



DECISION

Fair Work Act 2009
s.236—Majority support determination

United Workers’ Union

v

Life-Space Group Pty Ltd
(B2021/697)

COMMISSIONER BISSETT

MELBOURNE, 6 OCTOBER 2021

Application for a majority support determination – employer does not agree to bargain – application dismissed.

[1] The United Workers’ Union (UWU) has made an application pursuant s 236 of the *Fair Work Act 2009* (FW Act) for a majority support determination in relation to employees of Life-Space Group Pty Ltd (Respondent) who are employed by the Respondent to perform production and warehousing duties (the employees) at its premises at 6 McArthur Street, West Footscray, in Victoria.

[2] The Applicant seeks a majority support determination confirming that a majority of the employees who will be covered by the proposed agreement, want to bargain with the Respondent.

LEGISLATIVE REQUIREMENTS

[3] Sections 236 and 237 of the FW Act state:

236 Majority support determinations

- (1) A bargaining representative of an employee who will be covered by a proposed single-enterprise agreement may apply to the FWC for a determination (a **majority support determination**) that a majority of the employees who will be covered by the agreement want to bargain with the employer, or employers, that will be covered by the agreement.
- (2) The application must specify:
 - (a) the employer, or employers, that will be covered by the agreement; and
 - (a) the employer, or employers, that will be covered by the agreement; and
 - (b) the employees who will be covered by the agreement.

237 When the FWC must make a majority support determination

Majority support determination

- (1) The FWC must make a majority support determination in relation to a proposed single-enterprise agreement if:
 - (a) an application for the determination has been made; and
 - (b) the FWC is satisfied of the matters set out in subsection (2) in relation to the agreement.

Matters of which the FWC must be satisfied before making a majority support determination

- (2) The FWC must be satisfied that:
 - (a) a majority of the employees:
 - (i) who are employed by the employer or employers at a time determined by the FWC; and
 - (ii) who will be covered by the agreement;

want to bargain; and

 - (b) the employer, or employers, that will be covered by the agreement have not yet agreed to bargain, or initiated bargaining, for the agreement; and
 - (c) that the group of employees who will be covered by the agreement was fairly chosen; and
 - (d) it is reasonable in all the circumstances to make the determination.

- (3) For the purposes of paragraph (2)(a), the FWC may work out whether a majority of employees want to bargain using any method the FWC considers appropriate.

- (3A) If the agreement will not cover all of the employees of the employer or employers covered by the agreement, the FWC must, in deciding for the purposes of paragraph (2)(c) whether the group of employees who will be covered was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct.

Operation of determination

- (4) The determination comes into operation on the day on which it is made.

[4] The employees who will be covered by the proposed agreement are those employees of the Respondent who are engaged to perform manufacturing and warehousing duties at the Respondent's premises at 6 McArthur Street, West Footscray, Victoria 3012, excluding those employees in management or professional roles (i.e. Production Manager, QA and Laboratory staff), but including those employees who are engaged in maintaining the production and distribution areas in a state of general cleanliness and hygiene.

[5] The matters in dispute are:

- (i) Whether the majority of employees employed by the employer who will be covered by the agreement wish to bargain.
- (ii) Whether it is reasonable in all of the circumstances to make a majority support determination.

EVIDENCE

[6] Evidence was given for the UWU by Mr Tarek Soueid. Mr Soueid is an Industrial Organiser with the UWU. He has worked for the UWU since September 2019. Prior to commencing employment with the UWU he was a UWU Delegate at a Woolworths Distribution Centre where he worked for about 20 years. In that time he estimates he was involved in negotiations for approximately 7 Enterprise Agreements at Woolworths and has negotiated in excess of 10 enterprise agreements as a UWU employee. Mr Soueid was not required for cross-examination.

[7] Mr Soueid said that he first visited the worksite on 1 March 2021 in response to contact from employees at the site seeking information on how the UWU could assist them to improve their wages and working conditions. He made two more visits on 12 and 16 March 2021 where he spoke to employees and provided them with information on bargaining and the process of accessing bargaining.

