAT) after Austin Health ignored her multiple requests to negotiate her remuneration. The Tribunal dismissed the complaint, however Ms Tsikos successfully appealed that decision to the Supreme Court which held that the Tribunal applied the wrong test for direct discrimination under s8(1) of the *Equal Opportunity Act 2010* (Vic), and that the matter ought to be remitted to the Tribunal to rehear the matter. This decision was subsequently appealed by Austin Health to the Court of Appeal, which upheld the ruling of the Supreme Court.

One notable aspect of the appeal concerned the extent to which it was permissible for the Tribunal to have reference to a “comparator” when determining whether Ms Tsikos was the subject of unlawful direct discrimination.

In most Australian jurisdictions, discrimination law requires an applicant to demonstrate that they were treated less favourably as compared with someone who does not have the particular attribute complained about (in this case – age or being female). By contrast, for a direct discrimination claim to be made out under Victorian discrimination legislation, an applicant need only show that they were subject to “unfavourable” treatment.

The Court of Appeal held that it was not appropriate for the Tribunal to focus too narrowly on the special circumstances which led to Mr Spalding’s salary being higher than Ms Tsikos’ (which led to the Tribunal finding that Mr Spalding was not a “true comparator”). Rather, the Court of Appeal considered that it was appropriate for the Tribunal to “have had regard to the complex picture of unfavourable treatment advanced by Ms Tsikos”. This included:

- her repeated requests to negotiate her salary being blocked by management;
- that the other men in the Department were paid above-agreement salaries whilst Ms Tsikos and another woman were not given the opportunity to discuss remuneration;
- that these male colleagues acted in similar positions to the female employees and were paid significantly more;
- the operation of structural inequality and unconscious bias in the workplace generally and;
- the over representation of men who were given above-agreement remuneration across the Department.

Consequently, the Court of Appeal went on to say:

*“We agree with the judge that not only would it have been open to the Tribunal to find that composite picture was one of unfavourable treatment, it is difficult to see how the Tribunal could reasonably have concluded otherwise.”*

Ultimately, the employer’s appeal was dismissed.

### **Lessons for Employers**

With the recent legislative changes concerning the prohibition of pay secrecy clauses, employers should expect that employees will be wanting to have conversations regarding their pay, and particularly, how their pay compares with their colleagues.

However, with greater transparency, also comes greater risks for employers. Employers should consider implementing proactive measures in the workplace, including:

- reviewing remuneration of employees in the business, to ensure that there is a lawful justification for differentials in remuneration. If no legal justification exists, employers should take steps to rectify this. Regard should be had to the gender composition of the workplace, unconscious bias, and also other protected attributes of employees which could result in unlawful discrimination (e.g. race, age); and
- providing managers and other relevant persons in the business with appropriate training as to how to manage conversations with employees about remuneration.

Furthermore, while annual remuneration reviews are often a helpful way of reviewing employees’ remuneration, employers should be cautious in rejecting employees’ requests to negotiate changes to their remuneration which fall outside of annual remuneration reviews.

[\[1\]](#) *Austin Health v Tsikos* [2023] VSCA 82 (17 April 2023)