United Firefighters Union, Victorian Branch
Legal Update Newsletter
Keeping members informed about litigation issues

Issue: 4 Vol:1 September 2014

To ALL UFU MEMBERS

Litigation Update

This is the fourth Litigation Update keeping UFU members informed of current litigation and legal matters.

As members are aware, the CFA and MFB have embarked on an aggressive litigious approach to attack your terms and conditions of employment - which both employers agreed to in 2010. In order to protect members' terms and conditions of employment the UFU has instructed highly reputable and experienced legal teams of Queens Counsel, Barristers and Solicitors to combat the attacks and to prosecute the reneging of agreements.

It is important to note that despite the extensive litigation members have not lost any terms or conditions of employment to date.

But the legal battles continue as the CFA and MFB – with the endorsement of the Napthine Government – continue to use Fire Service Property Levy monies as a litigation slush fund to undermine the standing of firefighters in the community and to attack core terms and conditions of employment.

In order to monitor this unprecedented level of litigation necessary to protect members' terms and conditions of employment, the UFU has put in place processes in addition to the UFU's sound financial management systems. This included the establishment of a dedicated committee for the purpose of monitoring the cost of litigation and to report the status of such costs with any recommendations to the UFU Branch Committee of Management. This sub-committee is representative of the membership and includes professional expertise.

The Branch Committee of Management recently implemented a litigation levy as recommended by the sub-committee. This was done to protect the union in having to take all necessary actions to defend the interests of the members from the employer's attack.

THE MFB TERMINATION CASE HAS BEEN HEARD – WE NOW WAIT FOR A DECISION

The MFB's applications to terminate the operational staff and the ACFO's agreements have been heard and a decision is pending.

The MFB Application to terminate the MFB UFU Operational Staff Agreement 2010 and the MFB UFU ACFO Agreement 2010 was heard in the Fair Work Commission in July 2014 and was reconvened on 21 and 22 August for legal submissions to be presented by Counsel.

Commissioner Wilson has reserved his Decision and it is not known when a Decision will be handed down.

Whilst this case at this time relates specifically to the MFB enterprise agreement, members are reminded that the CFA sought access to commission files in this matter. Therefore the CFA may be considering making their own application to terminate the CFA Operational Staff Agreement, putting at risk the terms and conditions provided to CFA Operational Staff.

The MFB applied to the Fair Work Commission to have the MFB UFU Operational Staff Agreement 2010 and the MFB UFU ACFO Agreement 2010 terminated. These agreements were negotiated, agreed, signed by the MFB and UFU and then certified by the Fair Work Commission in 2010.

Continued attacks on your conditions despite agreement in 2010

The MFB wants to wipe out the operational staff terms and conditions of employment claiming the agreements they negotiated are now unworkable and contain “non permitted matters”. The MFB filed 15 witness statements and the UFU filed 74 witness statements in the Commission and the evidence was heard from the 7th to the 25th July before Commissioner Wilson.

The MFB did not contest the evidence of 34 of the UFU witnesses, including two expert witnesses, and as a result the statements were handed up and incorporated into the evidence as separate exhibits. All other witnesses were called and cross-examined.

Due to the extensive and unprecedented interest in the case, the Fair Work Commission set up a video link in a second court room so that 60-70 people could attend at any time to hear the evidence first hand.

Consistently about 60-100 firefighters attended each day filling both court rooms.

This presence of firefighters complimented the wealth of UFU witness statements that demonstrated firefighters do not want their Agreements terminated.

Under Section 226 of the Fair Work Act the Fair Work Commissioner must terminate the agreement if it is satisfied that it is not contrary to the public interest to do so and appropriate to do so taking into account all the circumstances.

The Act expressly includes the requirement to take into account the views of the employees, the employer and the union that are covered by the Agreements when determining if it is appropriate to terminate the Agreements.

.As the above tests include the views of the employees and the union, a wealth of evidence from firefighters of all ranks was put before the Commissioner including the UFU survey which showed that more than 96% of those that participated strongly disagreed with the termination of their agreement.

During the hearing the MFB produced a document now known as MFB Exhibit 9 dated June 2014 which sets out the Chief Officer’s intention to assess the fire risk of the MFD each week and determine staffing and trucks accordingly. The proposal provides for the Chief Officer to reduce minimum crewing to 246 and take 8 water tankers out of the system on the lowest risk days. It transpired during the hearing that only a select few of the MFB executive team and ACFOs had been made aware of this document. It has not been previously provided to the UFU.

