

Agreement Making News

8 AUGUST 2012

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Good Faith Bargaining is illustrated by Monty Python !!!

Important Lessons for Employers

An employer is not required to put self-interest to one side, or make concessions during enterprise bargaining negotiations. Neither is an employer required to reach agreement on the terms that are to be included in the agreement. Subject to meeting the good faith bargaining requirements contained in the *Fair Work Act*, the manner in which an employer approaches the issue of enterprise bargaining is largely a matter for it alone to determine.

However, a party who participates in bargaining must genuinely participate in the bargaining process, and must keep an open mind as to the prospect of ultimately reaching agreement. If an employer simply sits mute and merely rejects proposals of terms which are being advanced for its consideration, it might fail to meet the requirements in *section 228* of the *FW Act*.

Endeavour Coal Pty Limited v APESMA [2012] FCA 764 (19 July 2012)

In a previous decision, a Commissioner of Fair Work Australia (FWA) found that Endeavour Coal Pty Ltd (**Endeavour Coal**) had not complied with the good faith bargaining requirements imposed by *section 228* of the *Fair Work Act 2009* (Cth) (**FW Act**) in its negotiations with the Association of Professional Engineers, Scientists and Managers, Australia (**APESMA**) for an enterprise agreement. Endeavour Coal appealed that decision to the Full Bench of FWA.

On 22 March 2012, a Full Bench of FWA concluded that it was open for the Commissioner, and appropriate on the evidence, to conclude that the good faith bargaining requirements were not be-

ing met by Endeavour Coal as Endeavour Coal was not giving genuine consideration to the proposals being advanced by APESMA. The Full Bench went on to make Orders giving effect to its decision.

Endeavour Coal then made application to the Federal Court seeking writs to quash the decision, arguing that the decision of the Full Bench of FWA contained jurisdictional errors with respect to:

- the construction of *section 228*; and
- the Orders made by the Full Bench of FWA.

Misconstruction of *section 228* of the *FW Act*

Endeavour Coal argued that the Full Bench of FWA had misconstrued *section 228* of the *FW Act* as requiring Endeavour Coal to try to conclude an agreement with APESMA, and that the Orders made by the Full Bench requiring Endeavour Coal to negotiate clearly involved a requirement to make concessions and was contrary to the terms of *section 228* (2). In determining the matter, the Federal Court noted that “*the manner in which Endeavour Coal approaches ‘bargaining’ is, subject to section 228* (1), *largely a matter for it to determine*”.

The Court noted that *section 228*(1) does not require a party to ‘bargain’ in any particular manner, only within the bounds of the ‘*good faith bargaining requirements*’ set forth in *section 228*(1).

The Federal Court expressly noted that “*Endeavour Coal is certainly not required to put self-interest to one side*” and that *section 228*(2) clearly contemplates that no party to the bargaining process is required to do so.

However, the Court did note that if, in the course of bargaining, Endeavour Coal sits “mute” and merely reject proposals or terms which are being advanced for its consideration, it may fail to meet the requirements set forth in *section 228*(1).

- Agreement making, BOOT Tests, Good faith bargaining, Ballot assistance and Advocacy in Fair Work Australia
- IR Strategy including planning, execution, operational support and project management
- Reviewing your existing contracts of employment, HR and IR policies and procedures for Fair Work Compliance. Developing new policies where applicable.
- Performance Management,
- Independent Investigations
- Terminations
- Dispute Resolution assistance
- Mediation
- Negotiations
- Modelling of Labor Costs against award/agreement requirements

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The Court stated that *"a party who participates in bargaining that is subject to the requirements of s 228(1) must genuinely participate in the bargaining process; it cannot adopt the role of a disinterested suitor, only rejecting offers and proposals made by other bargaining representatives"*.

The Federal Court found that the Full Bench of FWA was correct to conclude that it was open to the Commissioner to find that the conduct of Endeavour Coal fell short of the good faith bargaining requirements imposed by section 228(1) of the FW Act.

Orders Made by the Full Bench of FWA

Separate from its submissions regarding the correct construction of section 228(1), Endeavour Coal also submitted that the Orders made by the Full Bench of FWA were beyond the power conferred on FWA by reason of either being:

- contrary to section 228(2); or
- not authorised by sections 230(4) and 231.

Order 1 made by the Full Bench of FWA on 23 March 2012 was that *"Endeavour Coal Pty Limited is to take the following actions within 14 days:*

- Provide to APESMA a list of subject matter that Endeavour Coal would be prepared to include in an enterprise agreement applying to employees at Appin Mine in respect of whom a Majority Support Determination was made on 8 July 2010 ('Staff');*
- Tell APESMA what aspects of the latest version of the APESMA proposed enterprise agreement (annexed to the Application), if any, can be agreed;*
- Tell APESMA what changes to the latest version of the APESMA proposed enterprise agreement should be made to make it an agreement that Endeavour Coal would make;*
- Propose terms of an enterprise agreement*

that Endeavour Coal would be prepared to enter into".

The Federal Court concluded that Order 1 was beyond the power conferred to it by the FW Act.

Order 2 made by the Full Bench of FWA was that *"Endeavour Coal is not to:*

- take any further action to unilaterally determine the terms of a new standard contract for Staff; or*
- alter standard terms contained in Staff contracts of employment; outside of the enterprise bargaining process"*.

The Court found that the second order was appropriately made in the circumstances and within the power conferred upon FWA.

Orders 3 and 4 made by the Full Bench of FWA were in the following terms:

"Endeavour Coal is to ensure that in future bargaining meetings it is represented by a person who has the capacity to make decisions and give reasons for Endeavour Coal's responses.

The parties meet to progress their bargaining within 21 days after Endeavour Coal has taken the steps ordered above".

The Federal Court concluded that Order 3 should be set aside as it was an order which seeks to confine the ability of Endeavour Coal as to who is to bargain on its behalf. The Court also concluded that Order 4, linked as it was to Orders 1 and 3, should also be set aside.