

Compliance issues under Fair Work Aged Care Queensland 2010

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What we will cover today

- Focus on new bargaining rules
 - Good faith bargaining and consequences
 - Industrial Action issues
- Union rights of entry and inspection.
- Freedom of Association (Adverse action)

Bargaining in good faith

- Commenced 1 July 2009
- Basic framework from 1994
- 1996 change reflects Paul Munro's comment
 - "All's fair in love and war..."

Bargaining representatives

- Notify employees of right to bargaining representative
- Employee can appoint themselves or anyone they choose as their BR
- Union is default BR for Union members
- Workforce can have more than one BR
- Employer must bargain with all BRs in good faith

Good faith bargaining – not all is fair

- Good faith bargaining requirements the Act
 - Attend/participate at meetings
 - Disclose information (subject to confidentiality)
 - Respond to proposals in timely manner
 - Genuine consideration to proposals and reasons for responses
 - No capricious/unfair conduct
- Not required to make concessions or reach agreement
- Be careful of union demands of good faith

Good faith bargaining – not all is fair

- invest those with sufficient authority to engage in meaningful negotiations;
- be prepared to compromise,
- not engage in ‘surface bargaining’,
- not putting fresh demands on the table at a late stage or reneging on agreements already reached,
- not seek to undermine by capriciously seeking to negotiate directly with E/ees*

Negotiating with employees

- QNU v. Lourdes Home for the Aged [2009] FWA 1553
- QNU had sent letter to Lourdes and Lourdes had responded through a Mr Priest that:

“we have received your request for a meeting to discuss negotiations of an enterprise agreement and are available to meet on Monday 9 November at 10.00am”

Negotiating with employees

- Met 9 Nov QNU undertook to prepare a draft and next meeting 30 Nov.
- 30 Nov Lourdes could not attend
- QNU says Lourdes failed to meet GFB requirements
- Lourdes tell QNU they are talking to staff to see if wanted an agreement

QNU v. Lourdes Home for the Aged

- Lourdes said

“it would be irresponsible to invest precious resources into this project without first establishing the need”

- Proposed meeting with QNU on 11 December 2009 to progress – no response
- QNU sought orders to abandon ballot and arrange dates and for all financial material

QNU v. Lourdes Home for the Aged

- SDP Richards looked at section 228 and said:
“the evidence before me does not establish that the employer has agreed to bargain...”
- Nothing in the plain words
- No appointment
- Predicated on Board approval

QNU v. Lourdes Home for the Aged

- Importantly:

"it appears to me important to encourage communication between employers and employees both directly as well as through their bargaining representatives."

QNU v. Lourdes Home for the Aged

- And:

“[where] the employer sought to be guided by its employees views concerning whether to bargain for this agreement should not without sound reason be subject to regulation...”

QNU v. Lourdes Home for the Aged

Therefore:

- Act will be interpreted strictly know the law
- Can speak to employees
- Ballot possible

What about the spin, Doctor?

ALHMWU v. Hall and Prior Aged Care

"Without doubt, the actions of the employer such as taking 'great delight' in the failure of the protected action ballot; using emotive language and having direct discussions and a 'straw poll' of employees, would annoy the union; however, negotiations are not timid and genteel affairs."

What about the spin, Doctor?

- All comments were accurate from perspective of parties
- Not capricious or deceitful
- Compare with *AMWU v Airflight*

If breach - what is the process?

- Step 1 - BR or employer seeks bargaining order from Fair Work Australia
- Step 2 - Serious and sustained breach of bargaining order - serious breach declaration from FWA
- If no agreement, FWA makes bargaining related workplace determination

Bargaining order

- BR can apply for bargaining order if:
 - Concerns BR/s not meeting GFB requirements or
 - Bargaining is not proceeding efficiently/fairly because multiple BRs
- Proper notice of concerns and reasonable time to respond
- BRs not responded to concerns appropriately

Bargaining order

- FWA must be satisfied:
 - Employer started bargaining
 - Majority support determination or
 - Scope order

Serious breach declaration

- Serious and sustained breach of bargaining order significantly undermining bargaining
- Other BRs exhausted all reasonable alternatives to reach agreement
- Agreement not in foreseeable future
- Reasonable in circumstances to make declaration of serious breach
- FWA must make **determination** within 21 days of order (or 42 if parties agree)

Other bargaining issues

- Scope order
 - Bargaining not proceeding efficiently or fairly
 - Reason is agreement will not cover appropriate employees or will cover inappropriate employees
 - Must give notice of concerns to relevant BRs
 - Geographically, operationally or organisationally distinct group
- Majority support determination
 - If FWA grants, can lead to bargaining order

