It's not fair: The difficulties of union collective bargaining in New South Wales

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ABSTRACT

This paper is a case study on the formalisation of wages and working conditions at a NSW workplace. The study highlights the importance of bargaining power and demonstrates the difficulty of negotiating an enterprise agreement in workplaces with low union density. In situations where union members are unlikely to take industrial action to pursue their claim, this case study highlights that the decision to make an enterprise agreement can rest entirely with the employer.

Introduction

Although bargaining is a key feature of industrial relations literature, there are few recent case studies which have the benefit of unlimited access to data, participants or the processes in the Industrial Relations Commission to describe, in depth, how an agreement is reached (see Fells 1997, Pegg and Young 2001). Rather, a significant number of studies take a macro approach, looking at outcomes across a whole industry (Bray 1996, Buultjens 1996, Waring and Barry 2001) or gender implications of bargaining (Strachan and Burgess 1997, George 1998, McDermott 1998). Or, they focus on one component of an agreement such as the mediation process (Davis 1998) or the use of accounting technology to justify a claim (Monir Zaman and Abu Shiraz 2003).

This case study follows the agreement/award-making process at a workplace in country New South Wales. It was possible because of unlimited access to personnel, union and company documents and Industrial Relations Commission proceedings. Firstly, a brief background to the workplace is provided. This is followed by a description of the bargaining process for an enterprise agreement when the previous agreement was terminated by the company. The story unfolds as the employer, attempting to introduce radical workplace change, refuses to negotiate an enterprise agreement, and the parties both lodge logs of claims for an award with the New South Wales Industrial Relations Commission. After months of conciliation, the parties seek arbitration. This process is described in section three of the paper. During the arbitration process, the constraints imposed on the Commission by wage fixing principles are revealed. These principles restrict the amount the Commission can arbitrate in a new award. Following the making of the new award, the union attempts to negotiate an enterprise agreement with the employer. The fourth section of the paper describes this process. Finally, the conclusion is made that, at workplaces where the employment is seasonal and union density is low, if an employer refuses to negotiate an enterprise agreement, there is little a union can do to further the wages and working conditions of its members.

Background to the workplace

The focus of this case study is a workplace in country New South Wales. The nature of the work is such that employment for most workers is seasonal, with the majority of employees working between May and September each year. During the peak season, work is performed twenty four hours a day, seven days a week.

The workplace began operation in 1987 and wages and conditions were governed by an informal arrangement between the employer and union. There was no award covering these employees. In 1991 an unregistered enterprise agreement was negotiated between the union and the company to cover a range of occupations at the workplace. Conditions remained the same at the workplace, with wage increases negotiated annually until 2001 when the enterprise agreement was formally certified for a 12 month period by the New South Wales Industrial Relations Commission. The agreement was not renewed after the nominal expiry date however the wage increases were renegotiated each year.

The bargaining process

During the non-peak season, in late 2002, the union began negotiations with the company for a new enterprise agreement. The company continually refused to renegotiate the enterprise agreement, arguing that it could not remain viable under the conditions in the existing agreement. In particular, the company highlighted that it believed certain occupations covered by the enterprise agreement were overpaid.

Instead of negotiating with the union for a new enterprise agreement, the company informed workers that it intended to offer individual contracts. Under these contracts, future State Wage Case increases were to be passed on to every worker except those in classifications which the company believed were overpaid. These 'overpaid workers' were to only receive 60 percent of the State Wage Case increase for the following two years, in order that their rate of pay would become comparable with the C10 basic trade rate in the Metal Industry Award.

In response, the union stated its intention to apply for a NSW award to cover the employees and at a union meeting, members endorsed resolutions that they would refuse to sign individual contracts, and stated that all negotiations for a state award and an enterprise agreement were to be done on their behalf by the union. As per usual practice, in 2002, the union then lodged a number of dispute notices in the Industrial Relations Commission and the Commission held several conciliation conferences to assist the parties in reaching a new agreement.

