

[2023] FWC 2597 [Note: An appeal pursuant to s.604 (C2024/91) was lodged against this decision - this decision has been quashed - refer to Full Bench decision dated 3 May 2024 [\[\[2024\] FWCFB 237\]](#)]



# DECISION

*Fair Work Act 2009*

s.472 - Application for an order relating to certain partial work bans

## **Application by Construction, Forestry, Maritime and Energy Union** (B2023/678)

DEPUTY PRESIDENT BINET

PERTH, 15 DECEMBER 2023

### *Certain partial work bans*

[1] Construction, Forestry, Maritime and Energy Union (**CFMEU**) have filed an application (**Application**) pursuant to section 472 of *Fair Work Act 2009* (Cth) (**FW Act**) with the Fair Work Commission (**FWC**). The Application seeks that the FWC order a variation to the proportion by which employees' payments and leave accruals were reduced by OSM Australia Pty Ltd trading as OSM Australia (**OSM**) as a consequence of industrial action engaged in by the employees.

[2] On 20 July 2023 the parties participated in a conciliation, but the issues in dispute could not be resolved.

[3] Directions for the filing of materials in advance of a hearing were issued to the parties on 28 July 2023 and amended on 11 August 2023 (**Directions**). The Application was listed for hearing in person in Perth on 12 October 2023 (**Hearing**).

### **Permission to be represented**

[4] The Directions invited the parties to make submissions as to whether the FWC should grant permission to the parties to be represented. A determination of this issue is necessary to ensure that the manner in which any hearing is conducted is fair and just.<sup>1</sup>

[5] OSM sought permission to be represented at the Hearing.

[6] Having considered the submissions of the parties, leave was granted to OSM to be represented pursuant to section 596(2)(a) of the FW Act on the grounds that it would enable the matter to be dealt with more efficiently taking into account the complexity of the matter.

[7] At the Hearing, Mr Luke Edmonds a solicitor employed by the CFMEU appeared on behalf of the CFMEU (**Mr Edmonds**) and Mr Simon Rogers a solicitor of Mills Oakley (**Mr Rogers**) appeared on behalf of OSM.

## Evidence

[8] In advance of the Hearing, the CFMEU filed witness statements of the following witnesses setting out their evidence in chief:

- a. Ms Sumayyah Sayed (**Ms Sayed**)<sup>2</sup>– Ms Sayed is a lawyer employed by the MUA. Ms Sayed filed three witness statements in these proceedings.
- b. Mr Robert Byrne (**Mr Byrne**)<sup>3</sup> – Mr Byrne was not available for cross examination and the CFMMEU withdrew his statement.

[9] Ms Sayed was cross examined by Mr Rogers at the Hearing.

[10] In accordance with the Directions OSM filed a witness statement of Mr Warren Harrower (**Mr Harrower**) setting out his evidence in chief.<sup>4</sup> Mr Harrower is the Employee Relations Manager of OSM. Mr Harrower gave additional evidence in chief and was cross examined at the Hearing by Mr Edmonds. Mr Harrower was not employed by OSM at the time the events the subject of this Application occurred.<sup>5</sup>

[11] The parties jointly prepared and filed a digital court book containing the evidence and submissions of the parties which was admitted at the Hearing and marked as an Exhibit DCB (**DCB**).

[12] The CFMEU were granted orders in [PR765236](#) for the production of OSM records of duties performed by Employees during the period in which the industrial action occurred.<sup>6</sup>

[13] The CFMEU filed written closing submissions on 31 October 2023, Tidewater filed written closing submissions on 8 November 2023 and the CFMEU filed written closing submissions in reply on 13 November 2023.

[14] In reaching my decision I have considered all the submissions made and the evidence tendered by the parties, even if not expressly referred to in these reasons for decision.

