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Bargaining fee stand-off continues

A Full Bench of the Australian Industrial Relations Commission has refused to accept demands for bargaining agent's fees as legitimate matters for enterprise bargaining, further driving a wedge between the approaches of the Commission and the Federal Court. Partner Jamie Wells reports.

The background

In September 2002, *Focus: Workplace Relations* reported the Commission's refusal to apply the approach of the Federal Court, accepting the legitimacy of demands for bargaining fees in enterprise bargaining. In essence, the Federal Court suggested that clauses imposing bargaining fees on employees dealt with a matter pertaining to the relationship between employer and employee and that industrial action taken to support a bargaining fee clause could be protected.

Current situation

The situation before the Full Bench was whether an agreement could be certified even if it contained additional matters such as a bargaining fee clause.¹ Although the issues before the Full Bench and the Federal Court were very similar, the different contexts meant that the Full Bench was not obliged to accept the view of the Federal Court.

The Full Bench heard a number of appeals together, each from a single Commissioner's refusal to certify an agreement dealing with matters such as bargaining fees and the disclosure of employee details to unions. In summary, the Full Bench decided:

- an obligation of an employee to pay to a union a bargaining fee is not about the relationship of employer and employee. It is really a matter concerning the relationship between the employee and the union; and

1. PR 926554

- an obligation to disclose employee details to a union does not relate to the relationship of employer and employee. In limited situations, a disclosure obligation might be permitted, being incidental to another matter touching the relationship of employer and employee. For example, if the disclosure obligation arises only in the context of proposed redundancies, and the details disclosed are designed to enable the union to assist and advise employees, a disclosure obligation can be legitimate.

Continued confusion

Although there is no technical reason to prevent the Full Bench and the Federal Court holding different views about the scope of the relationship between employer and employee, certain practical problems arise out of any difference of opinion. In particular, industrial action taken to support a claim about bargaining fees may well be protected, even though the success of that lawful industrial campaign will result in an agreement that cannot be certified. The employer is left in a difficult position, having to choose between the consequences of protected action or to yield to the union claim, even though the concluded agreement cannot be certified and will prove to be a waste of management time.

The Full Bench has rejected the opportunity to fall into line behind the approach taken by the Federal Court. As a consequence of taking this course, the scope of legitimate enterprise bargaining remains vexed. However, although there is no symmetry in the enterprise bargaining process as it presently stands, employers can still take comfort from the fact that bargaining fees and general disclosure obligations cannot form part of any certified and binding arrangements in the workplace.

Bargaining fee clauses in NSW

A Full Bench of the NSW Industrial Relations Commission has determined that a bargaining agent's fee clause is a legitimate matter, able to be part of a NSW enterprise agreement. Whether such clauses are allowable must be considered on a case by case basis. Senior Associate Paul Moorhouse reviews the decision.

Approval of enterprise agreements

The question of whether the Commission is able to approve bargaining agent's fee clauses arose out of the Commission's obligation to set and review principles for the approval of enterprise agreements. The Commission is required by the *Industrial Relations Act 1996* (NSW) to review these principles at least every three years.

The Commission noted that the Act requires enterprise agreements to deal with 'conditions of employment', and that this expression is defined in the Act in a way that is not limited to strict industrial matters.

Employer groups, the Labor Council and the Minister for Industrial Relations agreed generally that the existing principles should remain. However, there was no agreement on the submission by employer groups that the Commission should adopt a principle stating that it cannot approve clauses in agreements providing for the payment to a union of bargaining agent's fees.

Bargaining agent's fee clauses

The Full Bench rejected the employer groups' argument that bargaining agent's fee clauses did not deal with an 'industrial matter' and should not be permitted. The Commission noted that the Act requires enterprise agreements to deal with 'conditions of employment', and that this expression is defined in the Act in a way that is not limited to strict industrial matters.

Case by case analysis

The Commission's decision makes it clear that employers will still be able to argue, in the context of the circumstances of a particular agreement, that a bargaining agent's fee clause discriminates against non-union members, or that such a clause was not properly explained to or discussed with the non-union employees to be subject to the clause. However, employers will not be able to argue that these clauses are offensive as a matter of course.

Unfair contract jurisdiction

Two recent decisions of the NSW Industrial Relations Commission have confirmed that federal award employees can bring unfair contract claims under section 106 of the *Industrial Relations Act 1996* (NSW). Senior Associate Paul Moorhouse reports.