[8] Mr Soueid said in his written statement:

9. I recall that during my visits on 12 and 16 March 2021, the workers actively asked me for details of the types of wage rates and employment conditions in union enterprise agreements at other pharmaceutical sites, which I provided to them. On these occasions, I recall that I reiterated the information I provided to them during my first visit on 1 March 2021, about the benefits of enterprise bargaining and what the workers would need to do in order to access it.
10. I recall that the discussion with the workers during my visits on both 12 and 16 March 2021 were active and engaging and that several workers joined the union during my visit. Before leaving the site, I recall that I had a [sic] informed the workers that I would leave them to think about our discussion and to have further conversations amongst themselves about whether they wished to bargain and that I would return to the site in 3-4 weeks' time with a petition that they could sign, if they so wished, indicating their support to bargain with the Company for an enterprise agreement.

[9] Mr Soueid returned to the site on 27 April 2021 where he provided employees with a copy of a petition to sign if they wished to bargain with the Respondent. He said that at that time a number of employees expressed concern that their signature on the petition may be disclosed to the Respondent.

[10] Mr Soueid gave evidence that he collected signatures on the petition by walking around the lunch room and providing the petition and pens to employees. In doing so he says he reiterated the 'the purpose of them signing the petition was to indicate their support for bargaining an enterprise agreement'. He said he told the employees only to sign the petition if they wished to indicate support for bargaining 'because there was a chance that we could end up before the Commission to seek a majority support determination, at which point the reliability of the signatures could be called into question.' He said when he gave the petition to the employees he stood back and allowed them to decide if they wished to sign but made sure that he kept an eye on who was in possession of the petition at all times.

[11] Mr Soueid visited the site again on 5 May 2021 to talk to the afternoon shift employees and to give them an opportunity to sign the petition and, in doing so, used the same process he used in his April visit when collecting their signatures.

[12] Mr Soueid wrote to the Respondent on 10 May 2021 to inform them about the outcome of the majority support petition and to seek agreement to bargain. Following a series of conversations with the Respondent the UWU was advised on 28 June 2021 that the Respondent did not wish to bargain.

[13] Mr Asher Norman is employed by the Respondent as Head of Manufacturing. He said that he was aware that Mr Soueid had visited the site. Mr Norman said that, at the time the UWU informed the Respondent that it wanted to commence bargaining he was doubtful that employees understood the 'full effect of bargaining'. Further, he said that the Respondent had 'no desire to see a group of employees bargaining for other/additional terms and conditions that were not afforded to other individuals in the workplace' and that such a process could disrupt the harmony in the workplace.

[14] Mr Norman said that in late April/early May 2021 he met with Manufacturing/Production and Warehouse employees and provided details of enterprise bargaining compared to individual contracts. He explained to employees that enterprise bargaining would start with stripping away many of the Respondent's current conditions back to the Award standard and would also affect the proposed relocation incentives. He also explained that bargaining would involve a third party (UWU). The feedback received from the Shift Manager (Alison Peacock) was that employees appreciated the information. Mr Norman took this as a sign that employees were not as keen to bargain as the Respondent had been led to believe.

[15] On 10 May 2021 the Respondent received correspondence from the UWU indicating that employees wished to bargain for an enterprise agreement. The Respondent advised the UWU that it would be open to engaging in such a process but not until March 2022 given other priorities within the following 12 months.

[16] In June 2021 the Respondent undertook an anonymous survey of Manufacturing/Production and Warehouse employees in which it sought answers from staff on matters associated with a relocation due to occur. The survey also asked:

Do you want to enter into an Enterprise Bargaining Agreement or remain on your current independent employment arrangements?

[17] The response was:

4 employees indicated ‘Yes – I wish to commence bargaining towards an Enterprise Bargaining Agreement with the Union’s help’

11 employees indicated ‘No – I am comfortable with the current and proposed individual employment terms’

13 employees indicated ‘I don’t mind either way’

[18] Whilst stating that he now understood the question should have been phrased differently without reference to the ‘Union’, Mr Norman said that the ‘results highlighted to us, again, not all employees were keen to engage in bargaining’.

