DECISION

Fair Work Act 2009
s.236 - Application for a majority support determination
ss.318-319 - Applications for transfer of business orders

Health Services Union
(B2020/59)

Life Without Barriers
(AG2020/791)

COMMISSIONER MCKINNON MELBOURNE, 1 MAY 2020

Reasonable apprehension of bias – reallocation of matter to another Member – applications refused.

[1] Life Without Barriers provides home care and disability support services in more than 440 communities across Australia. It has approximately 7,000 employees, including disability support workers covered by the *Social, Community, Home Care and Disability Services Industry Award 2010*.

[2] The Health Services Union of Australia wants to bargain with Life Without Barriers for an enterprise agreement covering disability support workers in four of its Victorian residential facilities. Life Without Barriers does not want to bargain and has not agreed to do so. The Union now seeks a majority support determination to compel Life Without Barriers to bargain.

[3] In the background to this application, there is a dispute about award coverage. The parties have until now operated on the basis that the pre-reform *Health Services Union of Australia and MOIRA Inc - Disability, Early Intervention and Residential Sectors - Interim Award 2002-2003* (Moira Award) covers the employees who wish to bargain and applies to their employment. However, Life Without Barriers submits that the Moira Award may not apply for reasons associated with the transition to modern awards in the early days of the *Fair Work Act 2009*. It has made a separate but related application for transfer of business orders to clarify the position and ensure the modern award applies to the employees.

[4] A conference dealing with the majority support determination application was held on 24 February 2020. Subsequent discussion between the parties failed to produce an agreement between them, and on 18 March 2020 the Union asked that I recuse myself from dealing further with either its application or the separate transfer of business application made by Life Without Barriers. It asserts reasonable apprehension of bias arising from my conduct in conference on 24 February 2020 and an email to the parties on 28 February 2020. In the alternative, it submits that because it objects to my continuing involvement in the

proceedings, I should adopt the 'default' position and have the matter reallocated to another Member.

[5] The questions then are these:

1. Might a fair-minded lay observer reasonably apprehend that I might not bring an impartial mind to resolution of the questions for determination in each case?[1]
2. As the Union objects to my continued involvement in the matter, should it be reallocated to another Member because I conducted a conference between the parties?

Reasonable apprehension of bias

The nature of the Union's concern

[6] The Union says that in the conference on 24 February 2020, I:

1. cut off its advocate, Martin Davis and told him in a condescending manner that the Union's application was not just about ticking boxes;
2. raised matters that I needed to be convinced about but did not allow Mr Davis to respond to those matters;
3. showed concern for the ability of Life Without Barriers to meet above modern award conditions; and
4. raised the prospect of overpayments by Life Without Barriers.

[7] It further relies on what it describes as my calling the matter on for directions and hearing four days later, before Life Without Barriers had responded to its offer of settlement. It submits that together, these matters demonstrate antipathy for the Union's position in the applications and the arguments I anticipate it may make. It is concerned that I have "pre-judged" the case and not in the Union's favour.

[8] Dealing with each in turn, the first of these relates to an exchange between Mr Davis and I in conference about "ticking boxes". The full context of that exchange is not set out in the Union's submissions and nor was the conference recorded. The evidence about what occurred from Mr Davis and Mr Tony Pick, solicitor for Life Without Barriers, is conflicting both in relation to its content and how my tone was perceived.

[9] My recollection is that on a number of occasions, Mr Davis made statements to the effect that the Union had met the various requirements for the issue of a majority support determination, in particular because there was no agreement to bargain and that a majority of 23 out of 30 relevant employees had signed a petition in support of bargaining. At some point in the conference I responded to Mr Davis to the effect that it was not just a matter of "ticking the boxes" related to the first two limbs of the test in section 237 of the Act, and that he would also have to persuade me that it was reasonable in all the circumstances to make the determination. It is likely that I also raised the question of whether the group of employees was fairly chosen, because there was discussion about the composition of the chosen group in the context of the organisation. My satisfaction that it is reasonable in all the circumstances to

[1] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

make a determination is a statutory condition precedent to the making of a majority support determination.[2]

[10] As to the second assertion, I do not accept that the Union was denied the opportunity to respond to matters raised in conference. As is common practice in dealing with such matters, and after hearing from the Union, I asked Life Without Barriers for its response and then provided the same opportunity of response to Union in reply. It is also the case that a fulsome response on all matters raised was unnecessary as the conference was but one step in ongoing discussions between the parties about how to resolve the disputes between them.

[11] In relation to the affordability of the Union's claim, my recollection is that there was discussion in conference between the parties about funding arrangements for the type of work in question and the nature and source of those funding arrangements. This arose from preliminary submissions made by Life Without Barriers on the Friday prior to the conference. It was a general discussion only. No particular funding arrangement was established although there appeared to be some consensus on the issue. The matter is plainly relevant at least to the question of whether it would be reasonable in all the circumstances to make a majority support determination. That being said, at such an early stage in the dispute resolution process, I was not in a position to hold any actual concerns about the merits of the respective positions, because the arguments for and against have yet to be fully articulated.