At the time the MFB made the Applications to terminate the Agreements, the MFB said it would give an undertaking *"to maintain the core entitlements"* of operational staff if the Agreements are terminated.

The MFB first produced a 12-month undertaking with its witness statements in reply to the UFU witness statements just prior to the hearing. The Undertaking stripped many terms and conditions from the Operational Staff Agreements. Then, after all the evidence had been heard, the MFB changed the undertaking in its legal submissions to expire in 18 months.

The UFU has argued any such Undertaking does not provide any security for firefighters as it is questionable as to whether any such undertaking can be enforced. The terms of the undertaking involve a significant reduction in conditions that MFB firefighters currently enjoy under the 2010 enterprise agreement.

During the hearing when asked what would happen after 12 months, (as that was the period of the undertaking at the time), Chief Officer Peter Rau said he did not know.

Continued attacks on your conditions despite agreement in 2010

UFU APPEAL AND CFA CROSS-APPEAL OF THE "RECRUITS" CASE IN THE FEDERAL COURT OF AUSTRALIA

The UFU Appeal of the "Recruits Case" in the Federal Court has developed into a possible ground-breaking constitutional argument.

The Appeal was heard before a Full Bench of Justices Perram, Robertson and Griffiths in the Federal Court on the 13th and 14th August. The Decision has been reserved and it is not known when it will be handed down.

The UFU filed this case for breach of Agreement in 2012 after the CFA reneged on the agreed programme for recruiting.

Justice Murphy heard the case in April 2013 and handed down his Decision in January 2014. It is the Appeal of that Decision that was heard in August 214.

In his Decision Justice Murphy agreed that the CFA was a constitutional corporation and therefore the Referral Act which limits the Federal industrial relations system to impact on the State's ability to determine who it employs, did not apply. However, Justice Murphy found that the common law principle Re: AEU did apply and that the Agreement requiring 90 recruits a year impinged on the State's ability to determine the number and identity of its employees.

Re: AEU was a High Court case where the distinction between the powers of the State and the Commonwealth in terms of employing staff was determined and it was found that the Commonwealth (through a Federal industrial relations system) could not impinge on the State's right to determine who it employs and how many.

Justice Murphy found that the enterprise agreement clauses regarding staffing, contracting out/maintenance of classifications; secondment and lateral entry (clauses 26, 27, 28 and 122) were invalid as they impaired the capacity of a state government to determine the number and identity of its employees or the number and identity of employees to be made redundant. While Justice Murphy found four of the clauses of the Agreement were not enforceable because of the Re: AEU principle, he went on to say:

"I have some difficulty in treating the implied constitutional limitation as applicable to ***industrial agreements*** *that are bona fide voluntarily entered into by a state party and which may therefore have no practical impact on a State's capacity to govern."*

The UFU has argued that the State's right to determine such matters has not been impinged in this case as the State agreed to the clauses in question including the requirement to recruit at least 90 recruits a year.

There has not been any definitive decision on the situation where staffing clauses have been reached by agreement other than imposed by Arbitration or through Awards and therefore the UFU Appeal could develop the law significantly.

At the time the case was heard before Justice Murphy the CFA made additional unrelated claims. The CFA were not successful in claiming that the consultation clauses 13, 14 and 16 of the Agreement were "objectionable" and /or "unlawful terms". The UFU also successfully defended the dispute clause with Justice Murphy finding that this clause was valid and that the dispute resolution clause was not prevented from extending to matters beyond the Agreement.

Continued attacks on your conditions despite agreement in 2010

In the Appeal the CFA is contesting Justice Murphy's decision on the validity of these clauses and the finding that the CFA was a constitutional corporation.

VSO CASE ADJOURNED PENDING THE DECISION OF THE FEDERAL COURT APPEAL OF THE "RECRUITS" CASE

The UFU's case that the CFA's decision to employ VSO's breaches the CFA UFU Operational Staff Agreement has been adjourned pending the Decision of the Appeal of the "Recruits" case.

The UFU claims the CFA's employment of VSO's is in breach of the Maintenance of Classifications clause.

That clause is one of 4 clauses that Justice Murphy considered in the "Recruits" Case and determined the maintenance of classifications clause was unenforceable as it impinged on the rights of the State to determine staffing matters.

As that clause is now being directly considered in the Appeal of Justice Murphy's decision by the Full Bench of the Federal Court, the VSO case has been adjourned pending the Decision of that Appeal.

In 2013 CFA sought to introduce a Volunteer Support program and officers in early 2013 with no consultation and significant concerns raised by the Union about work currently performed by current Operational Staff.