[19] Mr Norman said that in early August 2021 the Shift Manager spoke to him and said that employees were not happy with the direction being taken by the UWU as the original issue employees had raised with the UWU (redundancies associated with a move to a new site) had been overtaken by the enterprise agreement. Later that day Mr Norman met with Manufacturing/Production and Warehouse employees who were considering moving to the new site. At that meeting Mr Norman spoke with 8 employees about his ‘genuine concern for the team that going down the EA path may not result in a beneficial outcome for the team.’ He said he held this view as the time and money that would need to be invested in bargaining would ‘likely negatively affect the...time and money which could be invested into the relocation and travel incentives.’ He said the new site was discussed and the ‘potential already approved’ travel and relocation incentives. He also reminded staff of the pay increases of 2% and 2.5% over the previous two years which the Respondent was ‘eager to continue.’

[20] On 15 September 2021 Mr Norman, Mr Eric Chen, the CEO and Ms Isabelle Slater, People and Culture Business Partner Operations, met with the afternoon shift employees to conduct an ‘anonymous’ vote, asking staff ‘Do you want to negotiate for an EBA with the Union?’ They also met with the day shift employees on 16 September 2021 and conducted the same vote. Mr Norman said the result was that 17 ‘No’ votes and 5 ‘Yes’ votes were received with 1 vote not marked. Mr Norman noted that not all affected employees had voted so it was determined to have one more vote to ensure all employees voted.

[21] On Wednesday 22 September 2021 Mr Norman put up an A3 poster on the Lunchroom notice board headed ‘What is Enterprise Bargaining.’¹

¹ Exhibit R2 - Witness statement of Mr Norman, Attachment Exhibit AN-2

[22] On 22 September 2021 Mr Norman spoke with day shift and afternoon shift employees advising them that the Respondent wanted to conduct another vote as not all votes were returned and that if staff did not want to make a selection the ballot paper was still to be put into the ballot box. This vote occurred on 22 September 2021 for day shift and afternoon shift employees. The question asked in this instance was ‘Do you wish to commence bargaining for an Enterprise Agreement’ with the answer options of ‘YES’ and ‘NO’. The result of this ballot was 7 ‘YES’ votes and 17 ‘NO’ votes.

[23] Mr Norman’s evidence is that the Respondent wishes to respect the wishes of its staff and not engage in enterprise bargaining for its staff.

SUBMISSIONS

United Workers’ Union

[24] In its submissions the UWU says:

- The integrity and reliability of its petition cannot be questioned. The simplicity and clarity in wording of the petition and the evidence of Mr Soueid of his attempts to explain the petition further demonstrates its reliability of the petition.
- The significance of the Respondent’s (first) survey of employee views is undermined by the dearth of information explaining what employees were told prior to the survey, what questions were otherwise included in the survey, whether employees were assured their answers were confidential, to what extent employees had confidence in the confidentiality of the survey and what information was provided to employees about how abstention would be characterised in response to the question.
- Its text exchanges with members² contradicts the Respondent’s claim regarding employee support for bargaining.
- The decision in *The Australian Workers’ Union v Kantfield Pty Ltd T/A Martogg & Company (Martogg)*³ cannot be relied on to support a conclusion that the most recent survey of employees (which might indicate a changing of minds from the time of a union petition) demonstrates there is no longer a majority of employees who wish to bargain.
- The delay between the finalisation of the petition (5 May 2021) and the making of the application (19 August 2021) does not lend credence to an argument that the petition is no longer a reliable indicator of employee preference.

[25] The UWU says that, if the Commission is not convinced of its arguments it should satisfy itself of the question by ordering the conduct of a ballot by the Australian Electoral Commission.

² Provided to the Commission on a confidential basis

³ [2016] FWC 6473

[26] The UWU submits that, for the purpose of s.273(2)(a), the cohort of employees from which the majority view should be determined is those employees employed by the Respondent on the date on which a decision on this application is issued.