However, by December 2002, with little progress having been made, the company notified the union that it had applied to the Commission to have the 2001 enterprise agreement terminated, effective from March 2003. Four days after the company made its application to the Commission, the union lodged a log of claims for an award. In February/March 2003, the company also lodged a log of claims with the Commission, and notified the union that 'in the spirit of cooperation', it would undertake that the terms and conditions in the terminated enterprise agreement were to apply until a new industrial arrangement was introduced.

The log of claims of both parties were at complete odds. The union log of claims contained all the provisions in the terminated enterprise agreement plus some additional provisions from industry awards which had been omitted from the original enterprise agreement. In other words, the union's claim did not attempt to significantly vary existing wages and conditions. In contrast, the company's log proposed a radical departure from previous practices.

Despite both parties serving logs to make a state award, during 2003 further conciliation conferences were held between the parties in an attempt to negotiate a new enterprise agreement, assisted by the New South Wales Industrial Relations Commission. The issues discussed included:

- The suitability of the company-provided uniform to the conditions under which work was required to be performed.
- Rostering arrangements. The union claimed that there was favouritism in rostering with some employees given the shifts they preferred (for example day shift) while others were favourably rostered to work at times when penalty rates applied. The union argued that, to ensure fairness in rostering, the roster should be rotating and include all employees and all work performed.
- Further, during peak periods, some workers were being given less than 10 hours between shifts – the union argued that the minimum time off between shifts was to be ten hours to allow sufficient rest time.
- Payment of meal breaks – Awards in the industry usually contain provision for an unpaid meal break of between 30 and 60 minutes. Due to the rostering practices at this company and the constraints imposed by the type of operation, the practice was that a paid 20 minute meal break was provided during the shift at a time when operations allowed. This paid meal break reflected the difficulty in rostering people for the unpaid 30 to 60 minute meal break which was typically found in the industry's awards and agreements. The employer wished to eliminate the paid break.

As part of the conciliation process, the parties believed that the Commission would gain a greater understanding of the dispute if the Commission inspected the workplace. This occurred in late August 2003, during peak season.

Following the inspection, the company agreed that the rates of pay for all existing permanent and seasonal employees at the time of the inspection would be grandfathered. In other words, while the rate might change for new employees as a result of the conciliation/arbitration process, existing employees' rates of pay would remain at the level they were before any negotiations took place. At this stage (August 2004), the company had only agreed to grandfather the rates of pay, claiming that the conditions were to be those contained in the company's log of claims which had been presented before the Commission.

To further the process, the company had reiterated in September 2003 that:

- Rates of pay of existing employees would be grandfathered.
- Conditions for all employees were to be in accordance with the company's log of claims.
- Non-grandfathered employees were to be paid the rates in the company's log of claims.
- These conditions would be embodied in an award with a nominal term of three years.
- The State Wage Case 2003 increase would be applied to all existing employees from September 2003 and subsequent State Wage Case increases paid from September in following years.

The union rejected the offer, with members passing a resolution that they would only accept grandfathering if it applied to wages *and* conditions and by the end of October 2003, the company had agreed to also grandfather the conditions for workers who were employed at the date of the inspection.

Despite this agreement, in October 2003, the union had written to the Commission noting that the company had been trying to impose the provisions of its log of claims on all employees (new and existing) before any arbitrated settlement had occurred.

The Commission called a further conciliation hearing between the parties in late October 2003 and by the end of this hearing the Commission indicated that conciliation was exhausted The parties had reached agreement over most of the matters in dispute although two key sticking points remained. The first related to allowances and the second to meal breaks.

The next step was arbitration and the parties agreed that the outcome was to be an enterprise award. Notwithstanding the previous eighteen months of negotiations, the company indicated that, if arbitration was to occur, all previous agreements were off the table and the Commission was to arbitrate on the entirety of wages and working conditions for all employees. To this end, the parties were directed to submit their evidence and affidavits by early December 2003 with the case listed for February 2004.

Arbitration

The hearing was held over three days in country New South Wales to enable witnesses who lived in the local area a chance to appear. After opening submissions, the union began to call its witnesses. After the first day of the hearing, with the first union witness having been in the witness box for most of the day, the Commission indicated that the parties were close to agreeing on the content of a settlement. The Commission directed both the union and employer to meet overnight in an attempt to reach an agreement which the Commission would then ratify as an award.