The UFU filed in the Federal Court regarding breach of the agreement and this matter has been set down to be heard in October 2014.

The UFU amended its statement of claim this year putting the Common Law Deed between the UFU and the CFA before the Federal Court in this matter. The Deed was agreed and signed by the CFA and UFU in 2010 to protect terms of conditions of employment should any term of the CFA UFU Operational Staff Agreement be deemed to be unlawful and/or unenforceable.

The Deeds have been put before the Federal Court in this matter as a result of the Recruits case (referred to above) where Justice Murphy found the no contracting out/maintenance of classifications clause were unlawful on the basis it interfered with the State's right to determine the number and identity of state employees.

The inclusion of the Deeds in this case means that the UFU is arguing that if the maintenance of classifications clause in the enterprise agreement is found to be invalid that the provision in the Deed should be enforced and the classifications and work of firefighters are to be protected through the Deed.

CFA RESERVED MATTERS ARBITRATION ADJOURNED PENDING "RECRUITS" APPEAL

At the time the 2010 CFA Operational Staff Agreement was negotiated and agreed, CEO Mick Bourke wrote a letter setting out a list of reserved matters that could go to arbitration if the CFA and UFU could not reach Agreement.

When the UFU first applied to have several "reserved matters" arbitrated, the CFA attempted to avoid arbitration by claiming the UFU first had to show the claims had merit, would be cost-neutral and had a health and safety aspect. The CFA changed its objections to claim the FWC does not have jurisdiction or they should not be arbitrated because they are matters included in the current bargaining, are matters being appealed in the Full Federal Court in the 'recruits' case and other jurisdictional grounds.
The CFA also objected to the Commission hearing the UFU claim for a Heavy Hazmat allowance on the same basis.

Continued attacks on your conditions despite agreement in 2010

The Fair Work Commission heard jurisdictional arguments earlier this year and determined the arbitration of the Reserved Matters should be adjourned pending "the completion of bargaining" and the Decision of the Federal Court of the "Recruits" Appeal.

The UFU has appealed the jurisdiction decision that the Reserved Matters arbitration should be adjourned pending the "completion of bargaining". However, the matter still remains adjourned pending the Decision of a Full Bench of the Federal Court of the "Recruits" Appeal.

In the "Recruits" Appeal the CFA is again contesting the enforceability and validity of a number of clauses in the CFA UFU Operational Staff Agreement 2010.

While the CFA's claims are unrelated to the issue of the breach of the requirement to recruit at least 90 recruits a year, the Federal Court is considering the validity and enforceability of a number of clauses. That includes the ability to arbitrate for new allowances (reserved matters) through the dispute and allowance clauses.

NON-PAYMENT AND PAYROLL DEDUCTIONS

The UFU lodged an application in the Federal circuit court on behalf of the hundreds of MFB fire fighters who were not provided with payments for overtime performed at the Hazelwood incident until months following the performance of their shifts.

The MFB deny that they did not pay the overtime in a timely fashion. They also deny that overtime payments were not made within a month of the work being performed. The UFU finds it difficult to believe that the MFB are able to deny these charges.

The matter could not be resolved through mediation and has been set down for a hearing in May of next year.

HAZELWOOD MINE FIRE OHS MATTERS

A Worksafe investigation into the serious health risks of exposure to carbon monoxide and contaminated water during the Hazewood Mine fire is underway as a result of the UFU complaint.

In March the UFU requested Worksafe Victoria investigate the circumstances of the exposures to carbon monoxide and later successfully had the investigation terms of reference widened to include contaminated water. Worksafe Victoria has used its powers to seek a range of information and will be investigating to see whether all reasonable steps were put in place to protect firefighters and the community.

In addition Worksafe is interviewing firefighters who had medical issues arising from their tours in the Mine and any other person with relevant information.

If you would like to participate in this Investigation please contact the UFU office for the appropriate arrangements to be made.

The Worksafe investigation has commenced against the backdrop of the Hazelwood Mine Board of Inquiry decision that was released in early September 2014.

The UFU filed an extensive submission and supplementary submission to the Hazelwood Board of Inquiry including personal experiences of a series of firefighters.

Continued attacks on your conditions despite agreement in 2010

Acting on firefighter concerns, the UFU repeatedly sought action from the Fire Services Commission, CFA and MFB Chief Officers and the Government to address the serious health and safety concerns at the time of the Hazelwood Mine fire operation. These concerns included exposure to health-threatening levels of carbon monoxide, contaminated water and the failure to appropriately test and monitor exposure levels and take appropriate action.