[27] In the alternative, the UWU submits that should the Commission order a further ballot of employees, the time determined by the Commission at which the date on which the majority view is ascertained should be the date on which the ballot results are counted.

[28] The UWU submits that the Commission should be satisfied, on its petition, that a majority of employees wish to bargain and that it is reasonable in all of the circumstances to make an order.

Life-Space Group Pty Ltd

[29] In its submissions the Respondent says:

- The relevant employees do not wish to bargain. This is evidenced by the results of the survey and ballots conducted by it in June 2021, 15 and 16 September 2021 and 22 September 2022 and the Commission cannot be satisfied otherwise.
- There is no evidence that the diversity of results (between the UWU petition and internal polling) has been caused by confusion or undue influence.
- Alternatively the Commission could conduct an independent ballot to determine if a majority of employees wish to bargain.
- The decision in *Martogg* does not support the conclusion pressed by the UWU. Rather Commissioner Ryan in that matter determined that a further ballot of the employees would not necessarily yield an accurate reflection of employee support for bargaining. The factual matrix in *Martogg* was substantially different to the circumstances in this case where a majority of employees has clearly indicated they do not wish to bargain.

[30] The Respondent submits that *Martogg* was, in any event, subject to appeal⁴ where the decision was quashed. In its decision the Full Bench determined that Commissioner Ryan did not have discretion to determine the time at which a majority of employees wished to bargain (being the date of the union petition), relying on the decision of Mason J in *Minister for Aboriginal Affairs and Another v Peko-Wallsend Limited and Others*⁵ in which it was said:

... there may be found in the subject-matter, scope and purpose of nearly every statute conferring power to make an administrative decision an implication that the decision is to be made on the basis of the most current material available to the decision-maker.”

⁴ *Kantfield Pty Ltd T/A Martogg & Company v The Australian Workers' Union* [2016] FWCFB 8372

⁵ [1986] 162 CLR 24, p.45

[31] The Respondent submits that the Commission should therefore give ‘strong consideration’ to its survey and ballots of the affected employees, all of which were conducted after the UWU petition.

[32] The Respondent submits that the Commission should not have regard to text messages exchanged between the UWU and employees of the Respondent as that material has not been provided to the Respondent or the veracity tested.

[33] The Respondent submits that the UWU application should be dismissed. In the alternative it says the Commission should conduct an independent ballot to determine the views of the employees concerned.

CONSIDERATION

[34] I accept that the matters that require determination in this case are if the Commission is satisfied that:

- (i) A majority of employees want to bargain (s.237(2)(a)).
- (ii) If it is reasonable in all of the circumstances to make the determination (s.237(2)(d)).

[35] I am otherwise satisfied and do find that:

- (i) The UWU is a bargaining representative for employees to be covered by the proposed agreement and has made an application for a majority support determination (s.236(1))
- (ii) The application made specifies the employer and employees to be covered by the proposed agreement (s.236(2))
- (iii) The employer has not agreed to bargaining (s.237(2)(b))
- (iv) The group of employees has been fairly chosen (s.237(2)(c)).

Do a majority of employees wish to bargain

[36] I accept the evidence of Mr Soueid as to the process he undertook to gather the signatures on the UWU petition in relation to bargaining. I accept the evidence of Mr Souied as to the integrity of that process.

[37] I have also accepted the processes described by Mr Norman in relation to how the Respondent undertook the survey of its employees and the subsequent ballots. Whilst Mr Norman was cross-examined, the integrity of its internal ballot processes, particularly in September 2021, were not seriously challenged. Further, no challenge was made to the information provided by the Respondent to its employees in relation to enterprise bargaining.

[38] Given that the text messages the UWU gathered from members employed by the Respondent while provided to the Commission have not been provided to the Respondent (and hence it has not had an opportunity to make submissions or provide evidence with respect to the content of those text message) I have not had regard to them.

[39] I am not satisfied, on the evidence before me, that a majority of employees of the Respondent want to bargain.

