

**ORDER PURSUANT TO S.66
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION : 2020 WAIRC 00992

CORAM : CHIEF COMMISSIONER P E SCOTT

HEARD : TUESDAY, 15 DECEMBER 2020

DELIVERED : FRIDAY, 18 DECEMBER 2020

FILE NO. : PRES 5 OF 2020

BETWEEN : ANNE LORNA BEST
Applicant

AND

THE AUSTRALIAN NURSING FEDERATION, INDUSTRIAL
UNION OF WORKERS PERTH
Respondent

CatchWords : Industrial law (WA) – Application pursuant to s 66 of the *Industrial Relations Act 1979* (WA) – Alleged breach of Union rules – Complaint that Union did not observe objects of Union – Separate and distinct identities of State registered organisations and federal organisations with state branches – Application under *Industrial Relations Act 1979* (WA) is against State registered organisation – Applicant covered under state branch of federal organisation – No jurisdiction for Commission to deal with claim – Application dismissed

Legislation : *Industrial Relations Act 1979* (WA)
Fair Work Act 2009 (Cth)
Fair Work (Registered Organisations) Act 2009 (Cth)

Result : Application dismissed for lack of jurisdiction

Representation:

Applicant : Ms A Best (on her own behalf)
Respondent : Mr M Olson (on behalf of the respondent)

Case(s) referred to in reasons:

Williams v Hursey [1959] HCA 51; (1959) 103 CLR 30

Re McJannet; Ex parte Minister for Employment Training and Industrial Relations (Queensland) [1995] HCA 31; (1995) 184 CLR 620

Moore v Doyle (1969) 15 FLR 59

Reasons for Decision

- 1 Ms Best says she is a member of The Australian Nursing Federation, Industrial Union of Workers Perth (ANFIUWP) and she complains that the ANFIUWP did not comply with r 3 – Objects of its Rules in that it:
 - (a) did not promote and protect her interests as a member in matters regarding the Enterprise Bargaining Agreement (EBA) with her employer, St John of God Murdoch in 2018;
 - (b) did not represent her industrial interests with her employer, St John of God Murdoch; and
 - (c) did not improve her conditions of employment at St John of God Murdoch after numerous complaints to it about work issues, in accordance with the EBA.
- 2 The outcomes that Ms Best seeks are:
 - (a) a declaration that the ANFIUWP has breached r 3 – Objects, sub-rules (1) to (6) of its Rules; and
 - (b) that I investigate why the alleged breaches have been allowed to continue and that her complaints have not been dealt with by the ANFIUWP.
- 3 The ANFIUWP says that it is an organisation registered pursuant to the *Industrial Relations Act 1979* (WA) (the IR Act). Ms Best’s employer, St John of God Murdoch, is a national system employer for the purposes of the *Fair Work Act 2009* (Cth) (FW Act) and the nurses employed by St John of God Murdoch are eligible to be members of the federally registered organisation, the Australian Nursing and Midwifery Federation (ANMF). It says that it is jurisdictionally barred from representing Ms Best as she and her employer are a national system employee and employer respectively, and that the Western Australian Industrial Relations Commission has no jurisdiction to deal with her complaints.
- 4 The ANFIUWP also says that if it is the appropriate organisation to answer Ms Best’s complaint, then r 3 – Objects, which Ms Best says it has breached, is aspirational and not able to be breached. It says that its Council takes those objects very seriously but it cannot guarantee the outcomes it aims to achieve.
- 5 Finally, the ANFIUWP denies that it has breached r 3 of its Rules.
- 6 During the course of the hearing, Ms Best acknowledged that:
 - (a) Her employer is St John of God Health Care Inc;
 - (b) St John of God Health Care Inc operates the private hospital, St John of God Murdoch, where she works; and
 - (c) Her employment is covered by the *St John of God Health Care – ANMF – Registered Nurses’ and Midwives’ Agreement 2018* [2019] FWCA 6174, (the Agreement), an enterprise agreement made pursuant to the FW Act.
- 7 However, Ms Best says she is a member of the ANFIUWP and it undertook the bargaining for the Agreement, and is the organisation which communicates with her about bargaining.

