Conduct industrial relations negotiations

Overview

Industrial relations policies and strategies can be effectively implemented through either a Certified Agreement or an Australian Workplace Agreement.

Both types of agreements are outlined in the Australian Workplace Relations Act 1996. The Act specifies the required content of the agreement, the steps involved in formalising your agreement (either through the AIRC or the Office of the Employment Advocate), and the processes used by the AIRC and OEA to ensure that your agreement meets all of its legal obligations.

Negotiations, therefore, are becoming a necessary skill in today’s work environment. Because of the Australian Workplace Relations Act 1996 and its emphasis on bargaining in the workplace, employees now need to ensure that they are confident in undertaking the negotiation, or that their interests are represented in the negotiation by their union.

Breakdowns in negotiations need to be managed formally. The Australian Workplace Relations Act 1996 contains a dispute resolutions procedure which organisations can follow, although it is recommended that the organisation have a trusted, formal grievance procedure which emphasises the speedy resolution of all grievances or conflicts.

Key terms

Negotiation
The process where parties involved interact and reach an agreement or settlement, which resolves the issue between them.

Procedural fairness
The process is fair.
Substantive fairness
The final decision is fair.

Negotiations between employers and employees

Negotiation is a practice used by Australian employers and employees in two main circumstances:

- negotiating Certified Agreements or Australian Workplace Agreements
- resolving industrial conflict.

Factors to assist in deciding who will represent employees

There are a number of factors to consider when deciding who will represent the interests of employees during negotiations.

Under the Australian Workplace Relations Act 1996, Certified Agreements may be made between the employer and the union representing the interests of the employees.

On the other hand, Australian Workplace Agreements are made between an employer and a single employee, or group of employees. Under this type of agreement, the union can only represent the interests of the employee(s) if it has received a written request from the employee(s) involved.

When deciding who should represent employees, the following factors also need to be considered:

- the number of employees in the workplace
- the role and influence of the trade union
- the number of trades/occupations to be covered by the enterprise agreement.

Employer representatives

Employers also need to carefully consider who will represent their interests during the negotiation. Employer representatives may include line managers, an internal/external Human Resource or industrial relations expert, or an industrial relations expert from the employer association to which they belong.
Conflict and cooperation

Throughout the negotiation process, each negotiator tries to achieve a result that conflicts with that sought from the other side. However, each negotiator cannot achieve his or her objective without the cooperation of the other negotiator.

For example, when buying a car, the salesperson is determined to get the highest price possible while the person buying the car wants to negotiate for the lowest price. But, if neither party can cooperate to reach an agreed price, the salesperson loses the sale, and the buyer will be without a car. Therefore, to satisfy both of their needs, they must negotiate and make an agreed joint decision.

Think

Think of a situation, either in your work or in your personal life, where you needed to negotiate with someone (eg buying a car, negotiating a pay rise).

Think of your highest and lowest acceptable limits in the above situation. For example, you want a pay rise of $200.00 per fortnight, but you will accept a rise of no lower than $100.00 per fortnight.

What was the outcome of your negotiations, and do you think you would have done anything differently?

The negotiation process

Before starting negotiations, all parties need to identify and assess the potential risks and benefits associated with their negotiation. That is, do the potential benefits outweigh the potential risks of not negotiating?

The process of negotiation is also influenced by:
1. the relationship between the parties – its present condition and its history
2. who will be representing the interests of the parties (eg union, employer representatives or direct negotiation between the employer and employee)
3. the way negotiations have been carried out either within the organisation or within Australia (eg are ambit claims, where the negotiator claims more at the beginning than they really want, the practice?)

4. the individual characteristics of the opposing negotiating team; that is, their personalities, communication styles, and the importance they have placed on a positive outcome for the negotiations.

Effective negotiations

Effective negotiation should aim to achieve an outcome that both parties can live with and that accomplishes your purposes. You need to ensure that neither party walks away from the negotiating table without agreement having been reached, and that relationships are not permanently damaged.

Successful negotiations often depend on you having done the research and anticipated likely occurrences, and knowing the other party and their present and prospective situations.

Common ground

The process of negotiation should involve informed, creative compromise and accommodation. However, it clearly does not mean charity. If you have a superior bargaining position or the other party gives you everything you want, the deal should be promptly negotiated and closed. However, it is more likely that the other party will resist certain matters, and this is when an attempt should be made to search for common ground.

Effective compromise requires homework and credibility, as well as critical analysis and perspective regarding the other party and the deal. Remember, while your goals and concerns are important, you also need to analyse the available methods to solve the other party’s concerns. Once you understand the other negotiating party’s concerns, you will be better able to find a solution that will be acceptable to both parties.