[40] In reaching this decision I am mindful that the Full Bench in *Martogg* said:

...the decision as to whether a majority of employees want to bargain is to be made on the basis of the most current material available at the time of the decision.⁶

[41] The most current material available to the Commission is the result of a secret ballot the Respondent conducted of the relevant employees on 22 September 2021. This result clearly indicates that, of the 24 employees concerned 7 employees did wish to bargain and 17 employees voted against bargaining.

[42] This is to be contrasted with petition of the UWU which 17 employees signed on 27 April 2021 and 5 May 2021 indicating they wished to bargain.

[43] Between 10 May 2021 and 28 June 2021 (a period of 7 weeks) it seems there were discussions between the UWU and the Respondent as to whether the Respondent would bargain. The Respondent said, and I accept, that its advice to the UWU was that it would bargain but not until March 2022 after other priorities which would ‘absorb key resources’ were completed. It was in this 7 week period that the Respondent added a question about bargaining to a staff survey in relation to a site relocation.

[44] For reasons not known, the application to the Commission for a majority support determination by the UWU was not made until 19 August 2021 (7 weeks after discussions with the Respondent about bargaining appear to have ended and over 3 months after the petition was signed). In this period the Respondent had discussions with some employees (those who were considering moving to the new site) and received further feedback from the Shift Manager that employees did not appear interested in pursuing bargaining.

[45] While it is not clear why such a delay in filing the application occurred, the result on the Respondent’s balloting of its employees would suggest that enthusiasm for what the UWU was pursuing in late April and early May appears to have waned considerably over the period to late September.

[46] There is merit in a union pursuing a majority support determination to not unduly delay an application to the Commission from the time employees make their wishes known. The longer the delay the greater the chance of views changing (for a range of reasons) and more contemporaneous views of employees being sought.

⁶ *Kantfield Pty Ltd T/A Martogg & Company v The Australian Workers’ Union* [2016] FWCFB 8372 at [37]

[47] I accept that the Commission may properly have regard to a union petition signed by affected employees in determining if they wish to bargain but it must be reasonably close in time with an application to the Commission. However, taking into account the views of the Full Bench expressed in the *Martogg appeal*, the Commission should also have regard to the views of employees expressed to the employer. The contemporaneous nature of the views expressed to a union through a petition, a timely expression of an employer's decision as to bargaining and an application to the Commission would minimise any inconsistency in views or divergent opinions.

[48] I have, in this case, carefully considered the conflicting views of employees expressed in the UWU petition and the Respondent's ballots. I have also taken into account the period of time between the employees expressing their view on the UWU petition and the application coming to the Commission. Given these circumstances I am not convinced that employees wish to bargain.

Is it reasonable in the circumstances to make the determination?

[49] For the reasons set out above I do not consider it would be reasonable to make the determination sought by the UWU.

Should the Commission order a fresh ballot?

[50] Beyond a discretion for the Commission to determine for itself how to decide if a majority of employees wish to bargain there is no specific provision that requires the Commission to undertake such a ballot itself or arrange for some other organisation (such as the Australian Electoral Commission) to do so.

[51] In this case the time between the UWU petition and the Respondent's last secret ballot is some 4 ½ months. The effluxion of time since the UWU gathered its signatures is such that I do not consider, without some more contemporaneous indication contrary to that provided by the Respondent, that there is any reason to consider the wishes of the employees have not been clearly expressed (noting that the text messages, even if I did have regard for them, do not provide such clarity)

[52] The question on the Respondent's ballot of 22 September 2021 was simple and easy to understand (and there is no evidence that this was not the case). After June 2021 the views of the employees appear to be a rejection of bargaining.

[53] In these circumstances and without compelling evidence to the contrary, I see no warrant for the Commission to conduct a ballot.

[54] I should emphasise that my decision in this matter is influenced by the lengthy delay between the signing of the petition and the matter being heard.

CONCLUSION

[55] The application for a majority support determination is dismissed.



COMMISSIONER

Appearances:

S. Ananth for the Applicant.

T. Fuimaono-Page for the Respondent.

Hearing details:

2021.

Melbourne by Microsoft Teams video:

September 30.

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