## Background

[15] OSM employs employees to perform work in the offshore oil and gas industry (**Employees**) who are covered by the *OSM Australia Pty Ltd and MUA Offshore Oil and Gas Enterprise Agreement 2021* (**Agreement**). Some of the Employees are members of the CFMMEU.<sup>7</sup>

[16] The Employees crew the following eight vessels operated by OSM's clients in the offshore oil and gas industry (**Vessels**):<sup>8</sup>

- a. Siem Pilot
- b. Siem Aquamarine
- c. Maersk Master
- d. Sunrise G
- e. Pacific Valour

- f. Pacific Vulcan
- g. Pacific Grackle.

[17] The Employees perform the roles of Chief Integrated Rating, Integrated Ratings, Chief Cooks, Cooks, Chief Steward or Steward onboard the Vessels.<sup>9</sup>

[18] In accordance with a protected action ballot order made on 14 March 2023, the CFMEU issued a formal notice notifying OSM of its members' intention to take protected industrial action (**Action Notice**).<sup>10</sup>

[19] The Action Notice provided that members of the CFMEU would engage in protected industrial action in the form of 12 hour stoppages from 6am on 22 March 2023 until 6am on 27 March 2023 (**Industrial Action Period**).<sup>11</sup>

[20] The Action Notice exempted the following work activities (**Exempt Duties**)<sup>12</sup>:

- a. watch keeping at sea;
- b. fire rounds;
- c. port security watches;
- d. safety drills;
- e. provision of meals and mess room services;
- f. movement of perishable stores;
- g. all dealings with emergency equipment in any manner; and
- h. any and all safety and emergency related issues.

[21] In response to the Action Notice, on 21 March 2023 OSM, provided its Employees with a written notice purportedly pursuant to s.471(1)(c) of the FW Act (**Payment Reduction Notice**).<sup>13</sup> In the Payment Reduction Notice, OSM informed Employees that:<sup>14</sup>

*“If you are directed to undertake the above Exemption duties, you will be engaging in a “partial work ban” (as that is defined in the Fair Work Act s470(3)).*

*OSM has considered these exemptions. It is extremely difficult to know what duties fall within the Exemptions and what duties do not. OSM has considered this and estimates that the usual time an employee would spend during any given day performing these duties will be 10%.*

*Accordingly, we confirm that if you do engage in partial work (that is, you engage in stoppages but perform some or all of the above duties as directed) your payments will be reduced by 90% for each day you engage in the partial work ban.”*

[22] The description of the exempted duties in the Payment Reduction Notice makes no reference to the “provision of meals and mess room services” listed as an Exempt Duty in the Action Notice.<sup>15</sup> Furthermore the Payment Reduction Notice made no reference to reductions in Employee leave accrual.

[23] In accordance with the Action Notice, Employees engaged in the notified industrial action for the duration of the Industrial Action Period.<sup>16</sup>

[24] OSM reduced the pay and leave accrual of the following thirteen Employees by 90 percent for the duration of the Industrial Action Period (**Affected Employees**):<sup>17</sup>

- a. Michael Hart
- b. Neil Bowles
- c. Clinton Crow
- d. Jeffry Badger
- e. David Suleiman
- f. Shane Oliver
- g. David Iyer
- h. Douglas Francis Hawes
- i. Ceri Williams
- j. Clifford Rowlands
- k. Daniel Nicolson
- l. Sam Conroy
- m. Walter Koteka

[25] The evidence of Mr Harrower who was not employed by OSM at the time of the Industrial Action was that the amount of the reduction was determined by his predecessor Mr Clarence Paul (**Mr Paul**) who adopted a calculation determined by Mr Paul's predecessor, Ms Osten. Ms Osten established her calculation for the purposes of industrial action which occurred in December 2022. According to Mr Harrower, the assessment conducted by Ms Osten was itself based on historical data.

