From: Stuart Andrews

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Swinburne EA approval overturned

By a decision handed down on 17 July, the Full Court of the Federal Court has quashed the decision of the Fair Work Commission made on 16 December 2014 to approve the Swinburne University of Technology Academic and General Staff Enterprise Agreement 2014 ("the Swinburne University EA"). In two separate substantive judgments, the Court ruled that the Fair Work Commission ("FWC") had misapplied the provisions of the *Fair Work Act 2009* ("the FW Act") in relation to which casual staff should be included in a ballot for the approval of an enterprise agreement.

Background

As outlined in an AHEIA Member Update in December last year, a Full Bench of the FWC approved the Swinburne University EA that had 57 more votes cast in favour than against in a ballot of staff conducted in late February 2014, shortly before the commencement of the 2014 academic year. In doing so, the Full Bench rejected objections by the NTEU that the University had wrongly included casual staff who were ineligible to vote in the ballot.

The legislative provisions

Section 181(1) of the FW Act confers eligibility to vote on *"employees employed at the time who will be covered by the agreement"*. As the University is a constitutional corporation, the definition of "employee" is also extended by section 13 of the FW Act to include a person who is "usually employed".

Given the nature of casual employment, a difficulty arises in terms of deciding which casual staff are “employed at the time” of the ballot who, in turn, are to be regarded as being “covered by” the agreement.

The three approaches to interpreting section 181(1)

It is convenient to analyse the Federal Court decision by looking at the approach taken by the University (which was accepted by the FWC), and the approaches taken in the two separate substantive judgments of the Court, in relation to the concept of being “employed at the time” of the ballot.

The approach taken by the University was to include all casual staff who had been employed during the preceding 12 months. This included sessional academic staff who had been engaged under terms that required them to notify the University if they were not available for casual work within the period of the engagement. This approach was accepted as appropriate by the FWC for a ballot undertaken near the commencement of the academic year.

The second approach is that taken by Justice Pagone, who also took the view that it was proper for the University to include casuals engaged during the preceding 12 months. His Honour did so on the basis that it was appropriate to include persons who comprised part of a casual pool who could be called upon to perform casual work from time to time, such that these persons should be properly regarded as being “usually employed” by the University within the extended meaning of section 13 of the FW Act. Justice Pagone concluded, however, that the University fell into error by not taking the further step of excluding some of those persons due to their personal circumstances and including others who could be properly regarded as being “usually employed” by the University at the time of the ballot.

The third approach is that taken by Justice Jessup (with whom Justice White concurred), who concluded that notwithstanding section 13 of the FW Act, the section 181(1) eligibility requirement that the employees be “employed at the time” means that to be eligible to vote an employee must be actually employed at the time that the ballot occurs (and not merely usually employed at that time). Without needing to express a conclusive view, His Honour held at [25] that this should extend to employees employed during the whole of the 7 day access period that precedes the ballot. In this respect, section 180(2)(a) of the FW Act also refers to “employees employed at the time who will be covered by the agreement” needing to be provided with explanatory material in relation to the proposed agreement.

The third approach referred to above, taken by two judges of the Federal Court, has to be taken to be the authoritative statement as to who is to be included in a ballot for the approval of an agreement.

It should also be noted that the concept of being “covered by” the agreement relates to being in a class of employment within the scope of the agreement, as opposed to a need for a voter to be someone who is going to be employed after the date that the agreement will commence operation.

Implications for universities

The implications of the Federal Court decision can be summarised as follows:

1. Universities should provide a vote to persons who will be employed in any employment category covered by the proposed agreement and who will be employed at some time during the whole of the period commencing at the start of the 7 day access period and concluding at the end of the ballot for the approval of the proposed agreement. (This is so irrespective of whether their employment might come to an end before the agreement takes effect). All other persons are ineligible to vote.

2. In determining which casual staff are entitled to vote, universities are likely to need to obtain advice from individual heads of academic departments and administrative areas as to which casuals "on their books" are going to be actually employed to do work within the period referred to in (1) above.

3. As alluded to by Justice Jessup at [10], the inclusion of ineligible voters or the exclusion of eligible voters will not be fatal to the vote where the voting margin in favour of the agreement is higher than the number of persons wrongly included and/or excluded.

4. Having regard to (3) above, the need to take particular care as to who is included and excluded from the vote is heightened if the margin is likely to be close (as will often be the case where a proposed agreement is being put to a vote against union opposition).

Please contact Peter Raymond on 03 8611 0511 or via peter.raymond@aheia.edu.au if you would like to discuss further.

Regards

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