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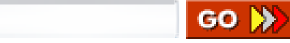

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Court rejects JJ Richards appeal

20 April 2012 1:40pm

The Federal Court has today confirmed that unions that are facing an employer that refuses to bargain are not obliged to seek a majority support order or jump other hurdles before asking members to authorise industrial action.

Justices Chris Jessup, Richard Tracey and Geoffrey Flick, in separate judgments, upheld FWA decisions that accepted that the TWU could seek a protected action ballot after waste contractor JJ Richards declined the union's request to commence bargaining.

The bench rejected arguments put by the employers – JJ Richards and AMMA – that the Fair Work Act prevented FWA making a protected action ballot under s443 unless bargaining had commenced.

Justice Tracey said that there was "simply no warrant to read into [s443(1)] words of limitation which do not appear".

He said Parliament had mandated that the tribunal make a ballot order if the two conditions prescribed by s443(1) are satisfied, "even if bargaining between an employer and employees has not commenced".

Justice Flick said the subsection imposed "only two express statutory constraints upon the mandatory obligation" to make a ballot order.

No question arose about "implying any further constraint" on the operation of s443(1) on top of the two that had been "expressly identified" by Parliament, he said.

Doing so "would confront the difficulty of reading into a statutory provision words which are not there" and this would "improperly propel the Court from its accepted role of interpreting the will of the Legislature into the territory of itself redrafting legislation".

Justice Flick said the TWU had satisfied the "genuinely try" requirement under s443(1) by writing to the company seeking to commence bargaining.

The "exchange of correspondence - the TWU letter and the company's response – "was sufficient to satisfy the precondition to the exercise of the power conferred by s 443(1)", he said.

FWA bench wrong on one point

Justice Jessup said the FWA full bench was wrong in its conclusion that there was "nothing in the legislative provisions to suggest that a bargaining representative should not be permitted to organise protected industrial action to persuade an employer to agree to bargain".

He said unions could use bargaining orders "to bring an employer to the bargaining table. . . without taking industrial action".

Justice Jessup said that "although limited to an extent, the legislature has, both specifically and in some detail, turned its mind to the means by which an unwilling employer might, to use the Full Bench's metaphor, be persuaded to come to the bargaining table".

"Although not so stated in terms, it would be at least consistent with these provisions of [the bargaining order provisions at] Subdiv A of Div 8 to perceive a legislative assumption that recourse to industrial action would not be an available means to oblige an employer, or any other party, to commence bargaining".

Justice Jessup added that "there is much to be said for [JJ Richards' and AMMA's] case, as a matter of broad statutory purpose".

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He said it was "legitimate to point out. . . that the ability to take protected industrial action is to be seen as part and parcel of the statutory regime for bargaining in pursuit of, or in resistance to, the making of such agreements."

Justice Tracey said he shared Justice Jessup's reservations about the full bench's observations.

"The other provisions of the Act to which [Justice Jessup] refers suggest that a less confrontational and more ordered process was available to the Union had it wished to avail itself of it", he said.

J.J. Richards & Sons Pty Ltd v Fair Work Australia [2012] FCAFC 53 (20 April 2012)

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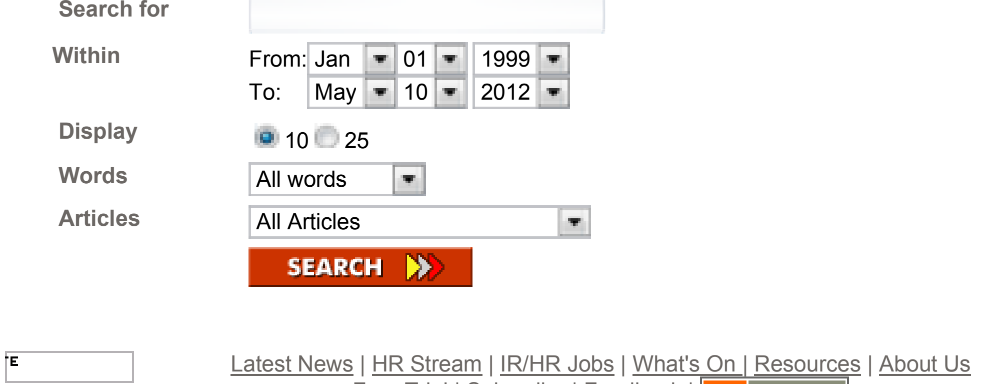

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