



DECISION

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009
Sch. 3, Item 16 - Applications to terminate collective agreement-based transitional instrument

Fair Work Act 2009

s.319 - Application for an order relating to instruments covering new employer and non-transferring employees

Mr Andrew May

(AG2016/6740)

Mr Francesco Theil-Harkin

(AG2015/7450)

Wilson Security Pty Ltd

(AG2016/7828)

Security services industry

DEPUTY PRESIDENT BINET

PERTH, 3 FEBRUARY 2017

Related applications for termination and transfer of the Wilson Security - Western Australia Collective Agreement - standing to be heard in respect of related applications.

[1] On 30 November 2015, Mr Francesco Theil-Harkin (**Mr Theil-Harkin**), in his capacity as an employee of Wilson Security Pty Ltd T/A Wilson Security (**Wilson Security**), made an application (**Theil-Harkin Application**) to the Fair Work Commission (**FWC**) to terminate the *Wilson Security – Western Australia Collective Agreement 2009* (**Agreement**).

[2] The Agreement has a nominal expiry date of 30 June 2014. For the purposes of Schedule 3, Item 16 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (**Transitional Act**) the Agreement is a Collective Agreement-Based Transitional Instrument. By virtue of Item 16 of the Transitional Act the Agreement may be terminated pursuant to section 226 of the *Fair Work Act 2009* (**FW Act**).

[3] Section 226 of the FW Act states:

“226 When the FWC must terminate an enterprise agreement

If an application for the termination of an enterprise agreement is made under section 225, the FWC must terminate the agreement if:

(a) *the FWC is satisfied that it is not contrary to the public interest to do so; and*

(b) the FWC considers that it is appropriate to terminate the agreement taking into account all the circumstances including:

(i) the views of the employees, each employer, and each employee organisation (if any), covered by the agreement; and

(ii) the circumstances of those employees, employers and organisations including the likely effect that the termination will have on each of them."

[4] The Theil-Harkin Application was originally allocated to Commissioner Gregory in Melbourne who listed the matter for a conference on Monday, 8 February 2016. The matter was adjourned following the conference to allow Mr Theil-Harkin, Wilson Security and United Voice (in its capacity as the default bargaining representative), to commence bargaining for a replacement enterprise agreement. Seven negotiation meetings were held between 29 March 2016 and 21 June 2016 but no substantive progress was made towards agreeing a replacement enterprise agreement. United Voice then lodged a subsequent application for bargaining assistance on 22 June 2016, following which two conferences were held on 13 July 2016 and 5 September 2016 but again, no substantive progress was made.

[5] On 31 October 2016, Mr Andrew May (**Mr May**), in his capacity as an employee of Wilson Security, lodged a separate application (**May Application**) to terminate the Agreement which was allocated to me. Mr May listed United Voice as his representative in the May Application.

[6] On 14 December 2016, the FWC issued directions to the parties in respect of the May Application and the Theil-Harkin Application.

[7] Subsequently, on 19 December 2016, Wilson Security made an application (**Wilson Application**) for an order pursuant to section 319 of the FW Act that the Agreement cover non-transferring employees of Wilson Security not currently covered by the Agreement who perform, or are likely to perform, the same work as the transferring employees covered by the Agreement (**Order**).

[8] Section 319(3) of the FW Act states:

"Matters that the FWC must take into account

(3) In deciding whether to make the order, the FWC must take into account the following:

(a) the views of:

(i) the new employer or a person who is likely to be the new employer; and

(ii) the employees who would be affected by the order;

(b) whether any employees would be disadvantaged by the order in relation to their terms and conditions of employment;

- (c) if the order relates to an enterprise agreement—the nominal expiry date of the agreement;*
- (d) whether the transferable instrument would have a negative impact on the productivity of the new employer’s workplace;*
- (e) whether the new employer would incur significant economic disadvantage as a result of the transferable instrument covering the new employer;*
- (f) the degree of business synergy between the transferable instrument and any workplace instrument that already covers the new employer;*
- (g) the public interest.”*

[9] In order to determine these Applications or ascertain if there is a necessity for a hearing in relation to any or all of the Applications, amended directions to replace those issued in relation to the May Application and the Theil-Harkin Application on 14 December 2016 were issued on 21 December 2016. Following submissions in relation to the dates for compliance with those amended directions, further Amended Directions were issued in respect of all three related Applications on 23 December 2016 (**Amended Directions**).

[10] The Amended Directions directed Wilson Security to file with the FWC submissions in respect of the May Application, the Theil-Harkin Application and the Wilson Application and any evidence on which Wilson Security sought to rely in respect of all three Applications which addressed the requirements of s.226 and section 319(3) of the FW Act, respectively.

[11] The Amended Directions also directed Wilson Security to provide a copy of all three Applications and any materials accompanying those Applications to all employees whose terms of employment are regulated by the Agreement.

[12] The Amended Directions advised that any employee who wished to make a submission regarding any of the Applications could do so by providing a written statement to the FWC by close of business, Friday 10 February 2017 advising that they wish to be heard in relation to one or more of the Applications and providing an outline of their reasons why. The Amended Directions noted that, in the event of such contact being made, the applicable Application(s) would be listed for conference or hearing after that date, and in the absence of any such contact being made, a conclusion about the Applications may be made on the written materials filed in accordance with the Amended Directions.

[13] In accordance with the Amended Directions, on 25 January and 27 January 2017, Wilson Security filed submissions and evidence in respect of all three Applications, and a Statutory Declaration sworn by Kelly Peterson, Senior HR Advisor – WA, confirming that the Amended Directions had been complied with.

[14] On 30 January 2017, United Voice sought permission under section 590 of the FW Act to be heard as a full participant in the proceedings, including permission to lead its own evidence and to cross examine witnesses called by the Applicants (**Standing Application**).