[12] For that reason I also do not accept that I made any definitive statement about the basis for Life Without Barriers' funding arrangements or the effect of an enterprise agreement on relevant employees. It is not a matter that is known to me. The conference was the first opportunity to hear from and engage with the parties on the various issues between them. I had a general impression from the originating application, preliminary submissions from Life Without Barriers and discussion in the conference about what might be relevant to determination of the application. Funding was simply one of those.

[13] As to the question of overpayment, the Union's comparison of the Moira Award and the modern award sets out key areas where it is said that the Moira Award is more beneficial than the modern award, including in relation to weekend and shift penalties as well as sleepover allowance. I noted above that the parties have operated for some time on the basis that the Moira Award applies to employees. One of the outcomes Life Without Barriers seeks from these proceedings is a finding that the Moira Award does not and has not applied to the affected employees since 21 July 2011 when the underlying pre-reform *Residential and Support Services (Victoria) Award 1999* was terminated. If successful in that regard, there is a possibility that overpayments (as well as underpayments) have occurred for some considerable period of time because of legal mistake. The matter is relevant in dealing with the disputes, including because of the possibility that some of the affected employees may be disadvantaged in their terms and conditions of employment if the transfer of business applications are granted.

[14] In discussion about potential resolution of the disputes, Life Without Barriers indicated that it was willing to give assurances to the Union about future terms and conditions of employment for affected employees, but only if certain conditions were met. That it did so is an ordinary incident of industrial negotiation. The conditions were communicated openly to

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[2] See *Fair Work Act 2009* (Cth), s.237(2)(d).

the Union by Life Without Barriers in conference. I encouraged the Union to consider the matter and to clearly set out its own position in response, by confirming the precise nature of undertakings it would need from Life Without Barriers, and what steps it was prepared to take in return in order to resolve the disputes. I do not accept that in doing so, I somehow limited the Union's ability to respond as it wished. The focus of the discussion about undertakings was necessarily responsive to the Union's concerns, being identified detriments to employees if the modern award were applied to their employment instead of the Moira Award. Steps toward resolution of the dispute were suggested and agreed. Ultimately, it remained to the parties to decide the path each wished to take, and on what terms, and to communicate that to the other within an agreed timeframe.

[15] Two days after the conference, and consistent with the agreed timeframe, the Union communicated to Life Without Barriers that it did not agree to resolve the matter in the manner suggested in conference. It put an alternative proposal for an enterprise agreement between the parties. It sought a response by 28 February 2020. Life Without Barriers responded to the Union on the afternoon of 28 February 2020 to the effect that the proposal did not reflect discussions in conference on 24 February 2020, related to a multi-enterprise agreement published only two days prior and called for a significant business decision from Life Without Barriers with potentially long term and far reaching implications. It advised that it was unable to respond in full that day but would do so as soon as practicable.

[16] Having had the benefit of hearing from the parties in conference on 24 February 2020, and having received each of the communications referred to above, I formed the view that it was unlikely that the applications would be resolved by agreement between the parties in the near future. I expressed a preliminary view that a hearing may be required and asked the parties to provide their views by the following week. It goes without saying that a hearing of the applications is necessary if the orders sought in each case are to be made. There is also no reason why, at any stage before the matters are determined, the parties cannot separately reach agreement on an alternative pathway or take other steps to achieve their preferred outcome(s), including by requesting a further conference.

[17] On 3 March 2020, the Union asked by consent of the parties that additional time be granted and that no directions be issued. The request was granted, as was a further request for extension of time the following week.

[18] On 18 March 2020, Life Without Barriers advised the Union that it did not agree to bargain for an enterprise agreement. The Union subsequently asked that the matter be reallocated to another Member on the basis that I had conciliated the matter and on the basis of reasonable apprehension of bias.

Is there a logical connection between the Union's concerns and the possibility that I might depart from impartial decision making?

[19] In each case, and unsurprisingly, the concerns articulated by the Union reflect its own perspective on how things transpired both in conference and four days later. However, I do not accept that in the circumstances of this case, there is a logical connection between my dealing with the dispute either on 24 or 28 February 2020 and the possibility that I might depart from impartial decision making, either because I have pre-judged the Union's case or some other reason. There is no submission, for example, that I have a particular interest in the

outcome or some form of association with, or connection to, a person involved or an issue arising in either case that might tend to the matter being decided other than on its merits.

[20] My role in conference was to facilitate discussion between the parties about resolving the disputes without the need for arbitration. The parties are both represented by experienced industrial advocates and the dispute has some history, including in the Commission. The discussion focused on practical options for resolution of the dispute and was more targeted than it might have been if the parties were new to the Commission or generally to industrial disputes. I raised matters for each party to consider and to prompt further discussion between them. On 28 February 2020, I sought parties' views about programming the matters for hearing after having received correspondence from them both. I expressed no view on the merits of the applications – indeed, the transfer of business application had not yet been lodged and no evidence had been filed in either proceeding. While I have a general understanding of the issues between the parties, at this early stage of the proceedings I am not in a position to know what either will put in support of its substantive application or in response to the other.

