



DECISION

Fair Work Act 2009

s.418 - Application for an order that industrial action by employees or employers stop etc.

Teekay Shipping (Australia) Pty Ltd

v

Maritime Union of Australia, The
(C2015/4570)

COMMISSIONER CAMBRIDGE

SYDNEY, 7 JULY 2015

Application for an Order to stop industrial action.

[1] This is the edited text of an ex tempore Decision made in transcript during proceedings held on 7 July 2015.

[2] This matter involves an application made under s. 418 of the *Fair Work Act 2009* (the Act), seeking that the Fair Work Commission (the Commission) make an Order that industrial action that is occurring be stopped and not occur.

[3] Section 418 of the Act is in the following terms:

“418 FWC must order that industrial action by employees or employers stop etc.

(1) If it appears to the FWC that industrial action by one or more employees or employers that is not, or would not be, protected industrial action:

- (a) is happening; or
- (b) is threatened, impending or probable; or
- (c) is being organised;

The FWC must make an Order that the industrial action stop, not occur or not be organised (as the case may be) for a period (the **stop period**) specified in the Order.

Note: For interim orders, see section 420.

(2) The FWC may make the Order:

- (a) on its own initiative; or
- (b) on application by either of the following:

(i) a person who is affected (whether directly or indirectly), or who is likely to be affected (whether directly or indirectly), by the industrial action;

(ii) an organisation of which a person referred to in subparagraph (i) is a member.

(3) In making the Order, the FWC does not have to specify the particular industrial action.

(4) If the FWC is required to make an Order under subsection (1) in relation to industrial action and a protected action ballot authorised the industrial action:

(a) some or all of which has not been taken before the beginning of the stop period specified in the order; or

(b) which has not ended before the beginning of that stop period; or

(c) beyond that stop period;

The FWC may state in the Order whether or not the industrial action may be engaged in after the end of that stop period without another protected action ballot.”

[4] The application has been made by *Teekay Shipping (Australia) Pty Ltd* (Teekay). The application seeks an Order against the *Maritime Union of Australia* (the MUA) and members of the MUA who are employees of Teekay.

[5] The industrial action that is the subject of the application relates to employees of Teekay who are members of the MUA, and who are allegedly refusing to perform work as directed so as to enable the vessel named *Alexander Spirit*, to sail to Singapore.

[6] The definition of industrial action is found at section 19 of the Act which is in the following terms:

“19 Meaning of *industrial action*

(1) ***Industrial action*** means action of any of the following kinds:

(a) the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;

(b) a ban, limitation or restriction on the performance of work by an employee or on the acceptance of or offering for work by an employee;

(c) a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work;

(d) the lockout of employees from their employment by the employer of the employees.

Note: In *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v The Age Company Limited*, PR946290, the Full Bench of the Australian Industrial Relations Commission considered the nature of industrial action and noted that action will not be industrial in character if it stands completely outside the area of disputation and bargaining.

(2) However, **industrial action** does not include the following:

(a) action by employees that is authorised or agreed to by the employer of the employees;

(b) action by an employer that is authorised or agreed to by, or on behalf of, employees of the employer;

(c) action by an employee if:

(i) the action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety; and

(ii) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.

(3) An employer **locks out** employees from their employment if the employer prevents the employees from performing work under their contracts of employment without terminating those contracts.

Note: In this section, **employee** and **employer** have their ordinary meanings (see section 11).”

[7] The evidence produced during the Hearing has confirmed that the industrial action which is the subject of the application is happening or is threatened, impending, or probable or is being organised. The MUA has advanced inter alia, the proposition that the industrial action taken in this instance does not satisfy the definition of industrial action on the basis that it is action that meets the exclusion to the definition of industrial action contained in s. 19 (2) (c) of the Act.

[8] I have considered the evidence provided by the MUA upon which it has been asserted that the industrial action relates to health and safety concerns of the MUA and its members such that the action has been taken in satisfaction of the terms of s. 19 (2) (c) of the Act. Upon evaluation of the evidence, I am unable to accept that the industrial action in this instance satisfies the legislative exclusion provided by s. 19 (2) (c) of the Act.

[9] The existence of what may be considered to be a legitimate concern which prompts the taking of industrial action does not render that action to be protected industrial action. Further, industrial action does not become protected industrial action because of circumstances where there may be personal psychological impacts arising from the continuation of work in accordance with the manner that work is customarily performed and without any form of restriction, limitation or delay upon the performance of work. The prospect of some adverse physiological condition does not translate into a reasonable concern about an imminent risk to health and safety.

[10] Although I may personally have great sympathy for the crew of the *Alexander Spirit*, the predicament that these individuals face is, in essence, a predicament that is broadly shared by many other Australian workers. The prospect of sailing the *Alexander Spirit* to Singapore may, for example, be contemplated in similar fashion to those vehicle manufacturing workers who assemble the final Falcon, Commodore and Camry.

