FairWork Commission

DECISION

Fair Work Act 2009
s.418 - Application for an order that industrial action by employees or employers stop etc.

ASP Ship Management Pty Ltd

v

Maritime Union of Australia, The
(C2015/7314)

COMMISSIONER CAMBRIDGE SYDNEY, 17 NOVEMBER 2015

Application for an Order that industrial action by employees or employers stop etc.

[1] 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) makes an Order that industrial action that is occurring, or threatened, or impending, or probable, or being organised, be stopped and not occur.

[2] 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."

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

[4] The industrial action that is the subject of the application relates to employees of ASP who are members of the MUA, and who are allegedly refusing to perform work as directed so as to enable the vessel named *MV Portland*, to sail from Portland, Victoria, to Singapore. The *MV Portland* is owned by *Alcoa Portland Aluminium Pty Ltd* (Alcoa). ASP provides ship management and crewing services for inter alia, the *MV Portland* which is a dry bulk carrier vessel which has, for many years, been engaged in shipping alumina from Western Australia to Alcoa's Portland smelter.

[5] 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)."

[6] The MUA sought an adjournment of the Hearing on the basis that it had only been provided with the evidence that the applicant sought to rely upon (the witness statement of Mr Jones) at the commencement of the proceedings today. The MUA asserted that it would be denied procedural fairness if it was required to deal with this evidence in such a short time frame and without an opportunity to provide evidence in response.

[7] I have refused the MUA application for an adjournment given that the MUA had been served with the application on Saturday 14 November, and the grounds contained in the application are not materially altered or elaborated upon by the evidentiary material contained in the witness statement of Mr Jones. In my view, the MUA had ample opportunity to prepare evidence that it would seek to rely upon in opposition to the grounds contained in the application and it did not advance, even in an elementary form, any such material. The compass of the application was well known by the MUA and it had sufficient opportunity to prepare evidentiary or other material in opposition to the identified grounds made out in the application.

[8] The Hearing proceeded accordingly, and the witness statement of Mr Jones was admitted and marked as Exhibit 1. Mr Jones was cross-examined on this material. The evidence that was produced during the Hearing has confirmed that the industrial action which is the subject of the application is happening. The industrial action that is occurring involves, inter alia, the refusal by employees to perform work as directed so as to enable the vessel *MV Portland* to sail to Singapore.

[9] In addition, the evidence has established that further industrial action of the same or similar nature to that which is happening, is threatened, impending, and probable. Further, based on the evidence provided during the Hearing, I am satisfied that the industrial action that is happening and that which is threatened, impending and probable, is being organised by the MUA.

[10] The industrial action that is happening and the industrial action which is threatened, impending and probable, is being organised by the MUA and it is not protected industrial action which meets the common requirements as established under s. 413 of the Act.

[11] The MUA has advanced inter alia, the proposition that the action taken in this instance was not industrial action as defined in s. 19 of the Act on the basis that the direction of the employer was not a reasonable or lawful direction. Further, it was asserted by the MUA that the relevant industrial instrument, the *APS SHIP MANAGEMENT PTY LIMITED SEAGOING RATINGS ENTERPRISE AGREEMENT 2012* did not cover the work of the relevant MUA members in respect to the voyage of the *MV Portland* from Australia to Singapore.

[12] I have considered the basis upon which the application was opposed by the MUA. I do not believe that the direction of the employer was unreasonable such that in any way the industrial action could be construed to not satisfy the definition of industrial action contained in s. 19 of the Act. Further, I am unable to apprehend how any prospect that the relevant industrial instrument may not apply to the particular circumstances of the journey to Singapore could operate to validate unprotected industrial action.

[13] The existence of what may be considered to be a number of legitimate concerns 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 some clarification required about particular arrangements applicable to the performance of work.

[14] Although I may personally have great sympathy for the crew of the *MV Portland,* the predicament that these individuals face is a circumstance that is broadly shared by many other Australian workers. It is relevant to restate what I said earlier this year in relation to the crew of the *Alexander Spirit.* In this instance the name of the vessel has changed but the circumstances are fundamentally the same. The requirement to sail the *MV Portland* to Singapore can be likened with those vehicle manufacturing workers who will have to assemble the final Falcon, Commodore and Camry. The particular predicament of the crew of the *MV Portland* is not dissimilar to the circumstances faced by numerous Australian workers employed in industries which are struggling to remain competitive when exposed to global economic forces.

[15] Further, I acknowledge that there may be legitimate concerns about particular aspects of the journey to Singapore and the repatriation arrangements to Australia. These and any

other concerns are matters which should be pursued via relevant approaches to the employer and in the absence of any industrial action. In the event that the concerns are not resolved then relevant applications to this Commission would be appropriately made, once again, in the absence of any industrial action. These concerns, legitimate as they may be, cannot validate the taking of unprotected industrial action.

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

[17] Therefore, pursuant to s. 418 of the Act, the Commission must Order that the industrial action stop.

[18] The Orders [PR574026] as broadly sought by ASP are made and issued separately.

COMMISSIONER

Appearances:

Mr R Millar of Counsel, appeared with *Mr C Egan* of HWL Ebsworth Lawyers for ASP Ship Management Pty Ltd.

Mr A Slevin of Counsel appeared with *Mr K Bolwell* for the Maritime Union of Australia.

Hearing details:

2015.
Sydney and Melbourne (video hearing):
November 17.

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