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Employment Law e-alert

Unions now allowed to organise industrial action to force employers to the bargaining table: *J.J. Richards v TWU*

When a union wants to force an employer to bargain for an enterprise agreement, it can now organise protected industrial action without needing to show that a majority of the workforce supports bargaining. A Full Bench of Fair Work Australia has clarified that a union only needs to be "genuinely trying to reach agreement" to ballot its members' support for industrial action.

Employers who do not agree to bargain and do not initiate bargaining are no longer shielded from an industrial action ballot until a majority of the workforce can be convinced to support it. Depending on what action is organised, simply not agreeing to a minority of employees' (or their union's) demands to bargain may no longer be an option. Employers must focus instead on using good faith bargaining tools to promote bargaining discussions around a sustainable outcome for the workplace, and to expose any unhelpful posturing or 'gaming' by bargaining representatives.

The decision, *J.J. Richards & Sons Pty Ltd v TWU* [2011] FWA FB 3377, upholds an earlier decision permitting the Transport Workers' Union to hold a ballot of its members seeking authorisation for industrial action. The TWU had sought (and was granted) permission to seek a ballot authorising TWU members taking industrial action, *before* J.J. Richards had agreed to bargain under the Fair Work Act, and *without* first demonstrating that a majority of the whole workforce supported the early resort to industrial action.

The result is that if a union simply shows it is "genuinely trying to reach agreement", a test with a relatively low threshold, the employees it represents can approve the taking of protected industrial action without a majority of employees necessarily being involved in the decision. If the employees represented are in crucial roles, the protected industrial action may result in heavy industrial pressure to bargain. The decision resolves for now a long running controversy, although not in a way many employer groups would say was intended when the Fair Work Act was introduced.

Key points:

- The key remaining mechanism for successful bargaining for employers is to enforce fair bargaining focussed on the needs of the workplace, actively using the good faith bargaining obligations. Effective deployment of those obligations requires planning and a willingness to expose bad bargaining behaviour.
- Potential exposure to protected industrial action is increased by this decision, but the increased exposure can be managed by employers leading the bargaining process and driving a defensible bargaining position from the beginning.
- The opinions which ultimately matter are the majority of employees voting on proposed agreements. Convincing these employees, within the bounds of good faith bargaining, will allow an earlier vote with better prospects of approval, and will limit the opportunity for a minority of employees to set the agenda.

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