[11] Consequently, the industrial action in this instance satisfies the definition of industrial action and it is not protected industrial action.

[12] Further, I do not believe that the industrial action is based on a reasonable concern about an imminent risk to health or safety. Therefore, pursuant to s.418 of the Act, the Commission must Order that the industrial action stop.

[13] The Orders [PR569058] as broadly sought by Teekay are made and issued separately.



Appearances:

Mr S P Meehan of Counsel, with *Mr D Lloyd* and *Ms H Martin*, solicitors from Ashurst Australia, on behalf of Teekay;

Mr S Crawshaw, SC of Counsel, with *Mr K Bolwell* on behalf of the MUA.

Hearing details:

2015.

Sydney:

July, 6 & 7.

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ORDER

Fair Work Act 2009

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v

Maritime Union of Australia, The
(C2015/4570)

Maritime industry

COMMISSIONER CAMBRIDGE

SYDNEY, 7 JULY 2015

Application for an Order to stop industrial action.

1. TITLE

This Order will be known as the *Teekay Shipping (Australia) Pty Ltd Alexander Spirit Industrial Action Order* (the Order).

2. PERSONS BOUND AND APPLICATION OF ORDER

This Order is binding upon:

- (a) The Maritime Union of Australia (MUA), and;
 - (i) its officers; and
 - (ii) its delegates, employees and agents who come into contact with, or have responsibility for, the Employees (as described in clause 2(b)),
(MUA Representatives);
- (b) employees of Teekay Shipping (Australia) Pty Ltd (**Company**) who are;
 - (i) members, or eligible to be members, of the MUA; and
 - (ii) employed on the Alexander Spirit; and
 - (iii) engaged in work which is regulated by the *Teekay Shipping Australia Pty Limited Seagoing Ratings Enterprise Agreement 2011* (**Agreement**); and

(iv) named in the Schedule

(Employees).

3. DEFINITION OF INDUSTRIAL ACTION

For the purposes of this Order, **industrial action** means any action of the following kinds:

- (a) the performance of work by an Employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an Employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;
- (b) a ban, limitation or restriction on the performance of work by an Employee, or on the acceptance of or offering for work by an Employee; and
- (c) a failure or refusal by Employees to attend for work or a failure or refusal to perform any work at all by Employees who attend for work,

but does not include the following:

- (d) protected industrial action within the meaning of s.408 of the *Fair Work Act 2009*;
- (e) action by an Employee that is authorised or agreed to by the Company; and
- (f) action by an Employee if:
 - (i) the action was based on that Employee's reasonable concern about an imminent risk to the Employee's health or safety; and
 - (ii) the Employee did not unreasonably fail to comply with a direction of the Company to perform other available work, whether at the same or another workplace, that was safe and appropriate for the Employee to perform.

4. INDUSTRIAL ACTION TO STOP OR NOT OCCUR

- (a) Each Employee must immediately stop all industrial action that is happening at the time that this Order comes into effect, and must not, recommence, engage in or threaten to engage in, industrial action while this Order is in force.
- (b) The MUA and the MUA Representatives, must stop organising, and not organise, any industrial action by any of the Employees.
- (c) The MUA must immediately, upon the service of this Order on the MUA, advise Employees who are members of the MUA, that any direction, advice or authorisation by the MUA to engage in industrial action is withdrawn and that such industrial action must cease immediately upon this Order coming into effect.

5. SERVICE OF ORDER

Without limitation as to other means of service, it will be sufficient service of this Order:

- (a) upon the MUA and the MUA Representatives if:
 - (i) a copy of this Order is sent by facsimile or email (or otherwise provided) to the National Office of the MUA, or to an officer of the MUA who has dealings with the Company in relation to any of the Employees; or
 - (ii) a copy of this Order is handed to or read in the presence of an officer or employee of the MUA;
- (b) upon an Employee who is a member of the MUA if:
 - (i) a copy of this Order is served on the MUA as provided for in clause 5(a); or
 - (ii) a copy of this Order is placed on the notice board(s) usually used for the purpose of communicating with Employees at the workplace by 10pm on 7 July 2015; or
- (c) upon an Employee who is not a member of the MUA if:
 - (i) a copy of this Order is personally served on the Employee on or about the Alexander Spirit at any time; or
 - (ii) a copy of this Order is placed on the notice board(s) usually used for the purpose of communicating with Employees on the Alexander Spirit by 10pm on 7 July 2015.

6. TERM AND DATE OF EFFECT

This Order will come into effect from 5:00pm on 7 July 2015 and will remain in force until 11:59pm on 7 August 2015, unless varied or revoked by further Order of the Fair Work Commission.



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