Arguments of inconsistency of laws rejected

In both *Thorntwaite v Australian National Credit Union Ltd*¹ and *Scott v Picone*,² the employer argued that unfair contract claims should be struck out on the basis that the employees were covered federally and that any order made under s106 would interfere with the operation of the applicable federal award or agreement.

The Commission held that, as a general rule, inconsistency would not arise simply because a federal award regulates the employment. It seems that the only circumstance in which orders under s106 will be inconsistent with a federal award or agreement is where the orders are limited to matters that are intended to be dealt with exclusively federally.

This takes a narrow view of the principle known as 'covering the field' inconsistency, where there does not need to be direct inconsistency, as long as the federal award or agreement shows an intention to fully regulate the employment relationship.

Employees of federal statutory corporations

The position of federal award employees contrasts with that of employees of a statutory corporation established by federal legislation. If federal legislation gives the statutory corporation the power to determine the conditions of employment of its employees, the Commission has held that a s106 order would be inconsistent with the federal legislation and, therefore, those employees cannot take advantage of s106³.

1. 2002 NSW IRComm 240

2. 2002 NSW IRComm 239

3. *Barry v Australian Broadcasting Commission* (2002) 112 IR 33

Implications

Employers with federal award employees in New South Wales need to ensure that they meet the NSW Industrial Relations Commission's standards of fairness in dealings with their employees. The jurisdiction under s106 applies not only in relation to termination of employment, but to all aspects of the employment contract and its operation.

As there is no s106 equivalent in other States (with the exception of a more limited provision in Queensland), employees in New South Wales (including those engaged under a federal award or agreement) often have a greater ability to challenge unfair aspects of their employment arrangements, or the termination of their employment, than employees in other States.

ETPs explained

The Australian Taxation Office has issued a draft tax ruling that clarifies when a payment to an employee is an eligible termination payment attracting concessional tax treatment, reports Senior Associate Suzanne Weingott.

An 'eligible termination payment' (ETP) is a payment made to an employee in consequence of the termination of his/her employment and is taxed at a concessional rate. However, what if the payment is an indirect consequence of termination, such as a payment in settlement of proceedings?

The ATO's Draft Tax Ruling issued at the end of 2002¹ indicates that the Tax Commissioner will regard a payment as an ETP if it flows from the termination of employment. The termination need not have been the dominant cause of the payment, but there must be some causal connection.

Accordingly, an ETP may be:

- a payment made to settle any claim that arises from termination of employment, even if it is not couched in those specific terms; or
- a severance payment (or 'golden handshake'), but is not a payment made to compensate a person for personal injury, such as a commuted workers' compensation payment.

The ATO has invited comment on the Draft Ruling until 19 February 2003 before finalising the ruling.

1. TR 2002/D12

Team members expected to pull their weight

Ordinary and customary turn-over of labour

Employers are not obliged to alter a roster to make exceptions for employees with disabilities. Senior Associate Suzanne Weingott reviews the decision of the Full Federal Court in *Cosma v Qantas Airways Ltd*.

Discrimination claim

Mr Cosma was employed by Qantas as a 'relief porter in Ramp Services'. Qantas organised its employees in Ramp Services into gangs of six, performing various tasks associated with loading aircraft. In the interests of fairness and to minimise risk of injury, those tasks were rotated among gang members.

After sustaining a shoulder injury, Mr Cosma was unable to perform some of the tasks required of the gang members. After a long period of rehabilitation proved to be unsuccessful, Mr Cosma was dismissed. Mr Cosma claimed that he had been discriminated against unlawfully, arguing, among other things, that there were a number of less physically demanding positions for Ramp Services operators that he could have performed.

Dismissed

The Full Court rejected this argument, observing that Mr Cosma was seeking to create his own classification of employment. The court found that Mr Cosma was employed as a porter to perform a range of duties as a member of a gang, and the duties rotated within that gang. If he was unable to participate as an equal member of the gang, Qantas was entitled to dismiss him based on his inability to perform the inherent requirements of the employment.¹

Relief for employers

The decision has implications for all employers who organise work in a particular way – whether through rotation of tasks, or by a rotating roster, or a combination of both. The message is that employers may not be obliged to carve out the less demanding tasks or shifts to accommodate people with disabilities.

Lawyer Simon Dewberry reports on a recent Queensland Industrial Relations Commission decision that is relevant to employers in industries that rely upon periodically rotating contracts.

