

Lawyers in the FWC: TO BRIEF, OR NOT TO BRIEF?

As an HR professional, would you be prepared to face up to the Fair Work Commission yourself? **Lisa Burrell** provides her tips for success

AUSTRALIA'S WORKPLACE relations tribunal, the Fair Work Commission (FWC), is continuing to tighten restrictions on the presence of lawyers. This may leave HR practitioners in the position of having to run the matters themselves.

Background

Under the Fair Work Act, a party to proceedings may not be represented by a lawyer or paid agent unless permitted by the FWC. The tribunal may grant permission to promote efficiency and fairness. Conversely, in-house lawyers and representatives from unions and employer associations, including those that are legally trained, are not subject to the restriction.

However, until the decision of the Federal Court in *Warrell v Walton*, lawyers were rarely denied permission. In *Warrell*, the Court ordered the re-hearing of a brain-damaged gardener's case after it found that, in allowing the employers legal representation, the gardener was denied a "fair and just" hearing.

Recent examples

Since the decision in *Warrell*, the FWC has refused to grant permission for representation by lawyers on numerous occasions, including those being upheld on appeal to the Full Bench.

By way of example, the Full Bench of the FWC rejected a "well resourced" company's

argument that it needed the assistance of a lawyer because of the "high volume of documents and wide range of issues". The Full Bench determined that "this commonplace occurrence does not constitute legal complexity".

A month later, a Full Bench found that an ASX-listed company had sufficient internal HR resources to proceed without legal representation, despite the fact that the former employee would be represented by a union advocate.

The message for employers

Ultimately, the issue of representation needs to be considered well in advance of any formal hearings. If there is a decision to proceed with engaging legal representation, there needs to be a clear understanding of how to self-represent in defending an unfair dismissal, or any other dispute, in case legal representation is denied. This is a particularly vexed issue for employers who have previously been reliant on having legal coverage through business insurance.

Getting ready to self-represent

For those either preparing to self-represent at a formal hearing or needing to prepare in case their legal representative or paid agent is ultimately refused entry, the following are our top tips for success.

Organisation is essential: Prepare copies of relevant cases and documents to hand up; create your own document library and 'case summary' that cross references your submissions and documents thoroughly.

Understand the setting: Ensure that you are well versed on required etiquette and formalities, from addressing the Commissioner, through to how to advocate your case.

Critically review: It is imperative that you understand the strengths and weaknesses of not only the claimant's case but your own. This will allow you to best guide arguments and cross examination, 'pulling on the reins' as needed to highlight evidence that most strongly supports your submissions.

Alternatively, you may wish to discuss engaging an employer association to represent your organisation, or utilise any in-house legal counsel to run the case.

For more information, contact VECCI at vecci.org.au 

¹ *Warrell v Walton* [2013] FCA 291

² *King v Patrick Projects Pty Ltd* [2015] FWCFB 2679

³ *Asciano Services Pty Ltd v Zak Hadfield* [2015] FWCFB 2618

Lisa Burrell is general manager of the Victorian Employers' Chamber of Commerce and Industry (VECCI). VECCI is Victoria's most influential employer group, servicing over 15,000 Victorian businesses per annum. An independent, non-government body, VECCI was founded in 1851 by the business community to represent business.