PROBLEM OF THE WAGE FIXING PRINCIPLES: One of the key concerns for the union regarding arbitration was the small 'ambit' of wages within which the Commission could determine the wages payable to those covered by the new award. This ambit was the result of the 'Wage Fixing Principles' which govern decisions of the Commission in relation to awards.

The Wage Fixing Principles are determined each year in the State Wage Case. The principles aim to provide 'a framework under which all concerned - employers, workers and their unions, governments and tribunals - can co-operate to ensure that measures to meet the competitive requirements of enterprises and industry are positively examined and implemented in the interests of management, workers and, ultimately, Australian and New South Wales society'. Accordingly, the principles from the 2003 State Wage Case state, at Principle 13 that:

> Any first award or an extension to an existing award must be consistent with the Commission's obligations under Part 1 Chapter 2 of the Act.
>
> In determining the content of a first award the Commission will have particular regard to:
> (a) relevant wage rates in other awards, provided the rates have been adjusted for previous State Wage Case decisions and are consistent with the decision of the Stage Wage Case 1989;
> (b) the need for any alterations to wage relativities between awards to be based on skill, responsibility and the conditions under which the work is performed;
> (c) for conditions of employment, other than wage rates, prima facie the existing conditions of employment;
> (d) that the award would comply with the requirements of section 19 of the Act.

The union's concern was that, because of a focus on enterprise bargaining in the industry over the last decade, award rates of pay had not been increased significantly and were in no way comparable to what workers were actually being paid. However, Principle 13 determined that the Commission, when making a decision, had to have regard to award rates only and effectively decide between the ambit created by the lowest and highest of these rates. For the union, this meant a decision through arbitration of between approximately $15.00 per hour and $17.00 per hour, even though these rates did not reflect the actual rates paid to workers in the industry under their enterprise agreements.

The second concern for the union was the level of work undertaken by employees of this workplace compared to other workplaces in the industry elsewhere. During the first day of evidence, the Commissioner highlighted that he did not believe the skills required by employees at this workplace were comparable to workers in other workplaces in the industry. Most importantly, the Commissioner noted that the training required to be able to work at the case study workplace was approximately four to five weeks while the training provided at other workplaces in the industry which undertook similar work was at least several months, and for some, more than a year. This was the key argument of the employer in their affidavits provided to the Commission, and one which seemed to strike a chord.

Hence it was important for the union to try to gain a favourable outcome from the negotiations rather than allow the Commission to arbitrate. Overnight, the parties agreed that the conditions in the terminated enterprise agreement were to apply to all workers as part of the new award. When the parties reported back to the Commission the following day on the success of their negotiations, they were able to report that the only outstanding issues related to the hourly rate of pay, the application of penalty rates and meal breaks.

On that basis, the Commissioner recommended that the parties keep negotiating, with the Commission acting as medicator. During the discussions, the company agreed that wages for the existing employees would be grandfathered, and the penalty rates under the terminated enterprise agreement would also apply. With the conditions for existing employees remaining the same as before but adjusted by the 2003 State Wage Case increase, the focus of the parties turned to the wages for future employees.

The Commissioner again reminded the parties of the constraints imposed by Wage Fixing Principle 13 and indicated that he did not believe that the skills required by workers at this company were as high as those at other like operations. For this reason, he suggested that if required to arbitrate the wage component, his decision was not likely to be at the highest award rate. By the end of the day, the company offered a wage rate of $16.30 per hour. The union accepted the offer on the basis that it was exclusive of penalty rates. However the agreement almost fell over when the employer revealed their offer of $16.30 was an 'all in' hourly rate.

The parties continued negotiating the rate, with the union using a current roster of working hours to ensure that the best deal was negotiated for future workers. The sticking point was the structure of remuneration. The union wanted an hourly base rate plus penalties for early morning, afternoon and night work, while the employer would not budge from the position of an 'all in' hourly rate.