Redundancy entitlements

Most redundancy entitlements, whether in an award or certified agreement, carry certain exclusions. Termination of employment will not involve redundancy if the termination is due to 'the ordinary and customary turnover of labour'. If the employer's ability to retain labour is dependant on the maintenance of a contract with clients and the contract is lost, redundancy entitlements may not be due, as the subsequent terminations could be due to 'the ordinary and customary turnover of labour'.

The Queensland Industrial Relations Commission has confirmed that an important factor in these cases is whether the employee was aware that the employment depended upon the maintenance by the employer of the contract.¹

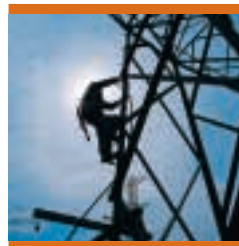
The decision

AFS Catering held a contract to supply catering services to the Queensland Police Service. AFS lost its bid to renew this contract and subsequently dismissed some employees. The employees argued they were redundant and, consequently, entitled to severance pay.

However, the Commission found that they had been informed of the insecurity of their positions when the employer announced that the contract was up for re-tender. Their dismissal in such circumstances was not due to redundancy, as it involved 'the ordinary and customary turnover of labour'.

Implications

Employers in industries that rely upon periodically rotating contracts may be entitled to avoid redundancy payments on loss of one or more contracts. Although



1. *Cosma v Qantas Airways Ltd* (Full Court of the Federal Court, 20 December 2002)

1. *Powell v Delaware North* (1 November 2002)

relationship issues need to be considered carefully, the employer's position is likely to improve if their employees have been made aware of the contingent nature of their employment.

Workplace privacy

The Federal Privacy Commissioner has issued an Information Sheet about the privacy obligations of organisations involved in the sale or purchase of a business, and the Victorian Law Reform Commission has published an Issues Paper on Workplace Privacy. Lawyer Rosemary Bryant-Smith reports.

Sale of business

The disclosure of information about a business, its employees and contacts during a due diligence can raise important privacy issues. Often, sensitive information is made available by the vendor to prospective purchasers and then to the actual purchaser on completion.

Whether or not you are involved in a sale of a business, personal information about employees and other contacts of a company must be handled with care.

The Federal Privacy Commissioner's Information Sheet (the information sheet) considers the application of relevant National Privacy Principles (NPPs) under the *Privacy Act 1988* in such situations. The extent to which the Act applies will depend on the circumstances: particular rules may apply to certain types of information, or if the company is a small business.

Types of information

Privacy issues can arise when disclosure includes information about employees, customers, trading partners or business associates, or marketing files.

The Act exempts personal information about employees, where the act or practice concerning the information relates to the employment relationship. This means that disclosure by the vendor of personal information about employees can be exempt. However, the exemption will not cover the disclosure of information about employees of other related organisations. This can be significant if there are different employers within a group of companies. Nor will it exempt actions in relation to employee records taken by a prospective purchaser.

Vendors and prospective purchasers

Both vendors and prospective purchasers must take reasonable steps to protect personal information from unlawful access, modification, use or disclosure during the due diligence process. While personal information may be disclosed by a vendor of a business to prospective purchasers, organisations subject to the Privacy Act will need to comply with the NPPs. Finally, on completion, no privacy obligations will arise if the business is sold by way of share acquisition. On the other hand, if the deal is an asset sale, the vendor and purchaser must comply with all relevant NPPs.

Handle with care

The Information Sheet is a reminder of the impact of the Act and NPPs on the handling of personal information. Whether or not you are involved in a sale of a business, personal information about employees and other contacts of a company must be handled with care. The Information Sheet is available at http://www.privacy.gov.au/publications/is16_02.html.

Victorian reforms

The Victorian Law Reform Commission's Issues Paper discusses what is meant by 'privacy' and how privacy can become an issue in the workplace. It highlights certain workplace practices in which employees' privacy can be an issue, including:

- surveillance and monitoring (by video, audio and other electronic means);
- physical and psychological testing;
- physical examination and searching of workers and their possessions; and
- collection, use and disclosure of personal information.

The Issues Paper is available at [http://www.lawreform.vic.gov.au/CA256902000FE154/Lookup/Privacy/\\$file/Issues_Paper.pdf](http://www.lawreform.vic.gov.au/CA256902000FE154/Lookup/Privacy/$file/Issues_Paper.pdf)



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