

## Employment, Workplace Relations & Safety

### **Update: UNILATERAL PAY INCREASES CONTRAVENE EMPLOYERS' EXPANDING GOOD FAITH BARGAINING DUTY**

Employers need to be aware that new good faith bargaining laws are being used to regulate a wider range of employer conduct than ever while bargaining takes place. In a recent Fair Work Australia decision, giving unilateral wage increases during extended bargaining negotiations was found not to be bargaining in good faith.

#### **UNILATERAL PAY INCREASES CONTRAVENE GOOD FAITH BARGAINING PROVISIONS**

An increasing range of employer conduct during bargaining is being challenged under the new good faith bargaining provisions of the Fair Work Act (**Act**). On 9 April 2010, Fair Work Australia (**FWA**) determined that the Commonwealth Bank of Australia failed to bargain in good faith when it provided unilateral wage increases to employees during extended bargaining negotiations [Finance Sector Union of Australia [2010] FWA 2690 (9 April 2010)].

#### **BACKGROUND**

The Finance Sector Union (**Union**) and the Commonwealth Bank of Australia had been negotiating a new agreement for approximately two years. During this period, the Bank's fundamental bargaining position was that it would not make any wages offers, due to the prevailing uncertainty created by the global financial crisis (**GFC**) and not until the Bank obtained a clearer resolution of other important employment conditions. Meanwhile, salary increases were awarded to employees in July 2009 and January 2010 without the involvement of the Union. The Bank asserted that less than half of its workforce was covered by enterprise agreements and the pay increases were part of a well established remuneration review practice dating back to 2004.

The Union argued that by implementing unilateral pay increases the Bank failed to bargain in good faith. Specifically, it alleged that the Bank failed to:

- disclose relevant information in a timely manner (s228(1)(b) of the Act);
- respond to proposals made by other bargaining representatives for the agreement in a timely manner (s228(1)(c)); and
- refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining (s228(1)(e)).

The Union sought wide ranging bargaining orders from FWA, including orders that:

- the Bank provide a negotiating position on pay to the Union within 7 days of FWA making the order;
- any further negotiations on pay increases be facilitated by FWA; and
- the Bank provide to the Union and FWA documents outlining projected employee budgets and spend figures for the next 2 years.

#### **DECISION**

FWA made a bargaining order against the Bank, but not in the broad terms sought by the Union.

Important bargaining principles emerge from the decision, as follows:

1. FWA determined that the Bank did not bargain in good faith because it adopted an approach to

wage increases which differed from its stated position on wage increases in talks with bargaining representatives, according to whether the Bank was dealing with employees within the collective bargaining forum or outside it. In making such a distinction, the Bank failed to disclose relevant information to the Union regarding wages, and engaged in unfair conduct which effectively undermined collective bargaining. Commissioner Smith stated:

*“...CBA appears to have two rules for dealing with its employees who are seeking to bargain. In the first place it expresses concerns about the GFC and reaching agreement on conditions [and other] matters before any wage increase can be discussed but at the same time it is prepared, outside of the collective bargaining forum, to deal with those same employees and to commit itself to a wages outcome.*

*...it cannot be that an employer is negotiating in good faith if it is able to alter terms and conditions of employment of persons, on whose behalf bargaining is taking place, for reasons other than those advanced to the bargainers.”*

2. FWA will refrain from broad interference in bargaining unless an applicant demonstrates that there are sound reasons for warranting FWA's involvement. Commissioner Smith concurred with previous statements made by Senior Deputy President Kaufman in *LHMU v Foster's Australia Ltd* [2009] FWA 750, that 'FWA should be slow to interfere in the legitimate tactics undertaken by parties'. Accordingly, Commissioner Smith declined to make the orders sought by the Union, despite finding that the Bank did not bargain in good faith. Commissioner Smith instead decided to 'take a small step, with limited intervention' and order that the Bank advise the employees' bargaining representatives within 24 hours of

any decision which changes its position of not considering wage increases.

3. The application of United States jurisprudence on bargaining under the FWA remains somewhat uncertain. In its arguments, the FSU cited a decision of the US National Labour Relations Board which held that employers must refrain from making unilateral changes during bargaining. Whilst FWA determined that it did not need to consider that US decision in this case, in doing so it arguably left open the possible application of US jurisprudence in Australia in the future.

## IMPLICATIONS FOR EMPLOYERS

The introduction of the concept of good faith bargaining is continuing to have an impact upon negotiations in the workplace and alter the industrial landscape.

**The scope of an employer's good faith bargaining obligations is expanding, and FWA may scrutinise a growing range of employer conduct if it occurs at the same time as bargaining is taking place, even if that conduct has little or no direct connection with the negotiations in question, as this decision makes amply clear.**

Employers can no longer assume that bargaining practices, particularly those strategies aimed directly at employees, will remain unchallenged by unions.

In planning and formulating bargaining strategies and timelines, prudent employers will take into account that previously successful tactics may ultimately be reviewed and overruled by FWA.

This article was produced by Herbert Geer.  
It is intended to provide general information in summary form on legal issues.  
The contents do not constitute legal advice and should not be relied upon as such.

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