Australian Government Solicitor the leading lawyers to government

Express law
fast track information for clients

AGS

11 APRIL 2014

Fair Work Commission decisions provide insight on validity of 'no extra claims' clauses in enterprise agreements and notices of employment representation rights

Validity of 'no extra claims' clauses in enterprise agreements

Commissioner Lee's decision in *Aurora Energy Pty Ltd* [2014] FWCA 1580 provides further insight into when 'no extra claims' clauses in enterprise agreements, which aim to prevent parties amending the agreement, are invalid.

Case summary

Aurora sought to vary its enterprise agreement by an application to the Fair Work Commission. The Communication, Electrical, Electronic, Energy, Information, Postal Plumbing and Allied Services Union of Australia (CEPU) disputed that it could be so varied, as there was a 'no extra claims' clause in the agreement. This clause provided that the 'parties must not make any further claims during the term of this Agreement.'

Commissioner Lee found that this clause 'would have the effect of "ousting" the ability of the parties to vary the agreement and to the extent that it does so it is inconsistent with [the Fair Work Act] and is invalid.' In this case, on the words of the agreement, the 'no extra claims' clause itself could not be varied. Where the clause itself may be varied, to allow for other changes, Justice Bromberg in *Mamara v Toyota Motor Corporation Ltd* [2013] FCA 1351, found that the clause may be valid. However, Justice Bromberg's decision is currently being appealed, so watch this space!

Implications

Whilst there is no blanket ban against 'no extra claims' clauses in enterprise agreements, in light of this decision, agencies should ensure they do not 'oust' the parties' abilities to vary the agreement under the *Fair Work Act 2009* (FW Act).

Text of the decision is available at:

https://www.fwc.gov.au/documents/decisionssigned/html/2014FWCA1580.htm

Attaching documents to notices of employee representational rights

In *Peabody Moorvale Pty Ltd v CFMEU* [2014] FWCFB 2042, a five-member full bench of the Fair Work Commission found that employers can validly attach information to notices of employee representational rights. However, they found that the 'attachments', in this particular case, actually formed part of the notice, and the notice, therefore, contravened the FW Act.

Case summary

The FW Act requires that an employer that will be covered by an enterprise agreement that is not a greenfields agreement must take steps to give a notice to employees of their rights to be represented by bargaining representatives (s 173). These notices must contain the

content prescribed in regulations, not contain other content, and be in a form prescribed by regulations (s 174(1A)).

In this case, the employer tried to attach 2 nomination slips to these notices. The CFMEU argued that this breached the requirements of s 174 of the FW Act.

The Commission found that whether 'attachments' form part of the notice, and therefore result in a contravention of s 174(1A), is a 'question of fact'.

Implications

There is no complete prohibition on agencies attaching information to notices of employee representational rights. However, agencies will have to ensure these notices do not form 'part of' the notice, if they do attach this information.

Text of the decision is available at:

https://www.fwc.gov.au/documents/decisionssigned/html/2014FWCFB2042.htm

HR Practitioners Forum – 1 May 2014

HR Practitioners Forum

AGS will be holding a HR Practitioners Forum from 4–5 pm on 1 May 2014 at the National Press Club, which will discuss agencies' rights and responsibilities in relation to employees' workplace relations activity. Discussion will include agencies' rights and responsibilities under the Australian Government Public Sector Workplace Bargaining Policy, consultation clauses in enterprise agreements and contracts, the *Fair Work Act 2009*, the *Public Service Act 1999* and other relevant legislation and policies.

To register for this event, please contact cbrevents@ags.gov.au or telephone 02 6253 7796 by Wednesday 30 April 2014.

For further information please contact:

Amanda Johnston
Senior General Counsel
T: 02 6253 7591
amanda.johnston@ags.gov.au

Sarah Wright
Senior Executive Lawyer
T: 02 6253 7630
sarah.wright@ags.gov.au

Liam Meagher
Lawyer
T: 02 6253 7540
liam.meagher@ags.gov.au