Broadspectrum deal expires in High Court; Bargaining doldrums; & more

Friday, March 22, 2019, 3:59pm

High Court sinks three-worker deal appeal

Broadspectrum's bid to revive a deal voted up by three workers in 2016 has hit a final roadblock, the High Court today refusing to grant special leave to appeal its rejection by the FWC.

The High Court's decision follows last August's refusal by a Full Federal Court to review the deal's rejection by a senior FWC member in early 2017 (see Related Article).

Approved in the first instance – Commissioner Bernie Riordan saying he could find no evidence it was a "sham" (see Related Article) – the company's *Justice Business Unit Enterprise Agreement 2016* was subsequently quashed by an FWC full bench in February 2017 and remitted to Deputy President John Kovacic for rehearing.

The deputy president the following month rejected the deal, an FWC full bench in August 2017 refusing Broadspectrum's leave to appeal his decision.

In last August's ruling on the company's bid for a judicial review, the Full Federal Court said that a "fair reading" of Deputy President Kovacic's reasons suggested that, "despite his finding that the employees were not performing work regulated by the agreement at the time of its making, if the principal purpose of those employments at the time the agreement was made was the performance of such work, [he] would have held that the employees were covered by [it]".

In opposing the deal, United Voice had argued the employees who negotiated it had no stake as they were paid well in excess of its rates, they did not perform correctional work captured by its classifications and were hired just before bargaining started.

Broadspectrum (formerly Transfield Services) challenged the decision, submitting the employees were covered by the deal when they voted and that their higher pay rates did not indicate they lacked a "stake" in the deal.

Transcript of hearing, March 22, 2019

"High level of dissatisfaction" with bargaining: Survey

Employers are spending more time negotiating enterprise agreements and have more agreements operating beyond their expiry dates, according to a new survey by the law firm Ashurst.

The firm's 2019 bargaining survey found that 31% of respondents were operating with agreements past their nominal expiry date – in some cases four years past expiry – in a 10% increase from the first survey in 2017.

"This suggests a high level of dissatisfaction with and movement away from the system," said Stephen Woodbury, partner and Ashurst global practice head, employment.

Woodbury said in his introduction to the survey that the results appeared to support concerns raised by both parties in the pre-election "campaign" about enterprise bargaining.

He noted the number of applications received by the FWC to approve enterprise agreements had fallen over the last two years, while the time taken for approval has increased as the tribunal sought more undertakings from employers.

This period has also seen a fall in enterprise bargaining and a shift to award coverage.

The Ashurst survey found that almost 39% of respondents took 12 months or longer to negotiate agreement, up from 30% in 2017, and that nearly 54% had difficulties getting the deal approved.

"Time spent negotiating is on the rise," Woodbury said.

"When coupled with the time taken in getting an agreement approved and the number of expired agreements still operating, the increased timeframes provide evidence to support calls for change, on the basis that the current system does not appear to be working in the interests of either party.

"As to why employers negotiate, a number of respondents commented that bargaining is a historical position and a 'force of habit' rather than something that adds to, or improves, their business performance."

The survey found the number of employers expecting to reap productivity gains through an enterprise agreement had risen by 8% to 48% from 2017, although some respondents said that productivity improvements were achieved outside the bargaining process.

One respondent suggested that agreements "now almost had to replicate the applicable award" so there was not much chance of productivity gains.

Another respondent suggested, "Let's just go back to the award and just pay a higher wage.

"Stop wasting time with bargaining."

The survey found opposition to the ALP's election pledges on IR, which include prohibiting employer lockouts during bargaining, limiting the ability to terminate expired agreements and requiring last-resort arbitration to settle enterprise agreement disputes.

On the proposed ban on employer lockouts, one respondent said that allowing protected action by only one party "would lead to death by a thousand cuts".

The survey found a more stable economic and market outlook, with fewer respondents seeking a temporary wage freeze or wage reduction than in 2017.

It also found that unions are increasingly bargaining about the right to convert from casual employment to permanent, with penalty rates being an issue beyond the retail, hospitality and fast food sector.

Woodbury said that Ashurst expected casual pay rates and entitlements to remain a contentious issue until the *WorkPac v Rossato* test case (see Related Article) finally determined the issues raised in the *WorkPac v Skene* decision (see Related Article).

Police discriminated against pregnant constable

In a decision likely to be closely scrutinised by both employers and unions, a UK employment tribunal has found that a pregnant police officer suffered both pregnancy discrimination and indirect discrimination when she was taken off active duty and placed in a desk role against her express wishes.

Having informed her manager that she wanted to remain in a frontline role, albeit with reduced responsibilities, until she went on maternity leave, the Devon and Cornwall Police constable was transferred to a desk job when 12 weeks' pregnant.

She was told at the time that the change was in keeping with "business needs" and her restricted duties.

The tribunal heard from her GP and midwife that the shift had brought on anxiety, severe headaches and a period of sick leave, as the constable had wanted to stay with a team that had supported her through an earlier miscarriage.

While Devon and Cornwall Police maintained that the constable's pregnancy was not the reason for the change of duties, the tribunal found the decision risked her mental health and ignored an assessment carried out when she announced her pregnancy.

The tribunal concluded the police force had "lost sight" of the fact that the constable was pregnant, seeing her "simply as a person with certain physical restrictions".

Mrs N Town v The Chief Constable of Devon and Cornwall Police 1401471/2018 (17 February 2019)

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