DECISION

Fair Work Act 2009
s.236—Majority support determination

Health Services Union
(B2021/229)

DEPUTY PRESIDENT BOYCE SYDNEY, 15 APRIL 2021

Application for a majority support determination.

[1] On 30 March 2021, the Health Services Union NSW Branch (**HSU**) made an application for a majority support determination pursuant to s.236 of the *Fair Work Act 2009* (**Act**) with respect to employees of Radiation Oncology Associates Pty Limited T/A Genesis Cancer Care and GenesisCare Northern Holdings Pty Ltd (**Respondents**) employed at the Respondents' worksites who are currently engaged under and covered by the *Health Professionals and Support Services Award 2020* (**Award**) in New South Wales.

[2] The HSU seeks a determination that a majority of these employees who will be covered by a proposed agreement want to bargain with the Respondents. There is no enterprise agreement that currently covers or applies to the relevant employees.

[3] It is not in dispute that the Respondents are "single interest employers" as defined by s.172(5) of the Act.

[4] The Respondents oppose the application on the basis that:

(a) the employees have not been fairly chosen;

(b) it is unknown to the Respondents whether there is majority support amongst each of the two distinct groups of employees to be covered by the application (i.e. Radiation therapists (**first group**), and administrative and patient support employees (**second group**)); and

(c) it is not reasonable in all the circumstances for the application to be granted.

[5] The parties agreed for the application to be determined on the papers. Both parties filed written submissions.[i]

[6] The relevant provisions of the Act are contained under ss.236 and 237, and read:

"**236 Majority support determinations**

(1) A bargaining representative of an employee who will be covered by a proposed single-enterprise agreement may apply to FWA 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

(b) the employees who will be covered by the agreement.

237 When FWA must make a majority support determination

Majority support determination

(1) FWA 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) FWA is satisfied of the matters set out in subsection (2) in relation to the agreement.

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

(2) FWA must be satisfied that:

(a) a majority of the employees:

(i) who are employed by the employer or employers at a time determined by FWA; 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), FWA may work out whether a majority of employees want to bargain using any method FWA considers appropriate.

(3A) If the agreement will not cover all of the employees of the employer or employers covered by the agreement, FWA 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."

[7] It is not in dispute that the application has been made validly in accordance with the requirements of s.236 of the Act.

Fairly chosen

[8] The Respondents submit, in short, that each of the two groups of employees are not fairly chosen as they perform different duties, are rostered differently, have different qualifications and skills (Radiation therapists are health professionals), and have different interests. The Respondent also highlights to the Commission that enterprise agreements covering the Respondents' relevant employees in Victoria separately cover the first and second group of employees, and that an enterprise agreement covering the Respondents' employees in Queensland only covers Radiation therapists.[ii]

[9] I reject the Respondents' contention that the employees to be covered by the application are not fairly chosen. As the HSU points out, both groups of employees are required to work on a cooperative and interactive basis at each of the geographically located worksites, i.e. administrative and support employees deal with appointments and patient records (and other ancillary duties to enable the business to function).[iii] This work enables the Radiation therapists to function. Further, the contentions by the Respondents as to different roles, tasks, skills and functions is not a sufficient basis to make a finding that relevant employees have not been fairly chosen.[iv] I therefore find that the group of employees to be covered by the proposed enterprise agreement have been fairly chosen, in that they are employees who are operationally and organisationally distinct.

Majority support

[10] Having examined the list of names and signatures provided by the HSU (on a confidential basis), and the list and names of the 124 relevant employees covered by the proposed enterprise agreement provided by the Respondents (on a confidential basis), the evidence is that the HSU has established that a clear majority of the employees (71 of 124) who would be covered by the proposed agreement have signed a petition indicating that they want to bargain with the Respondents.

[11] The Respondents submit that because the HSU obtained signatures of relevant employees over a three-month period (January 2021 to March 2021), and the Respondents put forward a proposed remuneration structure to Radiation therapists on 29 March 2021 (one day prior to the application being filed), the views of radiation therapists "may" have changed in respect of their desire to bargain with the Respondents for a proposed enterprise agreement. Further, the Respondents raise concerns as to the manner in which the HSU has obtained employees signatures.[v] I reject both of these matters as reasons to find that the application should not be granted. In this regard, the Respondents submissions amount to no more than mere conjecture. The submissions are not supported by evidence. In determining whether or

not to make a majority support determination, I am not required to look behind the votes of employees on the basis that they "may" have changed their mind. This is especially so where there is no evidence to support such a contention. Equally, even working on the basis that the submissions of the Respondent as to the conduct of the HSU have a factual foundation, I do not accept that the HSU has acted contrary to any provisions of the Act in obtaining relevant employee signatures.[vi]

[12] On the material before me, I am satisfied that:

(a) the HSU is a bargaining representative for employees who will be covered by the proposed agreement, and is capable of making this application for a majority support determination (s.236);

(b) a majority of the employees of the Respondents who will be covered by the proposed agreement want to bargain (s.237(2)(a));

(c) the Respondents have not yet agreed to bargain for a proposed enterprise agreement (s.237(2)(b));

(d) the group of employees who will be covered by the proposed agreement has been fairly chosen (s.237(2)(c)); and

(e) there is no basis to suggest that it is not reasonable in all the circumstances to make the determination (s.237(2)(d)).

[13] In conclusion, I am satisfied that all requirements of ss.236 and 237 of the Act have been met. Accordingly, the Commission must make the majority support determination sought by the HSU. A Determination will issue with this decision.

[14] Before leaving this matter, I should record that the Respondents filed Reply Submissions absent any direction, or the seeking of leave to do so. Whilst I have had regard to those submissions in making my decision in this matter, in my view, this practice should be strongly condemned. As the High Court said in *Re Application by the Chief Commissioner of Police (Vic):*[vii]

> "Where leave has not been given publicly for supplementary submissions and evidence, the provision of such material to court registries without permission of the court, publicly signified, is a derogation from the principle of the open administration of justice."[viii]

DEPUTY PRESIDENT

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[i] Respondents' Submissions, 9 April 2021, and Respondent's Reply Submissions, 15 April 2021; HSU Submissions, 14 April 2021.
[ii] Respondents' Submissions, 9 April 2021, at [4]-[8].
[iii] HSU submissions, 14 April 2021, at [10]-[19].
[iv] *QGC Pty Ltd v Australian Workers' Union* [2017] FWCFB 1165, at [44].
[v] Respondents' Submissions, 9 April 2021, at [9]-[15]; Respondents' Reply Submissions, 14 April 20121, at [1].
[vi] I equally reject the Respondents' submissions that a further vote of all or either of each group of relevant employees is appropriate or necessary (see Respondents' Submissions, 9 April 2021, at [16]-[20]; Respondents' Reply Submissions, 14 April 20121, at [2]). See also HSU submissions, 14 April 2021, at [20]-[27].
[vii] (2005) 214 ALR 422; [2005] HCA 18.
[viii] Ibid, at [54]. See also: *Carr v Finance Corporation of Australia Ltd (No 1)* (1980) 147 CLR 246.