[21] The test for apprehended bias is not concerned with apprehensions that are fanciful or unreasonable. In forming a view as to whether I might not bring an impartial mind to resolution of the questions for determination, the fair-minded lay observer is taken to have an understanding of the workings of the Commission and the legislative framework within which it operates. They are taken to be reasonable, and the person being observed is " a professional judge whose training, tradition and oath or affirmation require them to discard the irrelevant, the immaterial and the prejudicial."[3]

[22] I am dealing with the dispute from the perspective of independent umpire rather than the perspective of either the Union or Life Without Barriers. In dealing with the applications, this will call for consideration both of the respective positions of both parties and relevant matters such as the statutory context and any conditions on the exercise of power. There is no substantial reason presented by the Union in this case tending to support the possibility that I might approach the matter other than in the ordinary way. I am not persuaded that a fair minded lay observer might reasonably apprehend that I might decide the matter other than on its merits. It may be that the Union apprehends that the case will be decided against it. However, that is not a sufficient basis for recusal.

Should the applications be reallocated?

[23] The Union asks that the matters be reallocated to another Member of the Commission because I conducted a conference between the parties and it objects to my continued involvement.

[24] In *Ebner v Official Trustee*[4], a majority of the High Court, dealing with a question of reasonable apprehension of bias, observed as follows:

"*The principle to be applied*

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[3] *Johnson v Johnson* (2000) 201 CLR 488, 493 [12] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

[4] *Ebner v Official Trustee* 205 CLR 337, 348 [19]-[20] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

> Judges have a duty to exercise their judicial functions when their jurisdiction is regularly invoked and they are assigned to cases in accordance with the practice which prevails in the court to which they belong. They do not select the cases they will hear, and they are not at liberty to decline to hear cases without good cause. Judges do not choose their cases and litigants do not choose their judges. If one party to a case objects to a particular judge sitting, or continuing to sit, then that objection should not prevail unless it is based upon a substantial ground for contending that the judge is disqualified from hearing and deciding the case.
>
> This is not to say that it is improper for a judge to decline to sit unless the judge has affirmatively concluded that he or she is disqualified. In a case of real doubt, it will often be prudent for a judge to decide not to sit in order to avoid the inconvenience that could result if an appellate court were to take a different view on the matter of disqualification. However, if the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual parties could influence the composition of the bench. That would be intolerable."

[25] The reasoning is of relevance here. There are good reasons why a Member of the Commission ought not too readily decline to hear a case on the objection of one party to a proceeding.

[26] I do not accept that there is a default position or practice in the Commission such that if one party objects to a Member arbitrating a matter after having been involved in conference or conciliation, the application is then reallocated to another Member. As has been observed, the Act evinces no such intention. That said, there will be cases where reallocation is appropriate in the circumstances, as was recently observed by the Full Bench in *Construction, Forestry, Maritime, Mining and Energy Union v Watpac Construction Pty Ltd.*[5]

[27] The present case is not the same as the scenario considered in *Watpac.* I have not expressed a view about the merits of either case. I have not met with the parties in private or had the benefit of private discussions with them. No concessions have been made by the parties other than in the sense that each expressed a willingness to consider alternatives to arbitration. While each contemplated the making of proposals to settle the disputes, the only offer that transpired was made by the Union, and only after the conference had concluded. It was in the nature of a further proposal for Life Without Barriers to agree to bargain with it for an enterprise agreement. In that sense, the offer was not materially different to the outcome it seeks by its application, except insofar as the content of its proposed agreement was concerned. I am not aware of any other 'without prejudice' offers between the parties.

[28] The majority support determination application requires the Union to establish that the various statutory conditions for its making have been met. Some of those are matters of fact – such as whether there has been agreement to bargain and whether a majority of employees want to bargain. Others require an evaluative assessment in relation to whether the group of employees was fairly chosen and whether it is reasonable in all the circumstances to make the determination. Separately, the transfer of business applications are likely to involve complex questions of law in relation to the operation and interaction of two pre-reform awards and the

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[5] [2019] FWCFB 3855.

modern award in addition to consideration of the range of matters set out in sections 318 and 319 of Part 2-8 of the Act.

[29] No substantive submissions or evidence in relation to those matters have yet been filed and the parties have not yet been heard. The assessment of each condition or relevant consideration will depend on what is tendered in support of the respective positions and will occur only after the proper hearing of the applications. That will be so whether the matter is dealt with by me or another Member of the Commission.

Conclusion and disposition

[30] For the reasons above, I am not satisfied that a fair-minded lay observer might reasonably apprehend that I might not bring an impartial mind to resolution of the questions for determination in either the majority support application or the transfer of business application. The recusal application is refused in each case.

[31] The basis upon which the Union seeks reallocation to another Member is also insufficient to persuade me that reallocation is appropriate in the circumstances. The request for reallocation is refused.

[32] The applications will now be listed for further directions.

COMMISSIONER

Final written submissions:

Health Services Union of Australia, 17 April 2020
Life Without Barriers, 17 April 2020

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<PR718747>