



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT GOSTENCNIK

D2021/8

s.158(1) RO Act - Application for alteration of eligibility rules

**Application/Notification by United Workers' Union (108V)
(D2021/8)**

Melbourne

10.00 AM, MONDAY, 22 JANUARY 2024

RECORDING COMMENCED

[10.07 AM]

PN1

THE DEPUTY PRESIDENT: Mr Pefanis, I don't think I have actually formally granted leave for the union to amend its application.

PN2

MR PEFANIS: No, I don't think that's occurred.

PN3

THE DEPUTY PRESIDENT: No. So the UWU wishes to amend its application in the form set out in a document signed by the National Secretary on 4 December 2023.

PN4

MR PEFANIS: Yes, Deputy President, that's the one.

PN5

THE DEPUTY PRESIDENT: Yes, all right. Mr Fry, is there any objection to the application for leave to amend.

PN6

MR FRY: No, Deputy President.

PN7

THE DEPUTY PRESIDENT: All right. I will grant leave to amend the application in the form set out in the amended Form F68 signed by Tim Kennedy, the National Secretary of the union on 4 December 2023. Mr Pefanis, I take it that the union now relies on the declaration of Tim Kennedy dated 4 December 2023, filed with the amended application?

PN8

MR PEFANIS: Yes, Deputy President.

PN9

THE DEPUTY PRESIDENT: I won't mark that. It's part of the application requirements as amended.

PN10

MR PEFANIS: Thank you, Deputy President.

PN11

THE DEPUTY PRESIDENT: Yes, all right.

PN12

MR PEFANIS: Arising from that there is one minor issue that I wanted to take the Deputy President to.

PN13

THE DEPUTY PRESIDENT: Yes.

PN14

MR PEFANIS: And that is the name of one of the hospitals in the amended eligibility rules.

PN15

THE DEPUTY PRESIDENT: There's been a change in the name.

PN16

MR PEFANIS: Yes, there's been a change in the name. So the issue arises in that the member council of the union, who is the appropriate body for amending the rules, amended the rules on the basis of the old name. Thereafter it was discovered that the name had changed. We have pressed the application and we amended the application itself to vary the name, but the member council has approved an alteration to the rules on the basis of the old name.

PN17

THE DEPUTY PRESIDENT: Yes.

PN18

MR PEFANIS: It is the same hospital.

PN19

THE DEPUTY PRESIDENT: That was really my question, Mr Pefanis. Has the legal identity of the hospital changed by reason of its name?

PN20

MR PEFANIS: The hospital was - - -

PN21

THE DEPUTY PRESIDENT: This is Calvary Hospital.

PN22

MR PEFANIS: Calvary Hospital.

PN23

THE DEPUTY PRESIDENT: Yes.

PN24

MR PEFANIS: It was taken over by the ACT Government, and its name has changed. The amendment made by the member council doesn't refer to an entity, an employer. It just refers to hospitals.

PN25

THE DEPUTY PRESIDENT: Yes. And that may have been material if the rule had been confined to a private operator, but the rule covers governmental operators.

PN26

MR PEFANIS: That's right.

PN27

THE DEPUTY PRESIDENT: What are you wanting me to do to - - -

PN28

MR PEFANIS: Ideally we would seek to have the rule varied as sought in the amended application, and I have a couple of - there are a couple of sections of the Act which I'd like to point the Commission to just in relation to that.

PN29

THE DEPUTY PRESIDENT: Yes.

PN30

MR PEFANIS: So in the Fair Work (Registered Organisations) Act section - well, firstly in section 158 the Commission may provide consent to an alteration in whole or in part, but must not consent unless it is satisfied that the alteration has been made under the rules of the organisation. The Commission can be satisfied that the alteration has been made under the rules of the organisation.

PN31

We would submit that potentially the Commission could - given that the hospital is the same, that in effect the eligibility rules have been altered, still in accordance with the rules of the organisation, and given the Commission is satisfied of the other provision, the other requirements in section 158. Alternatively section 337J of that same Act:

PN32

In making an order in proceedings under this Act the Fair Work Commission is not restricted to the specific relief claimed by the parties concerned, but may include in the order anything which the Fair Work Commission considers necessary or expedient for the purposes of dealing with the proceeding.

