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Employment Law e-alert

“Not by the hair on my chinny-chin-chin”

Entry ‘rights’ back on the bargaining agenda ... for now

Under the Fair Work Act, the job of reviewing enterprise agreements for approval has been returned to the industrial tribunal, Fair Work Australia. Until an agreement has been approved, it will not operate to provide full protection from agitation about changes to conditions and industrial action. Getting agreements in a form able to be approved is a crucial step in the smooth introduction of new or revised conditions in enterprise agreements.

The tribunal is taking its job very seriously. Agreements have been refused approval for a wide variety of reasons, from mistakes in meeting timing requirements to failing to demonstrate that an agreement passes the “*better off overall test*”. The Fair Work Act has introduced a new bargaining regime, and reliance on past experience of what can be achieved is liable to mislead. Undertakings to the tribunal can cure only some errors.

An area of danger is inclusion in an agreement of conditions that cross the line into being “*unlawful terms*”. This will result in approval being refused. One type of unlawful term is a term that provides an entitlement to enter premises to hold discussions with employees. Under the Fair Work Act, the only entitlement to exercise right of entry for specific purposes (including discussions with employees) is under the right of entry provisions of the Act itself.

The tribunal has in a recent decision drawn a distinction between an entitlement to enter premises, and an invitation (*Pacific Dunlop t/a Dunlop Foams* [2010] FWAA 1401, 22 February 2010). In this decision the tribunal approved an agreement that included this provision: “*An authorized [union] representative is entitled to enter at all reasonable times upon the premises and to interview any employee, but not so as to interfere unreasonably with the Employer’s business*”. The basis for the decision was that the entry right is in the nature of a conditional invitation, and so does not amount to an entitlement. The decision recognises that an invitation is something that can be withdrawn at will, but the provision in the agreement falls short of this mark. Despite this, the agreement was approved.

This decision will, no doubt, lead to union demands for similar provisions to be agreed to during enterprise bargaining negotiations. In responding to those demands, employers need to know that the legal position is not settled. An appeal against the approval decision has been flagged. A successful appeal would mean that any agreement made in the meantime that includes a similar “*invitation*” to enter premises may not be approved.

Hunt & Hunt has recently alerted employers to a separate controversy about whether an enterprise agreement must provide for compulsory arbitration of disputes under its dispute settlement provisions. On appeal a full bench of the tribunal decided that compulsory arbitration was not required, and overturned the original decision under appeal. These issues show the process of bedding-in of Fair Work Act provisions dealing with enterprise agreements is far from over.

It is crucial for employers to stay aware of issues that could cause a long and complicated bargaining process to fall at the last hurdle, affecting employee morale and expectations.

The Quick Five

- Applications to approve enterprise agreements are being closely scrutinised in Fair Work Australia.
- Mistakes in content or process can lead to an approval application being refused, and involve the disruption of reopening bargaining and carrying out further votes.
- Inclusion in an agreement of an “*invitation*” to union officials to enter premises may pass the approval tests, but this could change suddenly.
- Careful formulation of any condition around “*right of entry*” is necessary.
- To have the best chance that a negotiated agreement contains appropriate conditions and will be approved first time around, an employer should be independently satisfied their agreement is sound and the right process has been followed.

Tim Lange recently joined David Thompson as a partner in Hunt & Hunt’s Melbourne team as a leading practitioner in employment and industrial relations. He has extensive experience in advising employers on enterprise bargaining strategy.

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