Good faith bargaining: is an employer required to pay bargaining representatives, or recognise delegates?

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A special status is conferred on bargaining representatives under the Fair Work Act 2009 (Cth) (the Act) when negotiations are on foot for an enterprise agreement. A bargaining representative must bargain in good faith with other bargaining representatives; may apply for a protected action ballot order to take protected industrial action; and, in the case of an employee organisation, may apply to be covered by an enterprise agreement after it is made. The legislation sets out broad good faith bargaining principles, but is not overly prescriptive about the rights and obligations of those who participate in the bargaining process. This means that there is a distinctive "grey area" about, among other things, the extent to which an employer is bound to accommodate an employee's involvement in the negotiating process, and whether employees should be paid to attend bargaining meetings. Several recent decisions of Fair Work Australia (FWA) shed light on these issues.

Legislation

The Act encourages collective bargaining, but also accommodates those who seek to bargain on their own behalf. An employer is automatically a bargaining representative. An employee organisation is, by default, a bargaining representative of an employee if it has at least one member who will be covered by the enterprise agreement. In addition, an employee may nominate another person, including an employee, to be his or her bargaining representative.

All bargaining representatives must comply with the requirement in the Act to bargain in good faith. The good faith bargaining requirements mean bargaining representatives must attend and participate in meetings at reasonable times; give genuine consideration to the proposals of other bargaining representatives and respond to those proposals in a timely manner; recognise other bargaining representatives; and refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining.[1]

Bowers v Victoria Police

In *Bowers v Victoria Police* [2011] FWA 2862, Sergeant Bowers was a member of the Victorian Police (VicPol) who had appointed himself as a bargaining representative. He had also been appointed as a bargaining representative by 132 other police officers. Bowers was having difficulties attending meetings with all of the other bargaining representatives because of his workload and shift patterns. VicPol had attempted to accommodate Bowers by providing plenty of notice of meetings; being available to meet within five days of scheduled bargaining meetings; and providing resources such as a telephone, computer and office space. Bowers sought, but was refused, the right to paid leave during his working hours to attend bargaining meetings. Bowers applied to FWA for orders that he be provided paid leave to attend bargaining meetings on the grounds that a failure to do so constituted a contravention of the good faith bargaining requirements.

Commissioner Smith considered that the issue before him was whether or not VicPol had breached the good faith bargaining requirements by: (a) not allowing Bowers paid time to attend the bargaining meetings with the other representatives; and (b) not allowing him paid time meetings to meet separately with VicPol.

Commissioner Smith was not persuaded that VicPol had contravened these obligations. He highlighted the importance of workforce participation in the bargaining process, but found it significant that there was no requirement in the Act to provide bargaining representatives with paid time off work. Commissioner Smith found that the role of bargaining representative was essentially a voluntary act. On this basis, he concluded that VicPol had made appropriate efforts to accommodate Bowers, was treating Bowers seriously and was affording him the same level of commitment to a negotiated outcome as was being provided to the union. Furthermore, VicPol was not providing paid leave to any other full time VicPol officer or employee (except for those in management whose role included negotiating on behalf of the employer). Bowers's application was refused.

Alinta Energy v ASU

Flinders Operating Services Pty Ltd t/as Alinta Energy v Australian Municipal, Administrative, Clerical and

Services Union [2010] FWA 4821 dealt with five related applications for bargaining orders made by the employer. The employer was negotiating with 15 bargaining representatives, five of which were unions. The remaining bargaining representatives were employees. Orders were also sought against the employer on the basis that it had breached the good faith bargaining requirements of the Act by seeking to control the number of delegates attending meetings.

The employer contended that the good faith bargaining obligations attach only to bargaining representatives, and not to delegates. The unions alleged that no distinction should be made between the union and its members. The unions contended that delegates have rights to attend bargaining meetings as part of the union acting in that capacity and the employer has no right to impose limitations.

Commissioner Hampton acknowledged the value of bargaining delegates and the important workplace perspective that they bring to the negotiating table due to their knowledge of the workplace. However, he also observed that bargaining delegates do not have the official status of bargaining representatives under the Act and that the Act does not provide for an automatic entitlement for delegates to attend bargaining meetings.

While in this particular case, the employer had complied with the requirements of the Act, he found that an employer would in most cases be acting unfairly and capriciously if it did not recognise the role of the delegates to participate within the bargaining process where sought by a bargaining representative. On the specific issue of whether it is reasonable for a delegate to attend bargaining meetings, the following factors should be taken into account:

- the number of employees involved in the work group;
- the number of delegates who may seek to attend;
- the number of meetings for the scope and nature of issues to be canvassed;
- the operational needs of the business; and
- accommodations which may be able to be made to allow the attendance of the bargaining delegate (ie, the scheduling of meetings to facilitate attendance and allowing participation through video facilities).

The decision did not directly address the issue of attendance at meetings on paid time, but the decision seems to imply that attendance would be on that basis.

Conclusion

- Employee bargaining representatives are entitled to the rights conferred under the Act, including attendance at, and participation in, meetings. However, this right does not extend to include attendance at meetings concurrently with all other bargaining representatives, or the right to be paid for their role in the process.
- Bargaining delegates acting on behalf of a bargaining representative, such as a union, may have the same right to attend and participate in meetings, providing such attendance is reasonable and does not unduly compromise the operational requirements of the business.

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Footnotes

1. Section 228 of the Act.