PN33

I would submit that the Deputy President may be able to use this provision. Sorry, in the sense that even though the relief sought is - - -

PN34

THE DEPUTY PRESIDENT: Sorry, what section was it?

PN35

MR PEFANIS: 337J. The issue with this provision is of course that having given leave to amend the application is not really different. We're not seeking - the Commission wouldn't be making relief different to that which is sought by the parties.

PN36

THE DEPUTY PRESIDENT: I suppose an issue that arises in relation to 337 is I am not sure that a consent to an alteration of an organisation's eligibility rules of order.

PN37

MR PEFANIS: Yes. There is also, we would submit, section 599 of the Fair Work Act itself - - -

PN38

THE DEPUTY PRESIDENT: Yes.

PN39

MR PEFANIS: - - - dealing with the Fair Work Commission's general powers.

PN40

THE DEPUTY PRESIDENT: Yes.

PN41

MR PEFANIS: So 598 makes clear that a reference in this part to a decision of the FWC includes any decision of the FWC however described, which we would submit covers this application, even though it's made under the Registered Organisations Act. 599:

PN42

Except as provided by this Act, the Fair Work Commission is not required to make a decision in relation to an application in the terms applied for.

PN43

THE DEPUTY PRESIDENT: Yes.

PN44

MR PEFANIS: There might be scope in that in - - -

PN45

THE DEPUTY PRESIDENT: So here you have applied for by virtue of the variation - what you're effectively wanting me to do is to treat the authorisation to vary the rules which refers to Calvary Hospital as though it were - that the intention is that the rule, the coverage rule is intended to cover employees who work at that location by whatever name.

PN46

MR PEFANIS: Yes.

PN47

THE DEPUTY PRESIDENT: Because it's referring to the intended operation of the rule, and this would be a matter of construction, but it would be surprising if I approved the rule in its form that was approved by the national executive rather than as set out in the application, that anybody would construe the rule in such a way as to not have any operation at that location if nothing else changed.

PN48

MR PEFANIS: Yes, that's right, and in that sense I suppose it is, as you say, Deputy President, it may be whether the question just goes back to section 158 and whether the alteration has been made under the rules of the organisation.

PN49

THE DEPUTY PRESIDENT: Yes.

PN50

MR PEFANIS: If the Commission is not minded to grant the alteration as sought in the amended application, on the basis of the member council's resolution, we

would ask if it were possible to have a note in the decision of this issue of the name change.

PN51

THE DEPUTY PRESIDENT: You mean I approve the rule by referring to it as Calvary, but noting that the name has changed since - was it since - it was just a mistake, wasn't it?

PN52

MR PEFANIS: It was a mistake in that - - -

PN53

THE DEPUTY PRESIDENT: Why can't I then alter - the intended operation of the resolution was to cover persons employed at that facility, and the resolution erroneously named that facility as Calvary Hospital, and it wasn't in fact called Calvary Hospital.

PN54

MR PEFANIS: Yes. The month before it had been changed.

PN55

THE DEPUTY PRESIDENT: Yes. Sorry?

PN56

MR PEFANIS: About a month before - - -

PN57

THE DEPUTY PRESIDENT: It had been - - -

PN58

MR PEFANIS: - - - before the resolution.

PN59

THE DEPUTY PRESIDENT: Yes, it had been changed. There is no real dispute that it was directed to persons who work there. I am just wondering whether I can simply amend the document that's filed, as purported to be a resolution, if I accept that the resolution was intended to cover persons at that facility going by whatever name, to correct that document under 602 - sorry - - -

PN60

MR PEFANIS: Section 586.

PN61

THE DEPUTY PRESIDENT: Section 586, yes. So the documents that are filed include the documents that record the resolution, and so the amended application to the extent that it corrects the name of the facility. So I will accept the amended application, because part of the amendment relates to the settlement, and I will correct the remaining part of the application so that the application of the (indistinct) rule relates to the correct name of the organisation; accepting that the governing body of the organisation sought to capture under the eligibility rules persons who are employed at that facility, whether that facility is operated by a private sector operator or by government.

PN62

MR PEFANIS: Yes.

