PRODUCTIVITY COMMISSION

ISSUE PAPER 3

Enterprise Bargaining

Aged Care Sector

In Victoria, the majority of aged care services have had a form of agreement in place since 2002. The agreements in 2002, and up to 2012, all incorporated terms of the old awards that had applied previously. The new agreements from 2014 are in the main stand -alone documents. We negotiated around 130 agreements in the latest "round"

The negotiating for these agreements has always been a long process as there are so many aged care organisations to meet with. The organisations vary in size from small 30 beds or less facilities to organisations with 34 facilities. Their ability to negotiate also varies enormously, as does the capacity to pay. However, despite this, the agreements have all produced very similar outcomes in wages and conditions across the sector, with a few having some different conditions in the latest round. The unions have always approached the negotiations on the basis that all agreement must have a specified set of outcomes, and must produce the same end result wages outcome.

The issue in trying to have a different outcome not acceptable to the unions, is that the ANMF in particular has a strong membership in some facilities. This in turn in my view, is linked to the nurse having to have professional indemnity insurance to maintain registration to practice, which is made available via their membership of the union.

The overall result for aged care providers in wage outcomes has been very high. If it is taken into consideration that the average outcome has been 14% over the life of each agreement, which was broken into a percentage each year, the multiplication factor pushes this way over what the industry has received in funding increases. So from 2002, each year, an average increase would be a 3.5% increase every year. This is a total of 13 such increases, which multiply upon each increase. In my view, this has been a serious contributing factor in pushing some smaller operators out of the industry. Some smaller operators have managed to resist paying this type of increase and as they do not seem to have many union members among their staff, industrial action was not feasible. Therefore they are still operating. There should not be such an unfetted ability to take protected industrial action, as in the next round of agreement negotiations, I am of the view employers in aged care will have to take a firmer line. The percentage of the income for facilities that is taken up in paying wages and related expenses cannot keep growing for the purposes of business viability and in some cases due to the lending agreements entered into with banks. Employers should be able to put an argument against having a protected action ballot taken where the wage claims, or other claims, can be seen as being unreasonable, and the offer put by the employer, as being reasonable in a particular set of circumstances. In my view, where there is a limited ability for employers in an industry to increase prices, such as aged care, community care and homecare, unions should not be able to take industrial action based on the employer refusing to agree to never ending wage and related expenses growth. Aged care employers who recently agreed to the 14% or higher wage increase subsequently, and without warning, had the funding for payroll tax removed as well as the

dementia specific funding removed. The effect of this was significant across the industry, but there is little hope of stepping back from the agreed wages increases.

Another issue which may impact on the industry in the future, is the growth of the number of people staying in their homes until they are almost palliative. The average stay in an aged care facility is becoming shorter, and then it is taking longer to fill the beds. Employers will need to take this into consideration in the next agreement negotiations, and another 14% increase in 2016-2017 would seem to be unreasonable. However, it is expected this will be the demand made by the unions as an industry "standard".

In the past, if an employer does not comply to the union's claims as demanded, and if the union has enough members at the site to make a difference, all the union has to do is make an application for a protected industrial ballot, and there is nothing the employer can do. It makes no difference that the claims may not be reasonable under any specific economic reasoning or any other reason, if there are sufficient members that vote to take the action, it is taken. This then involves members outside the public entrance to the business with placards etc, and the pressure that this places on the facility causes them to cave in despite any argument they may have had for not wishing to do so. This is no bargaining, it is blackmail. In my view, there should at least be an ability for employers to argue against the taking of this protected action on the basis that the employer has made a genuine offer which should be allowed to be put to the staff overall to vote on prior to the union stating the offer is not acceptable.

In relation to "permitted matters", all that should be allowed into an enterprise agreement is the basic wages and conditions. The National Employment Standards should not be able to be incorporated into an agreement as these may be subject to change or may even be removed at some time in the future. Any form of staff ratio should not be permitted. Any term that affects the ability of a business to operate flexibly should not be permitted. The agreements should be simple and advise of the entitlements to hours of work, annual leave, sick leave, wages, allowances, classifications, shift penalties and the like.