The Report of the Board of Inquiry found Victoria was unprepared to protect the community – four years after the Royal Commission's final report into the Black Saturday bushfires.

The Board has also supported proposals for more professional firefighters.

The Board of Inquiry found Victoria's lack of preparation saw firefighters exposed to elevated levels of carbon monoxide – which is lethal in high concentrations.
The fire services had no protocols for this initially, and then relied on a plan which had remained in draft form since 2006.

In addition to the UFU submission to the Board of Inquiry, and the request for WorkSafe to investigate, the UFU also asked the Coroner's Office to undertake the appropriate investigation into the conduct of the operation of the mine fire and resulting health issues suffered by firefighters and the community with a view to possible prosecution. The Coroner's Office responded stating it will not investigate as it views such an inquiry would be a duplication of the government's inquiry into the Hazelwood fire.

CFA PAD FLEXIBLE HOURS OF WORK

The UFU and CFA have again met but have been unable to resolve this dispute where the CFA want to implement flexible hours for PAD Operators pursuant to clause 150 of the 2010 Agreement. This matter is still in conferences before the Fair Work Commission.

The CFA has sought to implement a flexible hour's arrangement. The CFA has filed in Fair Work Australia in a bid to put PAD supervisors and operators on a roster. The PAD section of the enterprise agreement clearly sets out the hours of work. The CFA is claiming that a clause headed "flexible working hours" is sufficient to change those hours of work.

The UFU has claimed FWA has no jurisdiction to hear the matter as the hours of work clause details the hours to be worked and it would be an extra claim.
FWC decided that parties should attempt to reach agreement on the implementation of flexible hours. The UFU appealed this matter however because the FWC didn't finally decide the dispute, meaning the appeal could not be heard at that time.

The CFA have provided another amended proposal to the UFU. The UFU have met with affected members and put an amended proposal to the CFA which the CFA rejected. The matter is now listed for conference in the Fair Work Commission in October.

MFB LEAVE BALANCES

This matter has been ongoing at the Fair Work Commission regarding the accuracy of Firefighter's leave balances within the MFB. This has been a persistent and ongoing issue. To date the MFB has been unable to explain why numerous employees have identified significant discrepancies within their leave balances.

Several UFU representatives and officials were briefed by Deloitte partners on 27 August as an outcome to an earlier Fair Work Conference. The presentation by Deloitte failed to satisfy members and officials regarding the reasons for the negative leave balances or prove that they are legitimate.

Continued attacks on your conditions despite agreement in 2010

The UFU have requested the audit report and other material presented by Deloitte however the material is yet to be made available. The UFU have requested the matter be relisted at the Commission.

TRANSFIELD NON-PAYMENT OF ALLOWANCE

The UFU have lodged a dispute in the Commission regarding non-payment of an allowance at Transfield, the 'Range' allowance. The matter could not be resolved at a recent conference and will now be listed for arbitration.

AWARD MODERNISATION

As part of the award modernisation process, enterprise awards and other awards across all industries are being modernised or terminated. For most UFU members, the award is an underpinning set of basic conditions which usually only has effect if there is no enterprise agreement in place.

Awards are more heavily relied upon in industries where enterprise agreements are not common or are difficult to establish, however are important for all employees as a foundation of conditions on which collective action can improve conditions.

The UFU made applications to modernise the Victorian Firefighting Industry Employees Award and various other CFA and MFB awards.

CFA applications are currently adjourned pending the outcome of the "Recruits" case appeal.

There has been a hearing regarding the MFB component of the Victorian Fire-Fighting Industry Award matter.

The full bench of the Fair Work Commission recently ruled that the Victorian Fire-Fighting Industry Award was to be terminated, but then withdrew their order after procedural concerns were raised by the UFU. The UFU are considering lodgement of an appeal to the Federal Circuit Court.

At the moment, no order to terminate the award has been issued.

The MFB have opposed the continuance of the award as part of their overall strategy to reduce fire fighter conditions.

The Award that the MFB have referred to in correspondence regarding their application to terminate the operational staff agreements is the Firefighting Industry Award.
This is a generic award that provides for inferior conditions to the VFFIEA Award that was created specifically for CFA and MFB firefighters.

CFA FISKVILLE BARGAINING - FAIR WORK COMMISSION BARGAINING DISPUTE

This matter has been in front of the Fair Work Commission since 2012, where CFA stated that it was their final offer despite not having any wage figures in the agreement at the time.

The parties have been in numerous conferences before the Commission since and several matters have progressed however significant outstanding matters remain with no adequate movement from CFA.

Continued attacks on your conditions despite agreement in 2010

Fiskville hospitality staff are also seeking to become incorporated into the larger PTA agreement.

