A Summary of the Decision in *Community and Public Sector Union v Australian Unity Home Care Service Pty Ltd* [2019] FWC 3854

CPSU applied to the FWC on 16 November 2018 for an order for a separate Enterprise Agreement to cover only administrative staff (our members).

According to the evidence presented, the breakdown of staff numbers is:

- 3,740 home care workers
- 550 administrative workers (of which 362 are transferred, 156 on Modern Award, and 32 covered by 2018 AU EA)

The matter was heard by Commissioner Johns over 3 days- 26 Feb, 18 March, 27 March

The decision in our favour was handed down on 4 June 2019.

As a result, a new Notice of Employee Representational Rights (NERR) will have to be released to affected staff. And CPSU will commence negotiation of a separate Enterprise Agreement to cover only the admin staff.

There are 4 factors to be considered in granting a Scope order under the Fair Work Act:

(1) Good Faith Bargaining; and,
(2) Promote Fair and Efficient Bargaining, and,
(3) Fairly Chosen, and,
(4) Reasonable in the Circumstances.

The arguments for CPSU and Australian Unity for each, along with Commissioner Johns' decision are outlined below.

1. Good Faith Bargaining (*FWA* ss 238(4) and (4A))

This was not in contention- everyone agreed that CPSU was bargaining in good faith. Confirmed by Commissioner Johns at [18].

2. Promote Fair and Efficient Bargaining (*FWA* s 238(4)(b))

CPSU Said:

- Bargaining not proceeding efficiently so far- we put AU on notice in writing on 4 July 2018 and again on 27 August.
- Bargaining process had become 'complex, inefficient and confusing' due to trying to combine differing conditions, especially around hours or work and rates of pay.
- Administrative staff are in such a minority that they cannot meaningfully influence the outcome of bargaining. As a result, the distinct interests of the admin staff will be neglected in the process (which is unfair).
- If we had a separate agreement for just admin staff, bargaining would become more efficient because:

- Admin work is fundamentally different
- Admin staff have traditionally been covered by an entirely different set of conditions (copied state award)

AU said:

- A separate EA for admin staff would *not* be more efficient because:
  - Bargaining has been fine so far
  - The differences between admin and homecare workers are not as great as CPSU say
  - The Branch Operating Model makes roles integrated, and types of work are not as siloed as CPSU say
  - There are plenty of CPSU staff and Delegates at the bargaining table to promote admin interests
  - It would be inefficient to have to start bargaining again.

- The small number of administrative staff (compared to home care workers) alone is not enough to justify a separate EA.

- Home care workers naturally progress to admin roles, so they're often the same staff.

Commissioner Johns' Decision:

CPSU should have applied for the scope order earlier [21], but…

Agreed with CPSU that bargaining is not proceeding efficiently. Would have gone better if *'administrative employees carved out from the beginning'*. If removed, there will *be 'no further distraction caused by the home care workers being in the mix'* [22]

It would be unfair to the administrative staff if they were part of a combined EA because:

> The administrative workers *'are far outnumbered by employees who are home care workers…In this context the number of home care workers voting could swamp the votes of employees performing administrative work. It could deprive the administrative employees of a meaningful opportunity to engage in bargaining.*' [23]
>
> Administrative employees have traditionally been covered by the copied state award. Therefore, *'there would be an unfairness attached to denying the administrative employees (particularly the transferred employees) from bargaining separately with the copied State Award as the instrument to be had regard to in the course of bargaining. While I accept that the administrative employees have been well represented in bargaining by the CPSU, if the scope order is granted, the CPSU will be better able to represent their members and more fairly participate in enterprise bargaining.'* [24]
>
> Also unfair if transferred and non-transferred employees performing the same duties are treated differently: *'I am also concerned that there is an unfairness attached to the fact that transferred employees and non-transferring employees performing the same administrative duties are treated differently because of the underlying industrial instruments that apply. If the scope order is granted, employees doing the same work regardless of their transferred status will have a better opportunity to negotiate for terms and conditions of employment that are the same. This would be fair.'* [25].

For these reasons, this factor is met.

3. Group Fairly Chosen (*FWA* s 238(4)(c))

Commissioner Johns' decision:

- The Group (ie administrative employees) was not 'arbitrary, illegitimate or discriminatory' [30]
- The Group *is* geographically and operationally distinct (per decision in *Cimeco*)[1] [31]

4. Reasonable in the Circumstances (*FWA* s 238(4)(d))

AU tried to argue that the other areas of their business have single EAs, as do their competitors within the sector.

Commissioner Johns held [38]:

- No competitive disadvantage through having a separate EA for admin staff
- Rejects argument that a single EA would drive 'cultural change'
- Only benefit of single EA is 'administrative convenience', but this is not enough to tip the balance
- Therefore, granting the scope order is reasonable in the circumstances.

The Conclusion

Commissioner Johns found that all 4 factors had been met, and issued a separate Scope Order to that effect. He concluded his decision by saying:

[42] In this instance the Commission, as presently constituted, is satisfied that:
a) the applicant has met the good faith bargaining requirements; and,
b) the scope order sought would promote both fair and efficient bargaining; and,
c) the group of employees was a group that was fairly chosen, as it is a group that is geographically, operationally or organisationally distinct, and finally, having regard for all of the circumstances; and,
d) it would be reasonable to make the scope order.

[43] *Consequently, the legislative requirements for the making of the scope order have been met and in view of the conclusions that I have reached the application must be granted…*

The practical outcome of the decision is that:

[1] *Cimeco Pty Ltd v Construction, Forestry, Mining and Energy Union; The Australian Workers' Union; "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU); Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2012] FWAFB 2206.

'…*the enterprise bargaining for an agreement to replace the 2017 Agreement would have to recommence. The bargaining would have to restart with separate Notices of Employee Representational Rights (****NERR****) being issued so that each NERR identified the altered scope.'* [19]