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Employment Law e-alert

Compulsory Arbitration ruled out by FWA Full Bench

The Full Bench of Fair Work Australia (“FWA”) handed down a significant decision on Friday, 26 February 2010, reversing a previous decision by Commissioner Smith on 21 January 2010. The decision relates to the requirements of dispute resolution clauses in enterprise agreements.

Background

The Fair Work Act (“FW Act”) requires enterprise agreements to include a term that relates to the settlement of disputes (about any matters arising under the agreement or in relation to the National Employment Standards).

Woolworths Ltd submitted an agreement for approval to FWA with the support of the Shop Distributive and Allied Employees Association. The agreement contained a clause relating to dispute resolution that restricted access to arbitration by FWA to situations where both parties agree to that arbitration.

Last month, Commissioner Smith refused to approve this agreement, on the basis that the dispute resolution procedure did not provide for compulsory arbitration by FWA (i.e. arbitration irrespective of whether both parties agree to it occurring). This decision created a great deal of angst amongst employers.

Decision

The Full Bench of FWA decided that the FW Act does not require compulsory arbitration clauses in dispute resolution procedures.

In looking at the powers of FWA to deal with disputes, the Full Bench found a clear intention by Parliament that FWA can only arbitrate a dispute if it has been specifically empowered to do so.

Implications for employers

The decision means the following:

- existing approved agreements under the new system that contain no compulsory arbitration clause are not in danger of being declared invalid;
- employers can resist union pressure for compulsory arbitration clauses when negotiating future enterprise agreements; and
- employers should expect to receive requests from unions to use the model term for dealing with disputes contained in the Fair Work Regulations 2009. This model term does allow FWA, although it does not require it, to arbitrate disputes, without the consent of both parties.

Employers should obtain advice on precisely what type of dispute resolution procedure suits them best, prior to entering into the bargaining process.

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