The use of flexibility agreements is not encouraged as there is no real protection for the employer should there later be a claim that the employee or employees were actually worse off in some way. The onus is on the employer then to prove this was not the case to the satisfaction of a tribunal. The flexibility agreements should be signed off by either the FWO or the FWC.

There should not be productivity improvement clauses in agreements which relate to service delivery type services, as it is not the type of industry that can deliver productivity improvements. That was an issue in the past under different legislation, with the 4% second tier issue, where employers had to try to prove they had found savings before the state government would fund a pay increase in the disability sector.

While I have not had any direct experience in the public sector enterprise agreement negotiations, suffice to observe that these are rarely anything but an eventual cave in for political reasons due to the pressure applied via sophisticated and prolonged PR tactics. The cost to the state government of the funding needed to top up what public sector aged care providers get from the federal government must be enormous. The unions then use the outcome from these agreements to apply

pressure to the private operators. It also does make it more difficult in some areas for recruitment purposes.

ISSUES PAPER 4

EMPLOYEE PROTECTION

Unfair Dismissal

Having practiced industrial relations for over thirty years, representing employers in the aged, community and disability services sector, I have been involved in hundreds of unfair dismissal claims. "Go away money" is always expected and is encouraged by the various representatives, some who will pursue claims with no merit whatsoever so that they and/or their clients or members get something, no matter how badly the employee has acted. Some representatives exist purely to obtain their share of the "go away money", and this leads to excessive settlement claims and also to the representative not being willing to settle without taking the employer to the conciliation process.

Currently however, adverse actions claims are being utilised in particular when the employee was dismissed within the 6 month minimum employment period. I am sure that they are encouraged in this if they visit the Fair Work Commission web site. In reality, the adverse action option over rides the 6 months minimum employment period as the reverse onus is an obstacle which makes it difficult for an employer to argue where they did not actually give warnings or counsel before dismissing. The employee states she is pregnant and that is why she was dismissed, and the employer is somehow supposed to prove that was not why.

The system makes it too easy for any employee to make a claim of unfair dismissal, and despite the merits, the cost of defending the matter, the stress on the employer and any other staff who may have to be witnesses, the stress of thinking about being cross examined all go toward the employer paying up. The telephone conciliation process also works against the parties, as there is no pressure on either party not to exaggerate or lie when not face to face with each other.

Some of the decisions made in relation to what is unfair and what is not, or what is too harsh and what is not, are enough to have many of my clients simply decide not to terminate even the worst offenders. There have been decisions in favour of the employee which are staggering in my view. Also, the employer now seems to make a decision to terminate not simply based on the level of seriousness of the conduct, but also taking into consideration age, what the likelihood is of the employee being able to obtain future employment, their family responsibilities, whether they owe money on their house, their personal liabilities and lack of finances etc. When an employee has hit a resident, and a meeting arranged, the employer has never had to enquire as to the age of their employee, whether they have school aged childe, whether they own their own home, whether their wife works, what will the financial impact of dismissal mean to them, but the FWC takes all that into account no matter how serious the offence. It seems to me that the test as to whether a dismissal is harsh, unjust or unreasonable should only be measured against the level of seriousness of the misconduct or behaviour and the procedure involved in dealing with it. In Smith V AussieWaste Management Pty Ltd (2015), FWC 1044 (12th February 2015., it was found that swearing at the managing director was not reason enough for the employee to be dismissed. The words used "You

dribble shit. You always dribble F…king shit" were not considered to be at a serious enough level, was said in a private telephone conversation, and that the language in modern workplaces is more robust these days etc etc. This type of decision would seem to be demonstrable of why our society is going downhill at a rapid rate, with no discipline or respect in schools or workplaces. Surely saying this to your managing director is not acceptable and should be seen as serious misconduct. I accept that the applicant should have been afforded procedural fairness, but the comments relating to the use of the language is most disturbing to employers.

In our sector, in my experience, there is no specific group that is more likely to be dismissed. The employers are always short of good staff and only move to terminate when there is a serious issue. Obviously as the industry is so people driven, there is competition for staff, and no employer wants to be known as sacking staff for no reason. The residents and clients are all relying on the staff, so where the staff are not performing action is taken to protect the residents and clients. Unfortunately, there is an increase in poor workers as the Registered Training they are receiving appears to be lacking in substance and is too short. Some only have two months training in order to obtain a certificate 3 in aged care, for example. Another issue is the number of staff from overseas who simply go on leave to go back overseas without authorization. This is the type of issue facing employers.

