NSW ACT Independent Education Union
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18 July 2017

JQ:100/17

Dear Director

Re ARBITRATION OF DISPUTES

I am writing to state the Union's position in relation to a key outstanding issue in current negotiations for new enterprise agreements, that is whether or not the Fair Work Commission has power to arbitrate, that is resolve, disputes. As advised to CCER, this is a matter about which the Union feels very strongly.

The state system

Historically under the state system that applied prior to 2010, the Union was able to refer a dispute about any industrial matter to the Industrial Relations Commission. Following conciliation, the Industrial Relations Commission could arbitrate the dispute.

Transition to the federal system

The IEU met with CCER throughout 2010 concerning an "orderly transition" of state awards to the federal system, following the referral of IR powers by the NSW Government to the Commonwealth Government at the end of 2009.

An issue in the negotiation of the new federal enterprise agreements was whether or not the federal tribunal would have the power to arbitrate disputes. On 10 June 2010, CCER wrote to the IEU stating:

"2. Arbitration
The Employers have agreed that disputes about the content of an enterprise agreement and/or work practice agreement may be arbitrated by Fair Work Australia."

The draft of the disputes procedure inserted into EAs was identical to the current wording. Information sent to employees prior to the vote described the effect of the clause as follows:

"The parties to a dispute may agree on the process to be adopted by Fair Work Australia including mediation, conciliation and arbitration. In the event that a dispute remains unresolved following these processes, Fair Work Australia may exercise any of those methods (or others permitted by the Fair Work Act) to ensure that settlement of the dispute."

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Negotiations in 2014 - 2015

This issue again arose in the draft Systemic Schools EA circulated by CCER in April 2014. The proposed CCER draft limited the clause to disputes arising under the EA or the NES and stated:

"13.2 If a dispute is unable to resolved at the workplace, the dispute may be referred to the FWC for mediation and conciliation. For a dispute to proceed to arbitration, written consent must be obtained from both the Employer and the Employee. "

Finally, on 10 June 2015 CCER agreed in writing to extend the disputes procedure to cover disputes about Work Practice Agreements and agreed to arbitration:

"Dispute Resolution Procedures

The IEU have indicated they are not prepared to accept the employers' proposed changes to the current dispute resolution procedures. The employers' proposal would require both the employer and employee's written consent for a dispute to proceed to arbitration.

In the interests of reaching settlement, the employers have agreed to the following clause which is modelled on that set out in the current NSW Teacher Agreements.

44.3 The parties may agree on the process to be utilised by the Fair Work Commission including mediation, conciliation and arbitration.

44.4 Where the matter in dispute remains unresolved, the Fair Work Commission may exercise any method of dispute resolution permitted by the Act that it considers appropriate to ensure the settlement of the dispute."

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CCER has now stated however that there is no right of arbitration under the existing EA clause. This is contrary to the history of the negotiations on the clause where it has been stated by CCER to the Union and employees there is a right of arbitration. A recent Full Bench decision of the Fair Work Commission on 1 June 2017 has also created some doubt about the interpretation of the clause.

The Union therefore seeks this matter be put beyond doubt by inclusion of the following sentence in Clause 44.4: *"In particular, the Fair Work Commission may utilise mediation, conciliation and arbitration to resolve the dispute. "*

Why does the Union take this position?

The Union has sought to include a right of arbitration in the EA as we consider it is the quickest and most cost effective way to resolve a dispute, where the parties are unable to agree.

Arbitration is not litigation – no damages, penalty orders or pay orders can be made and the parties do not need to be legally represented.

It is also the Union's experience in independent schools, that if there is no possibility of arbitration, some members of the Fair Work Commission will refuse to make recommendations (as they are unenforceable) and employers will refuse to follow recommendations even if they are made.

We consider conciliation has been effective in relation to disputes in Catholic schools, because the Commission can arbitrate if the matter is not resolved. Disputes referred to the Commission have included disputes about the right to request part-time work; access to the Exemplar Teacher classification in the Archdiocese of Canberra and Goulburn; requirement for Three Year Trained teachers in the ACT to undertake further study; rates of pay for casual teachers under the Standards structure; the term dates dispute in Canberra and Goulburn and performance management processes etc. Until very recently, the employers have not disputed there is a right of arbitration under the EA, but the Union has only pursued a handful of matters to arbitration. The Union will not (and has no reason to) change our practice in this respect.

The Union also has a particular concern in relation to Work Practice Agreements (WPAs). In NSW, unlike the situation in other states, in most dioceses, teacher conditions are not included in the EA itself. Given this, the Union wants to be able to refer disputes concerning WPAs to the Commission and arbitrate the dispute if it is unable to be resolved.

Agreements applying to Catholic diocesan schools in Victoria and Queensland permit arbitration of disputes about working conditions and the Union does not understand why dioceses are apparently so opposed to the Union and employees retaining the right that we have always enjoyed. Many other EAs applying to non school Catholic employers in NSW also provide a broad right of arbitration.

Further discussion

The Union is happy to have further discussions about this matter if it cannot be resolved. However, we now need to inform our members about the outstanding issues in the negotiations and recommend steps which may include protected action to resolve the impasse.

Yours sincerely

JOHN QUESSY
Secretary