Effective negotiating requires you to identify the middle ground.

Atmosphere of reasonableness

Successful negotiations take place in an atmosphere of reasonableness. A confrontational approach is undesirable in all but a few instances. Try to reduce your controversial points and present your issues as matters of legitimate, mutual concern that will lead to long-term benefits.

The key to a good negotiation is the ability to recognise a deal that should not be made or cannot be made on reasonably acceptable terms because of either the position or attitude of the other party. This is often the case if the other party or its representatives constantly create crisis and impasse. In this
instance, you may be better off stopping negotiations because a reasonable deal is probably not possible.

**Negotiation phases**

There are four phases in the process of negotiation:

1. Preparation
2. Persuasion
3. Compromise
4. Closing

**Preparation**

It is important to prepare for all negotiations. Often, the successful outcome of a negotiation is dependent on the quality of the preparation undertaken. When preparing for a negotiation, it is important to consider the following points:

- Set a targeted outcome desired, and the minimum acceptable result. Formulate your objective.
- Research the data needed to support your claim.
- Prepare and rehearse your arguments.
- Assess the other party’s claims and their likely supporting arguments.
- Assess your bargaining power and those of your opposing side. Then determine likely scenarios (ie what will we do if they …). Determine alternatives.
- If you are part of a negotiating team, determine who will be doing what in the negotiation (ie chief representative).
- Plan your strategies and tactics. Often a negotiation team looks at several strategies including:
  - accommodation, where you accommodate the needs of the other party – perhaps to your own disadvantage
  - competition, where you pursue your own interests regardless of the needs of the other party – although this can damage relationships
  - compromise, where you come to a temporary solution
  - collaboration, where both negotiating parties aim at maximising the outcomes through a negotiated settlement.

**Persuasion**

The main aim of this phase is to outline the issues and broadly develop the argument and evidence in support of each side’s position. In trying to
achieve a win-win solution, it is important to try to establish common ground between the parties. This may be done by:

- asking the other negotiating party to outline their issues and claims
  - It is important that all issues are covered during this phase. Trying to introduce a new issue after this phase can damage or halt the negotiations.
- trying to establish a rapport with the other party
- avoiding dwelling on small issues at this early stage – remember you’re focusing on the major issues
- asking questions to clarify the position of the other party
- trying to be assertive without being aggressive or focusing on lengthy arguments
- avoiding being insulting or using antagonising language
- asking for the negotiation to stop for a specified duration if the other party introduces new facts which seriously affect your bargaining position, or if your team is disagreeing over issues.

Compromise

Once the claims and cases have been argued, the parties usually try to reach an agreement by trading concessions and through compromise. Some tactics that can be used include:

- making proposals (eg if you agree to … we may consider …)
  - Keep these proposals tentative and build on them.
- wording proposals so that they involve only a small movement away from your original position
- being wary of making quick concessions during protracted negotiations
  - Many negotiators agree to a proposal to finish up a negotiation quickly. You may regret making these proposals in the longer term.
- examining the possibility of packaging claims
  - It is possible that individual items may not be achievable, but when contained as part of a package, there may be more of a chance of agreement.
- ensuring that for every concession made by your team, that the other negotiating team also makes a concession.

Closing

This is the final stage of the negotiating process. During this stage, the parties reach one of two decisions. Either they agree to a negotiated settlement, or they accept that they are unable to reach an agreement and examine other avenues available to them.

- To finalise an agreement, the other negotiating team must acknowledge that you have made all likely concessions.
• Agreements are most likely to be reached when all parties acknowledge that they have reached an agreement that will benefit both sides.
• Ultimatums may encourage a side to either agree to an outcome or to stop negotiations.
• The agreement must be formally documented, and an agreement reached on its implementation.

Document agreed outcomes

Certified Agreements

Once a Certified Agreement has been approved by a valid number of employees who are covered by the agreement, it then needs to go to the Australian Industrial Relations Commission (AIRC) for approval. The application to the AIRC must take place within 21 days of the employees approving the agreement.

AIRC requirements

The Commission then examines the Agreement to ensure that it meets the requirements set out in the Australian Workplace Relations Act 1996. An agreement will not be approved until the commission is satisfied that it meets all of the criteria set out in the Act.