[26] For the duration of the Industrial Action Period, the Affected Employees were rostered to perform 12 hour shifts, remained onboard the vessel on which they were employed and remained ready to (and did) perform the Exempt Duties.<sup>18</sup>

[27] On 23 May 2023, the CFMEU asked the Affected Employees to provide the following information in relation to each 12 hour period of stoppage during the Industrial Action Period:<sup>19</sup>

- “1. *Full name?*
2. *Were you employed by Tidewater or OSM? (this info can be found on your payslip)*
3. *What Vessel were you engaged on?*
4. *Name/date of Action you participated in? e.g. work stoppages from 22 March to 27 March 2023*
5. *Did you receive a notice letter notifying you of reduction in pay? if so, please review the attachments and confirm whether it was one (or both) of those.*
6. *Which of the following duties did you perform during the action period:*

- *Watch Keeping at Sea*
- *Fire Rounds*
- *Port Security Watches*
- *Safety Drills*
- *Provision of meals*
- *Movement of perishable stores*

- *All dealings with emergency equipment*  
*Any safety and emergency related issues*

7. *What other tasks/ duties did you perform through the action?*
8. *How long did you perform each of these duties?*
9. *How much do you believe you were underpaid?"*

[28] Each Affected Employee provided the requested information.<sup>20</sup>

[29] In accordance with the Production Order issued on [PR765236](#) in 16 August 2023, OSM produced copies of documents described as “Daily Industrial Action Report” containing OSM’s records of the industrial action engaged in by the affected Employees during the Industrial Action Period.<sup>21</sup> The CFMMEU do not contest the accuracy of this information.

[30] The parties subsequently filed a document setting out an agreed summary of the time worked during the Industrial Action Period by the Affected employees.<sup>22</sup>

### **Consideration**

[31] Section 472 of the FW Act provides that:

*“s.472 Orders by the FWC relating to certain partial work bans*

- (1) The FWC may make an order varying the proportion by which an employee's payments are reduced.*
- (2) The FWC may make the order only if a person has applied for it under subsection (4).*
- (3) In considering making such an order, the FWC must take into account:*
  - (a) whether the proportion specified in the notice given under paragraph 471(1)(c) was reasonable having regard to the nature and extent of the partial work ban to which the notice relates; and*
  - (b) fairness between the parties taking into consideration all the circumstances of the case.*
- (4) An employee, or the employee's bargaining representative, may apply to the FWC for an order under subsection (2) if a notice has been given under paragraph 471(1)(c) stating that the employee's payments will be reduced.”*

[32] There is no dispute that the CFMMEU is a bargaining representative of the Affected Employees and therefore has standing to make the Application.

[33] Section 471 of the FW Act authorises an employer to reduce the payment of employees engaging in partial work bans. Section 471 provides as follows:

*“s. 471 Payments relating to partial work bans*

*Employer gives notice of reduction in payments*

- (1) *If:*
- (a) *an employee engaged, or engages, in protected industrial action against an employer on a day; and*
  - (b) *the industrial action is a partial work ban; and*
  - (c) *the employer gives to the employee a written notice stating that, because of the ban, the employee's payments will be reduced by a proportion specified in the notice;*
- then the employee's payments are reduced in accordance with subsection (2) in relation to the period (the industrial action period) referred to in subsection (5).*
- (2) *The employee's payments in relation to the industrial action period are reduced:*
- (a) *by the proportion specified in the notice; or*
  - (b) *if the FWC has ordered a different proportion under section 472—by the proportion specified in the order;*
- and the modern award, enterprise agreement or contract of employment that applies to the employee's employment has effect accordingly.*
- (3) *The regulations may prescribe how the proportion referred to in paragraph (2)(a) is to be worked out.*

*Employer gives notice of non payment*

- (4) *If:*
- (a) *an employee engaged, or engages, in protected industrial action against an employer on a day; and*
  - (b) *the industrial action is a partial work ban; and*
  - (c) *the employer gives to the employee a written notice stating that, because of the ban:*
    - (i) *the employee will not be entitled to any payments; and*
    - (ii) *the employer refuses to accept the performance of any work by the employee until the employee is prepared to perform all of his or her normal duties;*
- then the employee is not entitled to any payments in relation to the period (the industrial action period) referred to in subsection (5).*
- (4A) *If:*
- (a) *an employer has given an employee a notice under paragraph (4)(c); and*
  - (b) *the employee fails or refuses to attend for work, or fails or refuses to perform any work at all if he or she attends for work, during the industrial action period;*
- then:*
- (c) *the failure or refusal is employee claim action, even if it does not satisfy subsections 409(2) and 413(4), if the related industrial action referred to in paragraph (4)(a) is employee claim action; or*
  - (d) *the failure or refusal is employee response action, even if it does not satisfy subsection 413(4), if the related industrial action referred to in paragraph (4)(a) is employee response action.*