Consideration and Conclusion

- 8 The issue of the concepts of and legal arrangements between State registered organisations and federally registered organisations (and their state branches) can be confusing, in particular for members and others who are self-represented. This complexity has not made the circumstances relating to this application easy for Ms Best to understand. It is also the case that the organisations themselves occasionally become confused, and in some cases complacent, about which organisation their officers are engaged with in any particular circumstance.
- 9 The complexities of the separate legal identities of a State registered organisation and a federal organisation (and its state branches) have been the subject of controversy for decades. Firstly, the State registered organisation and the federal organisation are separate (*Moore v Doyle* (1969) 15 FLR 59). Secondly, a federal organisation may have state branches, but those state branches have no identity distinct from the federal organisation (*Williams v Hursey* [1959] HCA 51; (1959) 103 CLR 30), and *Re McJannet; Ex parte Minister for Employment Training and Industrial Relations* (Queensland) [1995] HCA 31; (1995) 184 CLR 620 at 640-1, 663).
- 10 Attempts since *Moore v Doyle* to overcome this issue have not completely resolved it in Western Australia (see Part 7 of Chapter 11 of the *Fair Work (Registered Organisations) Act 2009* (Cth) (FW (RO) Act)). This dual personality of State registered organisations and state branches of the federally registered organisations remains, although s 71 and s 71A of the IR Act allow some arrangements to improve administration for the two organisations. The FW (RO) Act also enables federally registered organisations to enrol some non-national system employees for limited purposes (see FW (RO) Act s 18B(3)). However, it is not clear that the State organisation in this case is able to enrol and represent the industrial interests of national system employees.
- 11 One of the points causing confusion for members and sometimes for the organisations themselves is that the officers of the state branch of the federal organisation and the State organisation may be the same persons. However, that does not mean that the organisations are interchangeable. They still maintain their separate legal identities. If in this case the State organisation has communicated with the members of the state branch of the federal organisation as if they were members of the State organisation this does not make them so, nor does it change the fact that they are separate and distinct entities.
- 12 This application is made against the industrial organisation registered under the IR Act, that is, a State registered organisation. It is the organisation which enrolls and represents members who are within the state jurisdiction. There is also a separate organisation which is able to represent employees of national system employers and is registered under the FW (RO) Act. It is the ANMF.
- 13 The Chief Commissioner's jurisdiction under s 66 of the IR Act is to deal with applications relating to the rules of an 'organisation'. That section falls within Division 4 of Part II of the IR Act, which provides for the registration of organisations, the obligations of those organisations and for applications regarding the observance of the rules. An 'organisation' for the purposes of s 66 of the IR Act is defined in s 7 of the IR Act as 'an organisation that is registered under Division 4 of Part II' of the IR Act. Therefore, an application for orders pursuant to s 66, such as this one, can only be against an organisation registered under the IR Act. The ANFIUWP is such an organisation. The ANMF is not.

- 14 While Ms Best says she is a member of and received communications from the ANFIUWP, and that this is the organisation that negotiates on behalf of nurses employed by her employer, based on the limited material before me, it would appear that in fact her industrial interests are within the purview of the organisation registered under the FW (RO) Act, the ANMF. That is the organisation which is a party to the federal industrial instrument, the Agreement, which covers her employment. It is likely to be the 2018 EBA Ms Best referred to in her complaint about the organisations failing in the negotiations. I note that the Agreement sets out in clause 2 – Parties (2) that '[s]ubject to compliance with the requirements of sections 185 and 201(2) of the *Fair Work Act 2009*, the Australian Nursing and Midwifery Federation (WA Branch) will be covered by this Agreement'. The Agreement is signed by the Secretary of the ANMF (WA Branch). That would appear to be the ANMF (WA Branch), which would be the state branch of the federal organisation, not the ANFIUWP.
- 15 Based on all the information before me, limited as it is, I conclude that Ms Best's complaints relate to the ANMF not to the ANFIUWP. The ANMF is not an organisation registered pursuant to Division 4 of Part II of the IR Act. Therefore, there is no jurisdiction for the Commission to deal with this claim.