These requirements are:

• The agreement must pass a no-disadvantage test – it must not undermine the basic conditions set out in the relevant state or federal award.
• The majority of employees who will be affected by the agreement must agree to its contents.
• Explanations about the agreement must take account of particular circumstances and needs (eg women, people from non-English speaking backgrounds, young people, people with a disability).
• The agreement must contain procedures for preventing and settling its terms.
• The employer must not persuade employees to use union representation.
• The agreement must have a set duration of not more than three years.
• The agreement must satisfy the minimum entitlement provisions in respect to equal pay, parental leave and termination of employment as specified in the Australian Workplace Relations Act 1996.
• The employer must not contravene the freedom of association requirements of the Act.
• The agreement must apply to all comparable employees in the business unless there are reasons for not doing so.
• Agreements must not discriminate against employees on the grounds of race, color, sex, sexual preference, age, physical or mental disability.
marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

**Australian Workplace Agreements (AWAs)**

Australian Workplace Agreements (AWAs) must be approved by the Office of the Employment Advocate (OEA), and must meet conditions set out in the Australian Workplace Relations Act 1996.

**Requirements of the OEA**

These conditions are:

- The AWA must pass the no-disadvantage test – the employee must not be disadvantaged overall by the AWA.
- The existing employee must receive a copy of the AWA at least 14 days before signing it. All new employees must be given at least five days before signing their AWA.
- The employer must explain to the employee the implications of their AWA.
- The employee must consent to the making of an AWA.
- When the employer offers AWAs containing different terms to employees, they must prove that they have not acted unfairly.

Once the OEA has approved the AWA, they issue a notice to the employer. The relevant award that applies to the AWA, which was used to ensure that their AWA passed the no-disadvantage test, must be identified within this notice.

**When employee(s) fail to abide by agreements**

Once approved by either the AIRC or the OEA, the agreement is both legally binding and enforceable.

There is a range of legal action that is available to employers should the employee or group of employees fail to abide by the certified or approved agreement.

The Australian Workplace Relations Act 1996 prohibits employees from taking industrial action during the life of an agreement. Should employees decide to take industrial action during the life of the agreement, employers are able to access a number of options including:

- referring to the AIRC
- seeking damages and injunctions through the Supreme Courts
- seeking damages through the court system.
Monitoring and evaluation of agreements

Agreements are reviewed by the management team and employees, or their representatives, at a mutually agreed time.

Workplace/enterprise agreements may specify a nominal expiry date, although this date cannot be longer than three years after the agreement has been signed.

Managing breakdowns in negotiations

The Australian Workplace Relations Act 1996 specifies the need for organisations to have a formal procedure to prevent and settle disputes. One of the most effective methods that can be used is a formal grievance procedure.

Grievance procedures

Unchecked grievances can be costly to companies, as they can result in increased levels of absenteeism, staff turnover, low morale and poor worker performance levels.

The NSW Anti-Discrimination Board recommends that organisations should have an effective, formal grievance procedure that is well publicised and trusted. In this way, grievances are more likely to become known and resolved earlier, and are less likely to escalate.

The NSW Anti-Discrimination Board says that grievance procedures provide employers with a way of finding out about anything that is going wrong and about anything that has a wider impact. Policies and procedures can then be changed to ensure that these things don’t reoccur.

Advantages of an effective grievance procedure

Some of the advantages of having an effective grievance procedure in place and active include:

1. ensuring that grievances are quickly and fairly handled, which will help to maintain a high level of morale
2. reducing the frequency of strike action
3. solving the problem at a lower level of management rather than involving senior management, union officials or outside parties, such as industrial tribunals.
Legal requirements

Anti-discrimination law specifies that the employer is legally liable for any incidents of discrimination and harassment within the workplace unless they have taken all reasonable steps to prevent these incidents from happening. All reasonable steps means not only taking steps to prevent these incidents from happening, but also providing an effective and formal internal grievance procedure.

Industrial Relations law also expects employers to resolve any harassment or discrimination occurrences internally, and to do so fairly. Should the grievance end up in either a state Industrial Relations Commission or the AIRC, they will examine your grievance procedure to see whether your organisation handled the matter according to the rules of ‘natural justice’.

Industrial Relations requirements

The state or federal Industrial Relations Commission examines two types of fairness in relation to internal resolutions:

- procedural fairness
- substantive fairness.

If you want to ensure that the decision made using internal grievance procedure, is fair, you need to show the commission that:

- the process was fair – procedural fairness
- the final decision was fair – substantive fairness.

Think

Remember a time you were involved in a negotiation – for example, buying a car or assigning household tasks.

What were your highest and lowest limits in this situation?

What was the outcome?

Is there anything you would have done differently?

Parts of this resource are adapted from Open Learning Institute (2003) Learner's Guide BSBHR504A TAFE QLD; used with permission.