*The industrial action period*

- (5) *The industrial action period is the period:*
- (a) *starting at the later of:*
    - (i) *the start of the first day on which the employee implemented the partial work ban; or*
    - (ii) *the start of the next day, after the day on which the notice was given, on which the employee performs work; and*
  - (b) *ending at the end of the day on which the ban ceases.*

*Form and content of notice*

- (6) *The regulations may prescribe requirements relating to one or both of the following:*
- (a) *the form of a notice given under paragraph (1)(c) or (4)(c);*
  - (b) *the content of such a notice.*

*Manner of giving notice*

- (7) *Without limiting paragraph (1)(c) or (4)(c), the employer is taken to have given a notice in accordance with that paragraph to the employee if the employer:*
- (a) *has taken all reasonable steps to ensure that the employee, and the employee's bargaining representative (if any), receives the notice; and*
  - (b) *has complied with any requirements, relating to the giving of the notice, prescribed by the regulations.*

*Employer does not give notice*

- (8) *If:*
- (a) *an employee engaged, or engages, in protected industrial action against an employer on a day; and*
  - (b) *the industrial action is a partial work ban; and*
  - (c) *the employer does not give the employee a notice in accordance with paragraph (1)(c) or (4)(c);*
- then the employee's payments for the day are not to be reduced because of the ban."*

[34] OSM rely on the Payment Reduction Notice as evidence of its compliance with section 471(1)(c) to authorise its deduction of pay and leave entitlements.

[35] Regulation 3.23(2) of the *Fair Work Regulations 2009* (Cth) (**Regulations**) requires that a notice given under paragraph 471(1)(c) must:

- "(a) state that the employee's payments will be reduced by an amount specified in the notice for each day the employee engages in the partial work ban; and*
- (b) specify an estimate of the usual time the employer considers an employee would spend during a day performing the work that is the subject of the work ban; and*
- (c) specify the amount by which the employee's payments will be reduced for each day the employee engages in the work ban."*

[36] The CFMEU submit that the Payment Reduction Notice is vague and does not comply with Regulation 3.23(2)(b).

[37] The Payment Production Notice relevantly stated the following:

*“PARTIAL WORK BANS*

*If you are directed to undertake the above Exemption duties, you will be engaging in a “partial work ban” (as that is defined in the Fair Work Act s470(3)).*

*OSM has considered these exemptions. It is extremely difficult to know what duties fall within the Exemptions and what duties do not. OSM has considered this and estimates that the usual time an employee would spend during any given day performing these duties will be 10%.*

*Accordingly, we confirm that if you do engage in partial work (that is, you engage in stoppages but perform some or all of the above duties as directed) your payments will be reduced by 90% for each day you engage in the partial work ban.”*

[38] The CFMEU submits that the Payment Reduction Notice did not comply with Regulation 3.23 because it did not specify an estimate of the usual time OSM considered that an Employee would spend during a day performing the work that was the subject of the work ban.

[39] The Payment Production Notice did the reverse. It specified OSM’s estimate of the usual time that the Employees performed duties other than those the subject of the work bans. Furthermore, the Payment Reduction Notice made no reference to the deduction of leave accruals.

[40] In considering whether to make an order to vary the proportion by which an employees payments are to be reduced, the FWC must consider whether the proportion specified in the notice given under paragraph 471(1)(c) was reasonable having regard to the nature and extent of the partial work ban to which the notice relates.

