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▶▶ Union campaign material didn't breach good faith bargaining obligations: FWA

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Jupiters Casino has failed in a bid to argue that union flyers and banners highlighting the lowest wage rise on offer were evidence of a lack of good faith bargaining.

Fair Work Australia Commissioner Ingrid Asbury rejected the application by Jupiters Limited for a bargaining order against United Voice for alleged breaches of [s229](#) in distributing material that told union members that the company's best offer was 1.5% a year.

Commissioner Asbury said in highlighting the lowest offer in a range of scenarios put forward during bargaining meetings for a new enterprise agreement, United Voice had "done no more than exercise its right as a bargaining representative to criticise the approach taken by Jupiters to bargain and wages outcomes".

She Asbury said it was not misrepresentation for a union "engaged in robust enterprise bargaining negotiations, presented with a range of scenarios for wage increases, to highlight to its members the lowest outcome available under those scenarios".

To find that this was misrepresentation, she said, would result "in a situation where Jupiters Limited highlighting the highest outcome in the scenarios could equally be accused of misrepresentation".

Unions can be critical, but must be accurate, Jupiters argued

Appearing for Jupiters, barrister Stuart Wood SC told Commissioner Asbury in the hearing in Brisbane last month that Jupiters was not arguing that a union had to promote management's position or present its information to members without being critical.

"We don't make any criticism that the union was entitled to describe that wage increase in colourful language. It was entitled to say it was unreasonable or, as one of the flyers said, miserable."

"That opinion is an opinion they're entitled to have. It's part of, as one of the cases say, the rough and tumble of these negotiations, but if you're going to use such descriptors, then the factual underpinnings for the description must be correct."

However, Robert Reed, appearing for United Voice, said that the only information provided by management on wage increases related to potential 3% increases which would be made up of a 1.5% wage increase and a 1.5% "payroll" increase brought about by bringing the agreement into line with national employment standards (NES) and modern awards.

He said the flyers "were critical of that offer in those terms. Those flyers and the banners referred to the 1.5 per cent offer. That was the offer that was made, and even if that wasn't what was meant, the union were perfectly entitled, as were its members, to regard that as the offer".

"Under those circumstances, the banners and the fliers merely represented a legitimate criticism of the offer as it had been presented to the union and its members. It was part of the cut and thrust of bargaining, and as has been said before, bargaining is not a genteel affair."

Jupiters argued that it had provided four possible scenarios at a meeting on October 26, which was not attended by the union because management had said there would be no further changes to its October 12 offer of a 1.5% wage rise and a 1.5% payroll increase.

Jupiters said that that these scenarios included possible wage increases of 1.8% in the first year and increases of up to some 3% (again made up of a combination of wage and payroll increases) in the subsequent two years.

Jupiters said that after the October 26 meeting, the union distributed banners and flyers headed "What's With 1.5?", which said: "Especially because after months of negotiation management's pay offer to us is a miserable 1.5 per cent," and "A 1.5 per cent increase won't cut".

Wood told the hearing the union "decided that there was an aspect of the offer made on 12 October that it could use for the purposes of its campaign which it then used in flyers up to 26 October, and despite what happened on 26 October, continued to present the case as if the



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position had not changed".

Opportunity for employer to correct union information

When asked by Commissioner Asbury why Jupiters had not printed flyers correcting the union information, Wood argued that it was the role of the bargaining agent to present information to its members.

"Each of those individuals, those 1600 employees, look to their representative to tell them the truth as to what the position is between the negotiating parties. They don't look to the employer."

Wood said it was up to Fair Work Australia to let the union know that it had not acted in good faith.

He said that "you cannot make good this sort of deficiency by the employer communicating on their own account. It requires an independent body, here the tribunal, to, where the parties are not able between themselves to correct mistakes they make, to say that one of them has gone too far".

In her decision, Commissioner Asbury said a deliberate misrepresentation by a union official "could trigger FWA's discretion to make a bargaining order to correct the misrepresentation, on the basis that it had unfairly undermined collective bargaining".

However, she said she did not accept that United Voice had engaged in misrepresentation or unfairly undermined collective bargaining.

Unions as bargaining representatives, not agents

Commissioner Asbury said she also did not accept the Jupiters submission that a union acting in the capacity of a bargaining representative has a fiduciary relationship with its members.

"The term stated in the Act is 'bargaining representative' and not 'bargaining agent'...The mere fact that Unions have a job to do as bargaining representatives as provided in the Act, does not necessarily create a fiduciary obligation".

Commissioner Asbury said it was difficult to see how a union or its representatives "could obtain a personal benefit, profit or advantage in the context of representing members in negotiations for an enterprise agreement".

She said the good faith bargaining obligations of [s228](#) placed sufficient statutory obligations on bargaining representatives to conduct themselves properly "without adding a fiduciary relationship to the mix".

Protected action ballot to proceed

Commissioner Asbury initially reserved her decision while the parties provided written submissions on a protected action ballot order sought by United Voice, but she approved the application yesterday.

Employees will be asked whether they endorse industrial action in the form of four-hour stoppages and wearing badges and/or stickers in contravention of Jupiters' uniform policy

[Jupiters Casino and United Voice \[2011\] FWA 8317 \(5 December 2011\)](#)

[Transcript of hearing, Jupiters Casino and United Voice, B2011/3926, Brisbane, November 23, 2011](#)

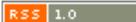
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