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Employee Relations News

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Greg Reiffel HR & IR Consulting

2016 marks my 30th anniversary of providing professional HR/IR and other related services to businesses across a number of industry sectors.
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In this edition:

Full Bench finds that video/tele conferencing are valid methods for negotiating EBA

LCR Mining Group Pty Ltd v Construction, Forestry, Mining and Energy Union [2016] FWCFB 400 (C2015/8035). VICE PRESIDENT CATANZARITI, VP, SAMS, DP, ROBERTS, C. 4 FEBRUARY 2016.

This matter relates to an appeal by LCR Mining Group Pty Ltd (Appellant) against a decision and order of Commissioner Saunders in dealing with an application for bargaining orders made pursuant to s.229 of the *Fair Work Act 2009*.

The Decision at First Instance:

- The CFMEU has members who work for LCR and who are not covered by an EBA.
- The CFMEU sought to enter into an EBA with LCR.
- LCR (a contractor for LCR) was appointed as LCR's bargaining representative.
- The CFMEU sought to negotiate an enterprise agreement for those employees in 2014. LCR initially refused to commence negotiations for such an agreement.
- As a result, the CFMEU filed an Application for a Majority Support Determination but LCR agreed to commence bargaining for an EBA before the FWC made a decision.
- The parties bargained for some time in late 2014 and early 2015 for an enterprise agreement. In about May 2015, the CFMEU alleged that LCR had ceased bargaining in good faith. On 8 May 2015, the Commission heard an application by the CFMEU for bargaining orders against LCR. Such orders were made by Senior Deputy President Hamberger on 8 May 2015.
- In the period from 8 May 2015 until 28 September 2015 there were a number of bargaining meetings held in person at the Newcastle airport between the CFMEU and representatives of LCR. The CFMEU accepts that LCR bargained in good faith in that period of time, but contends that it has not done so since that time.
- The CFMEU have complied with the requirements of the Act:
    - An application for bargaining orders has been made by the CFMEU;
    - The CFMEU has concerns that LCR has not met the good faith bargaining requirements;
    - The CFMEU has given a written notice setting out its concerns to the relevant bargaining representatives;
    - The CFMEU has given the relevant bargaining representatives a reasonable time within which to respond to its concerns;
    - The CFMEU considers that the relevant bargaining representatives have not responded appropriately to its concerns;
    - The CFMEU has complied with the requirements under the Act; and
    - LCR has agreed to bargain for an enterprise agreement.

- Bargaining representatives were unable to agree on where and how future bargaining meetings should be conducted: The CFMEU proposed that future bargaining meetings take place in person in the Newcastle area – as per past practice; with LCR initially proposed that future bargaining meetings should proceed by way of a teleconference or in person at Newcastle airport, subject to the CFMEU discontinue or withdraw its application for a bargaining order.
- The Commissioner then sought to define the meaning of "meeting" by way of the Macquarie dictionary, as it is not defined in the Act, finding:

> *"Although bargaining representatives may, in one sense, "come together" if they speak on the telephone, I am of the view that the ordinary meaning of "meeting" requires the participants in the meeting to be present in person…In view of the nature of enterprise bargaining negotiations, they are far more likely to be productive and beneficial to the parties if they involve face to face meetings where views can be expressed, documents and other material exchanged, and issues debated."*

- Following further considerations the Commissioner issued the Bargaining Order.

The Appeal:

- At the Appeal LCR contended that:
  - The Commissioner placed weight on the Macquarie dictionary definition of "meeting" in arriving at his conclusions, the Macquarie dictionary made no mention of a requirement that meetings must be held on a face to face basis.
  - The Appellant relied on a number of authorities in which the meaning of "meeting" was considered including *Maritime Union of Australia v Viterra Limited* and *Minister for Immigration and Citizenship v Yucesan*.
  - Various decisions in support of the proposition that the Commission and Courts commonly recognises meetings which occur via teleconference or videoconference as "meetings".
- The Full bench agreed stating:

> *"We find that the interpretation, that in no circumstances could a teleconference or videoconference constitute a "meeting" or qualify as "attending"…is too restrictive and clearly inconsistent with the objects and purposes of the Act".*

"Emphasis on negotiation and exhaustive attempts to reach agreement", Watson VP

Patrick Stevedores Holdings Pty Ltd v The Maritime Union of Australia [2016] FWC 510 (B2016/212). WATSON, VP. 29 JANUARY 2016.

- This matter relates to an application by Patrick Stevedores Holdings Pty Ltd to suspend protected industrial action, cooling off (s.425 of the Act), where the Commissioner considered:
  - Whether suspension is appropriate;
  - Whether suspension beneficial to bargaining parties because it would assist in resolving matters at issue;
  - Duration of industrial action ; and
  - Public interest and objects of the Act.
- Protected industrial action was being engaged in by employees of Patrick who are members of The Maritime Union of Australia (MUA).
- In this case the VP found that suspension of the protected industrial action is appropriate for a period of 35 days.

The VP's reasoning being:

- Throughout the bargaining process, the parties have been assisted by Deputy President Booth, acting in an informal capacity, because throughout the early stages of bargaining, Patrick and the MUA were aware that it would be useful to have a facilitator involved to assist in resolving a number of difficult issues. DP Booth facilitated some 14 meetings and conducted a site visit.
- In November 2015, the MUA made an application to the FWC for a protected action ballot order. A protected action ballot order was made by DP Booth.
- The results of the protected action ballot were declared by the Australian Electoral Commission with the majority of Employees who participated in the ballot voted to approve each form of industrial action that was put to them.
- Since the declaration of the results of the ballot, Patrick has received the following notices of protected industrial action from the MUA.
- The following protected industrial action has been organised by the MUA and taken by the relevant Employees:
    - Indefinite bans on the performance of overtime and shift extensions;
    - 3 x 12 hour stoppages of work;
    - 2 x 24 hour stoppages of work.
    - A 24 hour stoppage of work;
    - 3 x 8 hour stoppages of work;
    - 2 x 8 hour stoppages of work;
    - 2 x 4 hour stoppages of work.
- Under the Act, the FWC is required to make an order suspending protected industrial action if it is satisfied that it would be appropriate to do so taking into account the following matters:
    - Whether suspension would assist the bargaining representatives to resolve the matters at issue;
    - The duration of the protected industrial action;
    - The public interest and the objects of the Act; and
    - Any other relevant matters.
- According to Patrick, the negotiations were along very well…however the MUA had the opposite view:

  "I don't have anything to say about your inaccurate summary of the negotiations to date suffice to say that it isn't reflected in the ongoing minutes and you haven't been at the discussions.

  "…Neither should come as a surprise to Patrick because we informed the company at our last meeting prior to Christmas, in front of DP Booth, that we were going to do this unless we saw some meaningful movement from Patrick. Your correspondence prior to Christmas and actions prior and since have caused this current set of circumstances to occur. We will not be withdrawing the action and if Patrick refuses to meet next week we will escalate the action until you do meet…."

- The VP's view was:

  The objective of cooperative and productive workplace relations suggests an emphasis on negotiation and exhaustive attempts to reach agreement. There is no suggestion of a lack of good faith in the bargaining process or any undermining of the process of enterprise level collective bargaining…I consider that suspension is positively consistent with the public interest and the object of the Act."

Concluding that:

> ***"…****I decided to suspend protected industrial action because…I considered that the suspension would be beneficial to the bargaining representatives [and] it would assist in resolving matters in dispute."*

Until next time…

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