# Let the rumpus begin – universities stop work

## Cases emerging from the *Fair Work Australia* website

By Rob Guthrie

The *Fair Work Australia* website *http://www.fwa.gov.au/* allows access to decisions of the Australian Industrial Relations Commission and the newly formed tribunal, Fair Work Australia (FWA). Of current interest is the growing number of cases reported in relation to applications for ballot orders. At *http://www.fwa.gov.au/index.cfm?pagename=industrialballots* is some useful information relating to the process of obtaining a ballot order. It also shows that, since the legislation took effect on 1 July, several cases have detailed the process and procedure for obtaining a ballot order. A review of FWA cases and decisions indicates that not only has FWA already been busy, but that it is doing brisk business in ballot order applications. The need for ballot orders arises as enterprise agreements near their expiry date and the parties fail to reach agreement on the way forward.

It is also particularly pertinent to the wave of industrial action taking place in Australian universities. In September 2009, workers at 17 universities around Australia stopped work for 24 hours as part of a nationwide campaign concerning the negotiation of pay conditions for academics and administrative staff. The process to stop work was commenced under the provisions of the new *Fair Work Act* 2009 (Cth): s437 allows one or more bargaining representatives to apply to FWA for permission to hold a ballot in order to determine whether workers wish to commence industrial action. This action can be taken only if there is an existing agreement covering those employees, which has expired or is within 30 days of expiration (see s438). If and when a *protected action ballot* order is given, a secret ballot is conducted by the Australian Electoral Commission (AEC) or other nominated agent to seek the views of the relevant employees. Where the ballot is carried out by the AEC, the cost is borne by the Commonwealth.

Under s459, industrial action can be approved only if at least half of the employees who were eligible to vote have in fact voted, and the majority of those support the action. It is also a requirement that any action supported by such a vote must be taken within 30 days of the ballot. If the action is not taken, then the right to protection is lost. FWA will grant a ballot order only where it is satisfied that each applicant – invariably a union – has genuinely attempted to reach an agreement with the employer. Interestingly, in relation to the universities, a determination of good faith has been made in *National Tertiary Education Industry Union v University of Queensland* [2009] FWA 90, where the NTEU was able to satisfy FWA that it had genuinely attempted to reach agreement with the University of Queensland (UQ). UQ argued unsuccessfully that the NTEU was engaging in pattern-bargaining and not genuinely attempting to reach agreement with any one university. In relation to the submissions made by the University Senior Deputy, President Richards of FWA said:

> '…I am of the view that there is no evidence that the NTEU has failed to meet or has been reluctant to meet with UQ. The [uncontested] evidence of Ms Lee, […], [was] that she for her own purposes is prepared to meet each day, that might be supplementary to my previous findings that the NTEU, in my view, has met its obligations to meet and discuss claims. I see also nothing in the evidence that would give me cause to conclude that the NTEU has acted unreasonably in the conduct of those meetings or otherwise failed to respond to UQ. It is not my view that the Act requires any requirement on parties to respond in detail and writing to every claim that […] [is] put to them. Matters that are conveyed over the course of a week in advance of a meeting are often left, in my view, for reasonable discussion or discussion when the meetings convene and I draw no adverse inference from those sorts of circumstances.' (at para xxiv)

The importance of holding that the NTEU was bargaining in good faith was that FWA could then proceed to grant a ballot order to allow the NTEU to poll its members. The issue of pattern-bargaining is – given its considerable implications for other negotiated outcomes across this sector – central to university industrial relations.

As a general rule, employers oppose the grant of a ballot order by arguing that the precondition of bargaining in good faith has not been met. The NTEU has accordingly been the applicant in several ballot order applications, which have resulted in employees voting in favour of industrial action. >>

Interestingly, university employees have also been given a range of options in terms of the form of industrial action that they can take. For example, industrial action may include ceasing to answer student correspondence, publish student assessments, attend meetings, present lectures and the like. Part of the industrial action includes pickets, which have been organised at the main entrances of the university concerned.

It will also be interesting to see how universities discern which employees have engaged in industrial action, as it is not clear from the *Fair Work Act* 2009 (Cth) whether employees are obliged to advise their employers that they are taking industrial action.

An added complication for the education industry is the problem of payments, as ss470-5 contemplate a situation where employees can be paid for partial work bans. In many instances, academics will be engaging in partial work bans rather than outright cessation of work. Using the FWA cases and decisions website as a guide, there is a good deal of activity around ballot orders and good faith bargaining. Given the importance of these concepts, it is not surprising that stakeholders will be testing the waters in this regard. At present, university industrial action is featuring heavily in the decisions.

The FWA website is extremely useful, but could be improved with a search engine that isolates key words to facilitate searching for specific cases. Although the brief summaries allow for reasonably quick reference, individual cases must be located by scrolling through in date order. At present, key-word searches do not pick up key words in cases, although practitioners may be able to use *www.austlii.edu.au* if the FWA decisions are uploaded on to that database. ■

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