The power of the FWC to order costs is not of any assistance in the vast majority of cases as they are settled before they get to a formal hearing. Further, there seems to be a reluctance to order the payment of costs, particularly where the workers are part time and often do not have a lot of money.

Anti –Bullying

The reason why there is less anti bullying claims than expected is twofold in my experience. One is that there was not and is not excessive or genuine bullying in workplaces, and the second is that there is no money in it for the applicants. This in term means that there are no representatives to encourage making a claim.

General Protection and Adverse Action

From an employer perspective the use of this type of claim to force an employer to pay money in the absence of being able to lodge an unfair dismissal, is a major issue. The fact that the reverse onus of proof is used is unfair, and is often very difficult to prove. This is especially the case where an employee is dismissed within the 6 month minimum employment period or not employed in a transmission of a business.

Where an employer judges an employee not to be a good fit for the business, and chooses to terminate without reason or without counselling or warnings, an employee can claim that they had made an enquiry about getting more hours, asked for more money, been bullied and complained, ids pregnant and verbally told the employer, and that is the reason they were terminated, and the onus is on the employer to prove that was not the reason. This is almost impossible.

An employee has been on unpaid sick leave for over a year. There is a transmission of a business and that employee is not offered a job by the new employer. The employer claims general protections as the new employer did not employ her as she had sought a work place right with the previous

employer and taken sick leave. Of course the new employer would not want a staff member who was on long term work cover, was on long term sick leave paid or unpaid. The claim in my view is unreasonable, but the onus is on the employer to argue they had the right not to employ or to terminate.

There are many examples of the difficulty in employers being able to take action that they should be open to take, and then facing a claim under the general protections provisions. The threat of having damages of some type also awarded does affect the employer in making a decision to settle. Small businesses find the threat of the possible expense involved very over whelming.

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THE EFFICIENCY AND EFFECTIVENESS OF INSTITUTIONS

The role of the FWC in my view is becoming increasingly to be a resource for employees. The web site would appear to demonstrate this aspect. The site provides easy access to the employees as to the options they have with clear directions as to what to do. I am not sure that this represents a balanced view or the role of unbiased "umpire" the FWC should have. The FWC will advise employees as well on issues such as making a general protections claim if they are not eligible to make an unfair dismissal application. The FWC will also refuse an employer's request to change a date for conciliation or hearing, but applicants can go on a holiday and have their application to change a date agreed to.

The FWC practice of attempting to prevent either side being represented often places one party or the other at a disadvantage. While this has improved, as in many cases representatives are of assistance, it cannot be guaranteed a representative will be allowed to represent the client. In my view this is totally unfair, in particular where the other side has a union lawyer or union representative. My personal experience is that while I always respected the Commissioners, I was not worried about attending conferences and hearings. Now, after thirty years of appearing, (predominantly at conference), I feel apprehensive having to request permission to appear at a conciliation as I may be refused in the presence of a client, leaving them to do the best they can.

The unfair conciliators do a good job under what I say are difficult circumstances. I know of no employer representative or employer, who would not rather sit opposite an applicant in any type of conciliation. The telephone conferences are not ideal, as the parties are not forced to tell their story in front of each other. This does lead to people finding it easier to embellish their story, and that is either party. The system is geared to the applicant getting settlement money no matter what.

The terms of the Fair Work Act are favourable to unions. Not employers, and under these circumstances, employers do feel they do not have a level playing field. This goes to the obtaining of bargaining orders, the many and varied options open to employees, the advice for employees from the FWC and the fact that in some ways the FWC seems to be more of a service to employees than a tribunal.

In my experience there is also a lack of consistency in the approach taken on similar issues, depending on the Commissioner. There is the perception that some bias does exist, whether towards employer parties or toward union parties or employee parties. This is not an issue which will be easy to deal with however.

Finally, on Saturday the 7th March 2015, it was interesting to hear a report from Jo Hall regarding a woman suing her employer over a return to work after pregnancy issue, that this was being done "with the backing of the Fair Work Commission".

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