[41] Deputy President Easton explained in *Transport Workers’ Union of Australia v Transit (NSW) Services Pty Limited T/A Transit Systems* that:<sup>23</sup>

*“[50] Section 472(3)(a) requires the Commission to consider whether the calculation under Regulation 3.21 is reasonable. This firstly requires the Commission to assess whether the employer’s methodology and calculation of the time spent on banned work is sound. The Commission might consider whether the employer’s estimations of the time taken to perform certain work are reasonable, whether the employer has included or excluded particular tasks, and so on.”*

[42] Regulation 3.21 of the *Fair Work Regulations 2009* (Cth) (**Regulations**) provides the following mechanism to determine the proportion to be paid to employees engaged in partial work bans:

***“Reg. 3.21 Payments relating to partial work bans—working out proportion of reduction of employee’s payments***

*For subsection 471(3) of the Act, the proportion mentioned in paragraph 471(2)(a) of the Act is worked out for an employee or a class of employees by carrying out the*



*following steps.*

**Step 1**      *Identify the work that an employee or a class of employees is failing or refusing to perform, or is proposing to fail or refuse to perform.*

**Step 2**      *Estimate the usual time that the employee or the class of employees would spend performing the work during a day.*

**Step 3**      *Work out the time estimated in Step 2 as a percentage of an employee's usual hours of work for a day.*

*The solution is the proportion by which the employee's payment will be reduced for a day."*

[43] OSM estimated that the usual time that the Employees would spend performing the Exempt Duties was 10%. The Employees are engaged to perform 12 hour shifts. Ten percent of a twelve hour shift is 72 minutes.

[44] The CFMEU submit that the proportion calculated by OSM and specified in the Payment Reduction Notice was not reasonable having regard to the nature and extent of the partial work ban to which the notice relates.

[45] The information contained in the Daily Industrial Action Report indicates that as a matter of fact that the Employees performed on average more than 72 minutes of work.

[46] This was conceded under cross-examination, by Mr Harrower:<sup>24</sup>

*"MR EDMONDS: You have seen the industrial action reports. You would accept, wouldn't you, that a number of those employees, the vast majority of those employees, performed more than 72 minutes of work on days where protected action occurred?  
MR HARROWER: I agree with that."*

[47] The parties agree that the percentage of work completed by the Affected Employees during the period of the partial work bans was 34.82%.<sup>25</sup> There was therefore, as a matter of fact, a significant difference between OSM's estimate of the time Affected Employees would spend performing the Exempt Duties and the actual time Affected Employees spent performing the Exempt Duties.

[48] The reasonableness of the estimate made by OSM is immediately bought in question by the discrepancy between the description of the Exempt Duties in the Notice of Protected Action and the Payment Reduction Notice. The provision of meals and the provision of mess room services, that is, the cooking of food and the serving or cleaning of the mess room are two different and separate tasks. That OSM did not accurately identify the industrial action proposed may explain in part the discrepancy between OSM estimate and the actual hours worked by Affected Employees and would weigh in favour of a finding that the calculation relied on by OSM was not reasonable.

[49] The witness who gave evidence on behalf of OSM at the Hearing, Mr Harrower, had no

direct knowledge of how the estimate was calculated as he was not employed by OSM at the time the industrial action occurred. OSM elected not to call Mr Paul who was the relevant OSM HR Manager at the time of the industrial action.

**[50]** The evidence that Mr Harrower did give reveals that no contemporaneous estimate of the time Affected Employees would spend performing the Exempt Duties was undertaken. Rather, Mr Paul simply adopted an estimate used for earlier industrial action. There is no evidence that Mr Paul turned his mind to the making of an appropriate estimate in the circumstances of the pending industrial action. Mr Paul merely adopted an estimate made for the purposes of industrial action which occurred some time earlier. Furthermore, it would appear that Mr Paul was not involved in undertaking this earlier estimate and therefore his knowledge of its accuracy is unclear. In addition, the estimate was itself based on historical patterns of work. There is no evidence before me to suggest that these patterns of work have remained undisturbed over time or that Mr Paul turned his mind to this possibility.