PN63

THE DEPUTY PRESIDENT: And so although the resolution as recorded refers to Calvary the intended operation of that is to capture employees who work at that facility, which the council thought was called Calvary, but was not.

PN64

MR PEFANIS: Yes. Yes, 586 appears in our view to be the appropriate course to take.

PN65

THE DEPUTY PRESIDENT: Yes, I think that's right. So I would amend the application by deleting the reference to Calvary Hospital in the first dot point appearing after the words 'Australian Capital Territory:' and replacing it with North Canberra Hospital.

PN66

MR PEFANIS: Yes, Deputy President. And that is the terms in which the memorandum I understand was entered into as well.

PN67

THE DEPUTY PRESIDENT: I understand. Yes, all right. Mr Fry, is there any objection to that course?

PN68

MR FRY: No, Deputy President.

PN69

THE DEPUTY PRESIDENT: All right. In those circumstances I will pursuant to section 586 amend the amended application so that the scope of the coverage is accurately reflected by deleting the words 'Calvary Hospital' in the first dot point appearing and replacing it with the words 'North Canberra Hospital' as the first dot point. Yes?

PN70

MR PEFANIS: Otherwise, Deputy President, I had nothing further to add. I submit that on the material the Commission can be satisfied that the alteration meets the requirements of section 158, consent for the alteration to be granted.

PN71

THE DEPUTY PRESIDENT: Yes, all right. Mr Fry, do you want to say anything?

PN72

MR FRY: No, Deputy President, we're content with it to proceed.

PN73

THE DEPUTY PRESIDENT: Yes, all right. By its amended application the United Workers' Union seeks to alter its eligibility rule by including in part 26A of schedule 1 a new rule, which is in the following terms. I set out the terms of

the rule in full as appearing in paragraph 6 of the memorandum of agreement and undertakings without reading it.

PN74

The Health Services Union was initially an objector to the application setting out several grounds for objection, including that the persons who would be covered by the proposed alteration would more conveniently belong to the Health Services Union.

PN75

The parties have had an opportunity to have discussions about - Mr Pefanis, you can sit down - have had discussions about the objections that have entered into a memorandum of agreement and undertakings, which I have marked as exhibit 1 to these proceedings. The undertakings are directed to the objections, and set out the undertakings of the UWU which are directed to minimising or reducing demarcation disputes in the future.

PN76

The proposed alteration is intended to capture that which is said to be the existing industrial arrangements upon the ground. The UWU has also filed a declaration from its National Secretary, Mr Tim Kennedy, which sets out various matters about which I must be satisfied.

PN77

The application based on the declaration and other material that has been filed in my opinion meets the requirements of section 158 of the Fair Work (Registered Organisations) Act. I am also satisfied that the memorandum and undertakings are sufficient to fall within that which is contemplated by section 158(5), such that the undertakings are appropriate to avoid demarcation disputes that might otherwise arise from any overlap in coverage between the eligibility rules of the UWU and the eligibility rules of the Health Services Union, the other party to the memorandum of agreement and undertakings.

PN78

Consequently subsection (4) does not apply. Applications for an alteration to the eligibility rules of an organisation must also comply with section 121 of the Fair Work (Registered Organisations) Regulations 2019. That regulation sets out several matters which must be satisfied. The declaration of Tim Kennedy addresses those matters, and without repeating I am satisfied based on the declaration that the union has complied with regulation 121 of the regulations.

PN79

There are no other matters about which I am aware which would stand in the way of the exercise of my discretion to consent to the alteration. I am satisfied that the alteration meets the requirements of the Fair Work (Registered Organisations) Act and the regulations thereto, and so I will approve consent to the alteration to the eligibility rules of the United Workers' Union as set out in its amended application, which is also recorded at paragraph 6 of the memorandum of agreement and undertakings.

PN80

Unless there is anything else, Mr Pefanis, Mr Fry, I will adjourn.

PN81

MR PEFANIS: Thank you, Deputy President.

PN82

MR FRY: Thank you, Deputy President.

PN83

THE DEPUTY PRESIDENT: Yes, all right. Have a good day, we're adjourned.

ADJOURNED INDEFINITELY

[10.33 AM]