



# DECISION

*Fair Work Act 2009*

s.768BB - Application for an order about coverage for employee organisations under a state instrument

## **CPSU, the Community and Public Sector Union**

(AG2017/5026)

DEPUTY PRESIDENT KOVACIC

CANBERRA, 19 JUNE 2018

*S.768BB – Application for an order about coverage for employee organisations under a Copied State instrument.*

[1] This decision concerns an application made by the Community and Public Sector Union (**CPSU**) pursuant to s. 768BB of the *Fair Work Act 2009* (the Act). The application seeks an order that a number of copied State instruments cover the CPSU.

[2] For the reasons outlined below, I have decided to make the Order sought by the CPSU.

### **Background**

[3] The CPSU set out the background to the matter in its application. Specifically, in 2013 the NSW Government passed the *National Disability Insurance Scheme (NSW Enabling) Act 2013* (NSW), allowing the relevant Minister to transfer the employment of disability services employees to either employment with another public sector agency or a non-government sector employer.

[4] On and from 6 September 2017 around 100 employees were transferred from the NSW Department of Family and Community Services (FACS) to LiveBetter, a non-government sector employer.

[5] Pursuant to Part 6-3A – Transfer of business from State public sector, Division 3 – Copied State instruments of the Act, upon this transfer, a number of State awards became copied State awards and copied State instruments.

[6] The relevant Copied State instruments are the:

- Crown Employees (Public Service Conditions of Employment) Reviewed Award 2009<sup>1</sup>;
- Crown Employees (Administrative and Clerical Officers - Salaries) Award 2007<sup>2</sup>;
- Crown Employees (Public Sector - Salaries 2016) Award<sup>3</sup>; and
- Crown Employees Ageing, Disability And Home Care – NSW Department of Family and Community Services (Community Living Award) 2015<sup>4</sup>.

[7] On 27 October 2017, LiveBetter indicated that it opposed the application and requested that determination of the matter be postponed until a decision was issued in respect of a separate application made by the CPSU involving an identical factual scenario (i.e. AG2017/4028). The Commission agreed to this course of action.

[8] In subsequent developments, on 2 November 2017 a Form F53 – Notice of representative commencing to act was filed on behalf of the Health Services Union of Australia (HSU). The HSU’s representative stated in that Form F53 that it acted on behalf of the HSU “as an intervenor, with an interest in the proceedings. Particularly taking issue with the right of the Applicant to pursue an application of this type, including the Orders sought.” However, on 19 March 2018 the HSU’s representative advised the Commission in a telephone discussion with my Chambers that the HSU would most likely withdraw its objections to the application and that this would be confirmed in writing as soon as possible. To date written confirmation to that effect has not been provided.

[9] A decision in AG2017/4028 was handed down by Commissioner Johns on 8 March 2018<sup>5</sup>. The Commissioner determined that he “should exercise the discretion in s.768BB in favour of making an order that the CPSU be covered by the Copied State Instruments.”<sup>6</sup> An order to that effect was issued on 16 March 2018<sup>7</sup>.

[10] Against that background, this application was listed for mention and/or directions hearing on 9 April 2018. At the hearing Ms Alison McRobert appeared with permission for the CPSU together with Mr Dean Allen, while Mr Luis Izzo appeared with permission for the Respondent.

[11] The hearing concluded on the basis that the Respondent would advise the Commission if it pressed its objection to the application.

[12] On 16 April 2018 LiveBetter’s representative wrote to the Commission in the following terms:

“... Following the further time period afforded to our client to consider its position, I confirm that our client will be withdrawing its opposition to the Application.

Our client’s position is now that it neither supports nor opposes the Application and does not intend to participate in the proceedings further (unless requested to do so by the Fair Work Commission).”

[13] On 17 April 2018 the CPSU sent an email to the Commission requesting that the matter be determined on the papers.

