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Workplace View

May 2012

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Employers who refuse to bargain could face protected industrial action

Introduction

The Court of the Full Federal Court (**the Court**) has upheld a decision of Fair Work Australia (**FWA**) with potentially far reaching consequences for employers in the enterprise bargaining process.

The Court confirmed that bargaining need not have formally commenced before employees could apply for a protected action ballot which would enable them to take industrial action.

Employees need to pass the test of *genuinely trying to reach an agreement* - but this is a test to be determined, said the Court, according to the behaviour of the applicant (usually a bargaining agent acting on behalf of a group of employees) and is not subject to other bargaining steps set out in the *Fair Work Act 2009* (**FW Act**).

Background to the case

The Transport Workers Union (**TWU**) representing a group of workers employed by a haulage company (**the Employer**), wrote to the Employer to commence bargaining and attached a draft enterprise agreement. There was an exchange of correspondence in which the Employer cited operational reasons as the basis for its refusal to bargain.

The TWU applied directly to FWA for a protected action ballot which was granted. The Employer objected on the grounds that bargaining had not commenced.

FWA is required to make a protected action ballot order subject to two requirements under s443 FW Act. The first requirement is that there be an application for a ballot and the second requirement is for FWA to be satisfied that each applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted.

The Employer argued that by a proper construction of the clause and considering the other bargaining provisions in the Act, the second requirement would not be satisfied unless bargaining had commenced.

Justice Jessup noted the Employer's contention was a reasonable assumption, based on the comprehensive structure and integrity of the laws for the making of enterprise agreements in the FW Act.

However, the Court found it could not read words of limitation into the law which do not appear. The Court confirmed it is the conduct of the applicant seeking the ballot order that is relevant - whether their conduct indicates they are attempting to reach an agreement and that it is genuine. The Court found that, on the facts, the TWU fulfilled these criteria by writing to the employer seeking to commence bargaining and by attaching a draft enterprise agreement. Justice Flick stated that in this case, the disclosure of the content of the proposed enterprise agreement by the TWU and the fact the TWU tried to solicit a response from the Employer (which they received), fulfilled the requirement that the applicant be genuinely trying to reach an agreement.

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Point of difference

Both Justice Tracey and Justice Jessop expressed their reservations with FWA's observation that there was nothing in the legislation to prevent industrial action being used to compel bargaining. Jessop J observed that such an approach was not consistent with parliament's identified purpose of the FW Act, nor the carefully structured enterprise bargaining process set out in the FW Act. He thought there was a striking contrast between the particular wording of s443 and the regulatory scheme generally, but was nonetheless compelled by the wording of the FW Act to uphold the decision.

What does this mean for employers?

Employers who are approached to bargain will need to devise their strategy in accordance with this clarification of the law and give careful consideration to the potential for industrial action.

When an employer refuses to bargain, industrial action could be attempted to compel bargaining, even where the employer's refusal is based on sound operational reasons.

This is in contrast to the previously accepted wisdom that a range of steps in the bargaining process (Pt 2-4 of the FW Act) needed to be satisfied before protected industrial action could be sought.

A bargaining agent will not need to seek a majority support determination, good faith bargaining orders, or scope orders as a prerequisite to seeking a protected action ballot order.

While the applicant for a protected action ballot is required to be genuinely trying to reach an agreement, this test is not a difficult one to pass.

High Tea food allergy discrimination allegation found to be a tall order

A disability discrimination claim brought by a woman suffering from food allergies was summarily dismissed by the Federal Magistrates Court on the basis that her claim had no reasonable prospect of success.

The applicant was a member of the Industrial Relations Society of Queensland **(IRSQ)** and was keen to attend a 'Women in IR High Tea' fundraiser **(High Tea)**, but not so keen on paying the full price of the ticket. She asked to attend for free on the basis that, because of her life threatening food allergies, she would only be drinking water, orange juice and Sprite.

The IRSQ vice president said 'no' because the $50 price tag covered more than just food, it also included a fund raising component, the costs of the venue hire and audio visual equipment. An agreement was eventually struck and the applicant attended the High Tea for $25 but, despite this, the vice president soon found herself defending a discrimination claim.

The applicant claimed that the vice president should have allowed her in for free because as soon as a fee was charged, the vice president – knowing that the applicant was unable to eat - had unlawfully discriminated against her by placing her in a less advantageous position than those who could eat as many scones with jam and cream as they wanted.

Not only did the Federal Magistrate disagree that the applicant had been treated less favourably than those at the High Tea without the disability, he found that the applicant's claim did not trigger the provisions of the *Disability Discrimination Act 1992* (Cth) **(DD Act)**. This is because discrimination under the DD Act is not actionable per se. It is only actionable if it occurs within an identifiable environment or in identifiable circumstances that are stated by the DD Act to give rise to liability on the part of the discriminator. The two sections of the DD Act which the applicant should have

claimed under were:

- **Section 24 'Goods, services and facilities'**

  'It is unlawful for a person who… provides goods or services, or makes facilities available, to discriminate against another person on the ground of [their] disability.'

  and

- **Section 27 'Clubs and incorporated associations'**

  'It is unlawful for a club or incorporated association to discriminate against a person who is a member on the ground of [their] disability… by subjecting the member to any other detriment.'

In the Federal Magistrate's view, even if the applicant had got her claim straight, her prospect of success would not have improved. This is because, under s24, the vice president herself did not provide the services, the IRSQ did and it was not a party to the claim. Furthermore, the applicant had been provided with the relevant services because, as the Federal Magistrate put it, she attended the High Tea 'at a cost which she must have accepted (although perhaps begrudgingly).'

There was little hope under s27 either because, in the absence of a definition in the DD Act for 'detriment', the Federal Magistrate applied the ordinary meaning of the word in forming the view that the applicant had suffered no 'loss, damage or injury' (Macquarie Dictionary 2006) as a consequence of the vice president's actions. On the contrary, the IRSQ had granted her a substantial discount on the registration fee and she had accepted that concession and attended the High Tea (albeit sticking to the Sprite).

Employers should nevertheless be mindful of catering arrangements for employees who suffer from particular food allergies or who have medical conditions which affect what they can eat, as in different circumstances the employer in this case may very well have been found guilty of discrimination. When catering for employees or even clients, employers should inquire about special dietary requirements with a view to avoiding potential liability.

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Did you know?.....

In a move that is sure to impact some employment arrangements, the 2012-13 Federal Budget has slashed tax concessions for workers receiving Living Away from Home Allowance (**LAFHA**) and those receiving golden-handshake employment termination payments (**ETPs**).

Currently, ETPs are taxed separately to an individual's income and at lower rates. Under the proposed changes, tax concessions will only apply to the portion of the payment that takes the total annual income of the recipient to $180,000 unless it relates to 'genuine hardship'.

The Budget also proposes to restrict the Living Away from Home Allowance (**LAFHA**):

- to employees who maintain a home for their own use in Australia which they are living away from for work purposes; and
- for a maximum period of 12 months (this does not apply to fly-in fly-out arrangements).

These changes intentionally target temporary overseas workers, who will be forced to pay for their accommodation expenses out of their after-tax income, if not paid for by their employer (who may then be liable to pay fringe benefit tax).

Employers should evaluate:

- how the change to the calculation of the ETP will shape negotiations with departing employees; and
- how the change to the LAFHA will alter the cost of employing temporary overseas workers and influence recruitment strategies.

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