New Agreement content

- Work Choices concept of prohibited content gone
 - restrictions on use/conditions of engagement of contractors / labour hire workers
 - trade union training leave
 - Union encouragement
- Agreement about matters pertaining to relationship between:
 - employer and employees
 - employer and union

Industrial action

- 'Protected' v 'unprotected' industrial action – what is the difference?
- Not protected if in pursuit of pattern bargaining – common increase insufficient
- Not protected if before Nominal Expiry Date
- Not protected if procedural steps not followed
 - Protected action ballot
 - 3 working days notice – 'nature' of the action

Payment for industrial action

- Employer not allowed to pay employees for strikes or overtime bans
- Partial work ban – employer can pay a portion of wages in proportion to the nature and extent of the ban
- Calculate according to time usually doing duties refusing to perform during ban
- FWA can vary that proportion if disputed

Industrial action (cont)

- FWA can suspend/terminate protected industrial action
 - Significant economic harm to employer and any employees
 - Endangering life, safety or health or welfare
 - Significant damage to Australian economy
- With termination comes arbitration
- FWA can suspend protected industrial action if causing significant harm to 3rd party
- FWA can grant cooling off period

Changes to union entry

- *'Labor will maintain existing right of entry rules'*
- Significant expansion of union rights
- No need to be bound by Award/Agreement
 - Not necessary to investigate breach
 - Not necessary to hold discussions
- Union simply needs coverage of employees
 - Need to know Union rules

Entry – What's the same?

- Reasons for entry
 - Investigating breaches
 - Discussions
 - Workplace health and safety
- Notice – 24 hours
- Remedies for breach
 - Dispute to FWA
 - Penalties in Court

Entry – What's changed?

- Union doesn't need to be bound by agreement/award
- Union only needs representation rights

Entry – investigating breaches

- Breach of Act or instrument concerning a member
- Reasonable suspicion of breach
- Particulars of breach in notice
- Powers on site
 - Inspect work, process, object
 - Interview anyone who could be a member
 - Inspect / copy documents (other than non-member records)

Entry – discussion purposes

- Mealtimes and other breaks
- Must comply with reasonable request re: room/area/route
- No longer need to be bound by agreement/award

Entry – overarching considerations

- 24 hours notice
- Must comply with reasonable WH&S requirements
- Notice must state provision of union's rules about representation
- Affected member certificates – may avoid need to disclose member's name in notice

Freedom of association

- Now called 'general protections'
- Protecting 'workplace rights' and 'industrial activities'
- Not take 'adverse action' because of a workplace right or industrial activity

What is 'adverse action'?

- Dismissal
- Injuring someone in their employment
- Altering their position to their prejudice
- Discriminating
- Refusing to employ / engage
- Same applies for contractors

What are 'workplace rights'

- Entitlement to benefit of a workplace law/instrument (includes prospective E'ee)
 - Eg. Offering employment conditional on 'individual flexibility arrangement' - prohibited
- Able to initiate proceedings under a workplace law/instrument
 - Eg. Court proceedings / protected action ballot
- Able to make complaint or inquiry to seek compliance with a workplace law/instrument

What is an 'industrial activity'?

- Traditional 'freedom of association' issues
- Membership / non-membership of a union
- Seeks to be represented by a union (or not)
- Takes part in industrial action (or not)
- Represents the views of a union (or not)
- Pays a fee to a union (or not)

Other restrictions

- Action to coerce someone to:
 - exercise (or not) a workplace right
 - engage in (or not) an industrial activity
- Misrepresent workplace rights or rights re industrial activity
 - Eg. 'You have to be a member of the union'
- Undue influence/pressure re making individual flexibility arrangement, etc

Other protections

- Discrimination – not take adverse action because of race, colour, sex, etc
- Not dismiss because of temporary absence
- Not discriminate against an E'er because enterprise agreement covers a union (or not)
- Coerce a person to employ or allocate certain responsibilities to a person
 - Eg site WHSO, perform inductions

Has significant potential Smith v. QTAC

- Smith – CEO of QTAC
- Negotiating agreement
- Union complaint
- Injunction obtained against QTAC in attempting to terminate
- 14 days of hearings

Enforcement

- If action involves dismissal – can apply to FWA within 60 days
 - FWA must conduct conference (media'n/concil'n)
 - Broader than unlawful dismissal - alternative to unfair dismissal
- Other breach – FWA may conduct conference **if parties agree**

Take home points

- Good faith bargaining regime has flexibilities and responsibilities on both sides
- Industrial Action has new flexibilities
- Rules governing Union entry to site changed and wider
- Beware of adverse action.

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