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Swinburne University gets more than it bargains for

The Federal Court has revoked a decision made by the Fair Work Commission (FWC) to approve the Swinburne University of Technology's 2014 enterprise agreement (EA), due to the inclusion of casual or sessional employees in the voting process.

In February 2014 the University requested staff to vote in favour of the agreement, including individuals who had been engaged as sessional employees during the 2013 academic year. The University considered 2005 of the votes cast to be valid, and made an application to the FWC for approval based on a slim 57 majority votes in favour of the agreement.

The National Tertiary Education Industry Union (NTEU) opposed the application on the basis that some of the sessional employees included in the vote were not employed by the University at the time, and therefore not covered by the proposed EA.

The FWC acknowledged that by incorporating a strictly literal interpretation of the relevant provisions of the Fair Work Act when making its decision, casual or sessional employees not engaged by the employer at the time of voting would be precluded.

This was deemed to be an overly technical approach by the FWC, who thought it appropriate for the University to include some casual and sessional employees in the request to vote (even if they were not actually engaged at the time), because they were "usually employed" by the University.

The FWC considered that the question of which casual or sessional employees were included should be determined by reference to the nature of the employment, and the employment patterns in the industry and employer's enterprise. Therefore, those engaged on a sessional basis in the 2013 academic year and likely to be engaged in this capacity in the 2014 academic year were asked to vote on the agreement. This agreement was originally approved by the FWC on 16 December 2014.

The NTEU appealed the decision to the Federal Court, where a majority of the Court deemed the FWC's approach 6 months earlier to be incorrect. Justices Jessup and White found that the group of employees to whom a request for approval of an EA should be made (and who are eligible to make the agreement with the employer) is specifically confined by the Fair Work Act to individuals who are actually employees at that time. This meant that casual and sessional staff who are usually, but not currently, employed by the University, were not entitled to vote for the agreement.

Employers bargaining for an EA should be mindful when determining the eligible cohorts for inclusion in the pre-bargaining and bargaining steps of the agreement. Compliance with mandatory procedural steps at all stages of enterprise bargaining will help avoid approval being refused on technical grounds.

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