### **The statutory framework**

[14] s. 768BB of the Act provides as follows:

#### **“FWC orders about coverage for employee organisations**

(1) The FWC may make an order that:

- (a) a copied State instrument for a transferring employee that would, or would be likely to, cover an employee organisation (the first employee organisation) in relation to the transferring employee because of subsection 768AN(2) does not, or will not, cover the organisation; and
  - (b) another employee organisation (the second employee organisation) is, or will be, covered by the copied State instrument in relation to the employee.
- (2) When making an order under subsection (1), the FWC must consider whether the second employee organisation is a federal counterpart (within the meaning of section 9A of the Registered Organisations Act) of the first employee organisation.
- (3) The regulations may:
- (a) prescribe circumstances in which the FWC may make an order for the purposes of subsection (1); and
  - (b) otherwise make provision in relation to the making of the order.
- (4) An order under subsection (1) must be made in accordance with any regulations that are made for the purposes of subsection (3).”

[15] Regulation 6.03A of the *Fair Work Regulations 2009* states as follows:

**“FWA orders about coverage for employee organisations**

For paragraph 768BB(3)(a) of the Act, a circumstance in which FWA may make an order mentioned in subsection 768BB(1) of the Act is that the order is to be made:

- (a) on FWA’s own initiative; or
- (b) on application to FWA by a transferring employee, or a person who is likely to be a transferring employee; or
- (c) on application to FWA by the new employer, or a person who is likely to be the new employer; or
- (d) on application to FWA by an employee organisation that is entitled to represent the industrial interests of an employee mentioned in paragraph (b).”

**Consideration**

[16] Pursuant to Schedule 1A to the *Fair Work (Registered Organisations) Regulations 2009* the CPSU is the federal counterpart of the Public Service Association and Professional Officers’ Association Amalgamated Union of New South Wales (PSA NSW). The PSA NSW is the state registered employee organisation presently covered by the relevant Copied State Instruments set out above. However, it is not a registered organisation for the purposes of the *Fair Work (Registered Organisations) Act 2009* and therefore is not entitled to continue to represent the interests of the transferred FACS employees.

[17] Further, I am satisfied that, consistent with Rule 2 – Constitution and Eligibility for Membership, Part I, clause A.1(i)(f) of the Rules of the CPSU, former FACS employees are eligible to be members of the CPSU. Specifically, Rule 2 – Constitution and Eligibility for Membership, Part I, clause A.1(i)(f) provides that the following persons are eligible for membership of the Union:

“any person employed, usually employed or qualified to be employed by ... any other authority or body (whether corporate or not) being an authority or body that is financed in whole or in substantial part, either directly or indirectly by money provided by the Commonwealth ...”<sup>8</sup>

[18] I note that the PSA NSW is also an “Associated Body” within the Rules of the CPSU<sup>9</sup>.

[19] Having regard to the above, I am satisfied that the CPSU is able to make its application as it meets the requirement set out in Regulation 6.03A(d) of the *Fair Work Regulations 2009*. Further, I am satisfied that in making the application the CPSU satisfies the requirement set out in s.768BB(2) of the Act.

[20] In circumstances where employees of FACS have been transferred to LiveBetter, the CPSU is the federal counterpart of the PSA NSW, the CPSU is eligible to represent the transferred employees and LiveBetter neither supports nor opposes the application, I consider that I should make the Order sought.

[21] Accordingly, I will make the Order sought by the CPSU. The Order will be issued with this decision.



Printed by authority of the Commonwealth Government Printer

<PR608091>

---

<sup>1</sup> Award Code 1310

<sup>2</sup> Award Code 187

<sup>3</sup> Award Code 385

<sup>4</sup> Award Code 1424

<sup>5</sup> [2018] FWC 591

<sup>6</sup> Ibid at [95]

<sup>7</sup> PR601232

<sup>8</sup> <https://www.fwc.gov.au/registered-organisations/find-registered-organisations/cpsu-the-community-and-public-sector-union>

<sup>9</sup> Clause 5(c)(i) of the Rules of the CPSU