[15] By email from Wilson Security's legal representative, Wilson Security subsequently informed both United Voice and the FWC that it objected to United Voice's Standing Application.

[16] On 30 January 2017, in light of Wilson Security's opposition to United Voice's Standing Application, the FWC directed both United Voice and Wilson Security to provide written submissions to the FWC in respect of United Voice's Standing Application.

[17] On 31 January 2017 and 1 February 2017, respectively, United Voice and Wilson Security filed with the FWC written submissions in respect of United Voice's Standing Application, in accordance with the FWC's email directions dated 30 January 2017.

Consideration

[18] Section 590 of the FW Act sets out the powers of the FWC to inform itself and provides as follows.

"Powers of the FWC to inform itself

- (1) *The FWC may, except as provided by this Act, inform itself in relation to any matter before it in such manner as it considers appropriate.*
- (2) *Without limiting subsection (1), the FWC may inform itself in the following ways:*
 - (a) *by requiring a person to attend before the FWC;*
 - (b) *by inviting, subject to any terms and conditions determined by the FWC, oral or written submissions;*
 - (c) *by requiring a person to provide copies of documents or records, or to provide any other information to the FWC;*
 - (d) *by taking evidence under oath or affirmation in accordance with the regulations (if any);*
 - (e) *by requiring an FWC Member, a Full Bench or an Expert Panel to prepare a report;*
 - (f) *by conducting inquiries;*
 - (g) *by undertaking or commissioning research;*
 - (h) *by conducting a conference (see section 592);*
 - (i) *by holding a hearing (see section 593)."*

[19] Section 590 confers on the FWC a broad power to inform itself in relation to any matter in such manner as it considers appropriate, including by inviting oral or written submissions from a person or organisation.¹

[20] In order to determine the Theil-Harkin Application and the May Application, the FWC must satisfy itself as to whether or not it is in the public interest to terminate the Agreement. In addition, the FWC must decide whether it is appropriate to terminate the Agreement taking into account the views and circumstances of employees, employers and employee organisations covered by the Agreement.²

[21] In order to determine the Wilson Application, the FWC must take into account inter alia:

- (a) the views of employees affected by the order sought by Wilson Security;
- (b) whether any employees would be disadvantaged by the order sought by Wilson Security; and
- (c) the public interest.

[22] United Voice is not a party to the Agreement, however under section 590 of the FW Act, the FWC has the power to grant permission to an employee organisation to participate in proceedings even in the absence of an identifiable right, interest or legitimate expectation giving rise to a right to be heard.³

[23] There are a number of reasons why the FWC, as presently constituted, in the exercise of its powers under section 590 of the FW Act, might be assisted by United Voice in relation to the Applications even if United Voice would not otherwise have a right to be heard, including those set out below.

- (a) As the principal union with coverage of the security industry and security officers, United Voice is in position to make submissions and lead evidence in relation to the public interest in terminating the Agreement or issuing the order sought by Wilson Security.
- (b) In the course of participating in negotiations for a new agreement in its capacity as the default bargaining representative, United Voice will have had the opportunity to familiarise itself with the terms of the Agreement and the Award and therefore will be in a position to make submissions and lead evidence in relation to the effect of the termination of the Agreement or the granting of the Order on employees.
- (c) As the default bargaining representative in the negotiations for the new agreement, and as the former nominated representative of Mr Theil-Harkin and the current representative of Mr May, United Voice has had the opportunity to gather evidence in relation to the circumstances of the employees and their views.

[24] The assistance which might be provided has been prima facie demonstrated by United Voice by the inclusion in its standing submissions of examples of submissions it proposes to make in relation to issues the FWC must consider in order to determine the Applications.

[25] Section 577 of the FW Act states:

“577 Performance of functions etc. by the FWC

The FWC must perform its functions and exercise its powers in a manner that:

- (a) is fair and just; and*
- (b) is quick, informal and avoids unnecessary technicalities; and*
- (c) is open and transparent; and*
- (d) promotes harmonious and cooperative workplace relations.*

Note: The President also is responsible for ensuring that the FWC performs its functions and exercises its powers efficiently etc. (see section 581).”

[26] Given its role in the industry and the skill and expertise of its officers and legal representatives, United Voice is able to prepare submissions, obtain and present relevant evidence and test the submissions and evidence of Wilson Security with a much higher degree of detail, comprehensiveness, clarity and efficiency than individual security officers are likely to be able to achieve.

[27] This assistance will allow me to better discharge my obligations under section 577 of the FW Act.

Conclusion

[28] Under section 590 of the FW Act, the FWC may inform itself in relation to any matter before it in such manner as it considers appropriate.

[29] I am satisfied that participation by United Voice in these proceedings would assist the FWC in discharging its statutory functions.

[30] In the particular circumstances of this matter, I have decided to grant standing for United Voice to be heard with respect to the Applications. United Voice shall be entitled to file submissions and evidence and, if necessary, appear and be heard in respect to any proceedings convened in respect of these Applications, including call and cross examine witnesses.

[31] The grant of standing is not intended, and shall not be used, to unreasonably delay the expeditious determination of the Applications.

[32] In light of the above and in order to provide for the efficient determination of these Applications, United Voice is directed to file with the FWC and serve on Mr May, Mr Theil-Harkin and Wilson Security, by close of business, Friday 10 February 2017:

- (a) an outline of submissions in respect of each of the Applications;
- (b) a signed and dated witness statement for any witness on which it relies;
- (c) copies of any authorities on which it relies; and
- (d) a copy of any document upon which it relies.



DEPUTY PRESIDENT

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¹ Section 590 of the FW Act.

² Section 226 of the FW Act.

³ *DOF Management Australia Pty Ltd* [2016] FWC 3792 at [35].