The CFA is yet to put an offer to vote for employees, despite the previous agreement passing its nominal expiry date over three years ago.

The UFU have had two further conferences with the Fair Work Commission in September and are now expecting further correspondence from the CFA.

CFA OPERATIONAL BARGAINING UPDATE

CFA are taking a lengthy bureaucratic and legalistic approach to bargaining.

It appears that both Government and lawyers are providing direction and advice to their bargaining strategy.

Bargaining commenced in June 2013. There have been numerous meetings and matters before the Fair Work Commission, brought by both the UFU and CFA.

As members will be aware, in February 2014 the FWC issued interim orders against both the CFA and UFU in order to progress bargaining. These orders were complied with, however CFA in line with their previous legal behaviour, have simply found new matters to complain about.

The CFA is asserting that the UFU should also amend its claims in regard to the CFA view regarding re AEU and other legal issues regarding permitted matters.

In the interests of furthering the bargaining the UFU has redrafted clauses in such a way as to address the alleged concerns and these were provided to the CFA on 9 May 2014.

The UFU has a strong view that such clauses which the CFA complain of are permitted, and as discussed above the UFU is challenging the CFA "Recruits" case which the CFA is relying upon in making its complaints about the validity of the clauses.

Despite the significantly redrafted claims, the CFA have continued to refuse to discuss any claims at all. The CFA have claimed that the redrafted UFU claims are also not legal. Again the CFA went to the Commission seeking good faith bargaining orders.

The UFU defended these claims and Deputy President Smith is currently considering the matter. Further, the UFU also has recently met with the CFA twice, once in the presence of legal counsel, to explain why the CFA's position is incorrect.

The UFU has continued to seek to meet and bargain with the CFA, however the CFA have refused. The UFU is of the strong view that the CFA behaviour including in not attending and participating in bargaining meetings, is not in accordance with the good faith bargaining principles as provided under the Fair Work Act.

To date the CFA has not provided a satisfactory response.

MFB OPERATIONAL BARGAINING UPDATE

The MFB filed for a breach of good faith bargaining late last year and then withdrew their application in February this year. On the same day, the MFB then notified under the Fair Work Act an intention to seek bargaining orders on different grounds regarding the UFU allegedly seeking unpermitted content, including re AEU related clauses.

It became apparent that the MFB would not agree to the UFU proposed clauses, and would not continue to bargain. The UFU on a totally without prejudice basis committed to recast the UFU claims in such a way as that they should not offend any party._Recasting was a work intensive process and involved assistance of the UFU legal team.

Continued attacks on your conditions despite agreement in 2010

However the MFB have now claimed that the re-casted claims are not lawful. The MFB have simply refused to continue to bargain.
The MFB have put forward an ultimatum that they will only bargain if the UFU withdraws the claims that the MFB assert are illegal. The MFB won't even meet to discuss the claims they complain about. The MFB has threatened to instigate a further legal action, namely a scope order application.

The hypocrisy of the MFB position is that they claim that it is because of the scope issue that the bargaining is not progressing effectively, yet during the termination case the MFB claimed it was because of the terms sought by the UFU and the re AEU issues that bargaining was not progressing.

The UFU has also notified the MFB of numerous concerns regarding their conduct in relation to the good faith bargaining requirements under the Fair Work Act. Like the CFA, the MFB have not provided a satisfactory response.

COMPASS BARGAINING

Firefighters engaged by Compass at defence bases in Northern Victoria and Southern New South Wales have been advised that they will not be provided with a redundancy payment at the conclusion of their contract later this year. The UFU initiated bargaining and lodged a protected action ballot application to try to ensure that members receive appropriate entitlements.

The UFU will consider lodgement of an application in either the Federal Circuit Court or Fair Work Commission at an appropriate time to try to ensure the entitlement is provided.

With respect to bargaining, the UFU and Compass have reached agreement to increased wages for the final months of the enterprise agreement.

Serco Sodexo, who also employee firefighters based in NSW recently made an application to the Fair Work Commission to reduce the amount of redundancy payable to members.

A directions hearing was held regarding this on 23 September with a hearing to follow in early October.

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Do you have a question?

Please email any questions to reception@ufuvic.asn.au.

The United Firefighters Union holds one of the highest membership densities of any contemporary unions, whereby almost all CFA and MFB firefighters are members.

This means we have a collective voice which is both unique and loud.

It means as a collective, we can cause change where wrongs need to be righted.

STRENGTH IN UNITY

Authorised by Secretary Peter Marshall