When the parties finally reached agreement for an 'all in' hourly rate of $16.80 per hour, the Commission indicated that this was a realistic outcome. The union calculations showed that, based on an eight week roster, the workers would be better off under the new award than they would have been if they had been paid according to the highest hourly rate in the industry awards. Of course, this did not hide the fact that all other workers in the industry earned significantly higher than their award rates of pay, and nor did it hide the fact that existing employees were going to be paid a significantly higher hourly rate of pay than future employees, plus penalties, for exactly the same work.

With the wage rate for future employees agreed, the final sticking point was whether the wages payable the existing employees would be increased by future State Wage Increases. At the start of negotiations, the employer had made it clear that they believed these workers were overpaid and that their intention was to freeze the wages of the grandfathered employees until the wage rate in the new award caught up. Given the difference between the two rates of pay, this would effectively mean that the rate of pay for existing workers would be frozen for several years. The union argued that it was its intention that the State Wage increase be passed on to existing workers as well as future workers, and that the grandfathering arrangement was not a wage freeze.

To resolve the dispute and make the award, the Commission inserted a provision under the wage rates of the grandfathered employees, which stated that 'the parties will confer with respect to the application of the 2004 State Wage Case and any dispute in this matter will be referred to the Commission'. The union sought a further provision which stated '… and any decision of the Commission will be binding'.

The reason the union wanted this provision was simple. The Wage Fixing Principles state that the State Wage increase must be absorbed into over award payments. The manner in which the rates of pay for the grandfathered employees had been written into the award was such that they were over award payments. This meant that, regardless of a dispute being referred to the Commission, the Commission could not flow the State Wage Case increase onto the grandfathered employees rates of pay. However the Commissioner indicated to the union that he believed the employer would look at the 2004 State Wage Case in good faith and there was no need to include the sentence as sought by the union.

However, soon after the 2004 State Wage Case was handed down, the union approached the company seeking that the increase be applied to the rates of pay of the grandfathered employees. The company refused and the union notified a dispute in the Commission. As expected, when the union appeared before the Commission, the Commission indicated that its hands were tied by the Wage Fixing Principles and the increase could not flow on to the grandfathered workers except without the employer's consent. In other words, the rates of pay of the grandfathered employees had become frozen for several years until the award rate caught up. There was nothing the union could do except, as the Commission recommended, commence negotiations for an enterprise agreement with the employer.

ENTERPRISE BARGAINING: With the end of the peak season rapidly approaching, the union wrote to the employer, stating its intention to negotiate an enterprise agreement. The company responded that it did not intend negotiating further with the union.

Although union members were keen to negotiate penalty rates for new workers as well as a higher rate of pay overall, they were not willing to take industrial action to further their claim. This was the result of a number of factors. Firstly, there were only a few weeks left in the peak season, and most of the workers felt that management could simply hold out to the end of the season and suffer the impact on their business. Second, a high number of the seasonal workers were not union members and only intended working with the company for one season. They did not hold a long term view on the future of wages and conditions. Third, union members were reluctant to take action because, while for most of the locally employed workers, this was a second job and they could survive without the income, they noted that for other seasonal workers, this was their only source of income and they could afford to take industrial action.

In the absence of industrial action, if the company did not agree, there was no way an enterprise agreement would be negotiated to cover workers at the site.

Conclusion

This case study has highlighted the problems in determining a realistic rate of pay for workers in NSW who are not covered by an award. As noted, the Commission is bound to operate within the Wage Fixing Principles determined in State Wage Cases. This means that a decision for rates of pay in a new award must have regard to the rates in existing awards covering similar work. Given the focus by unions on enterprise bargaining, often the rates of pay in these awards are very low when compared to the rates that enterprise agreement covered workers actually get paid.

Finally, this case study has highlighted that, even in regimes where the Government is not anti-union, unless an employer agrees to negotiate, there is little a union can do to further the wages and working conditions of its members. Of course, industrial action is the way claims can be pursued, but this is not likely in workplaces with low union density, in this case as a result of the seasonal nature of employment.

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