**[51]** Furthermore, there is no evidence before me that the historical estimate matched the actual hours worked by the Employees during the previous industrial action such that it might be used as a reliable measure.

**[52]** OSM submit that it had no way of knowing what work would or not be performed by the Affected Employees and that this excused its reliance on a historical estimate. However, the Exempt Duties were clearly identified and a number of the Exempt Duties (including those which required the longest time to perform) were duties which could reasonably be presumed to be performed. For example, the evidence is that the Affected Employees have a separate statutory requirement to perform watch duty. Further more for obvious reasons the provision of meals and mess room services are typically excluded from industrial action for.

**[53]** OSM also submit that the work performed by the Affected Employees could not be commercially valued at more than 10% and the 'inconvenience' suffered by OSM outweighs the value of duties which were performed. The statutory regime requires employers to have reference to the time the relevant duties take to perform not some monetary value that the employer might attach to the duties. In any event it is clear from the evidence that the Exempt Duties included statutory duties which if not performed would have required the vessel to return from sea. The performance of those duties allowed the Vessel's to stay 'alongside' reducing the impact of the industrial action on OSMs clients. Inconvenience to employers is the point of protected industrial action which is made lawful by the FW Act to balance the bargaining power between employees and employers.

**[54]** Clause 26.2 of the Agreement provides that Employees accrue time off at the rate of 1.153 days' leave to compensate Employees public holidays, intervals of leave, annual leave, personal/carer's leave, compassionate leave and time spent travelling in off duty time. The evidence is that leave accrues each day an Employee is on a vessel regardless of the number of hours actually worked on that day.<sup>26</sup> If there is no nexus between hours of work and leave accrual it is difficult to establish how leave accrual can be withheld for partial performance.

**[55]** OSM withheld 90% of Employees leave accruals during the period of Industrial Action. OSM's intention to do so was not made clear in the Payment Reduction Notice.

[56] OSM did not point to any authority in which leave accruals have been withheld pursuant to section 471.

[57] Taking into account these matters, I am not satisfied that the leave and pay withheld was reasonable having regard to the nature and extent of the work ban.

[58] In determining whether to make an Order, the FWC must also consider the fairness between the parties taking into consideration all the circumstances of the case. Given the all the circumstances of this case, and in particular:

- a. The discrepancy between the Exempt Duties and the duties listed in the Notice of Reduction it was unclear to Employees what duties they would be paid for and what duties they would not be paid for.
- b. The employees were not clearly notified that OSM intended to withhold leave accruals.
- c. No contemporaneous estimate was undertaken by OSM and the validity of the assessment which it relied upon is not supported by evidence.
- d. The actual hours employees worked on average significantly exceeded the estimate made by OSM which suggests that the estimate was itself not reasonable.

[59] I am satisfied that as a matter of fairness between the parties it is appropriate to make an order varying the proportion by which the Employee's payments are reduced as follows:

- a. An Order to vary the proportion, by which the Affected Employee payments were reduced to 65%.
- b. An Order to vary the proportion, by which the Affected Employee's accrual of leave were reduced to 0%.

[60] An order<sup>27</sup> to this effect will be issued with this Decision.



DEPUTY PRESIDENT

*Appearances:*

*Mr L Edmonds, for the Applicant.*

*Mr S Rogers, for the Respondent.*

*Hearing details:*

2023

PERTH

12 October

*Final written submissions:*

Applicant's final written submissions filed 13 November 2023.

Respondent's final written submissions filed 8 November 2023.

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<sup>1</sup> *Warrell v Walton* (2013) 233 IR 335, 341 [22].

<sup>2</sup> Digital Court Book (DCB) Ibid 35-104, 120-125.

<sup>3</sup> Ibid 126.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid 139.

<sup>6</sup> Ibid 106-108.

<sup>7</sup> Ibid 9.

<sup>8</sup> Ibid 138.

<sup>9</sup> Ibid 138.

<sup>10</sup> Ibid 9, 11-12.

<sup>11</sup> Ibid 8, 15.

<sup>12</sup> Ibid 13-14.

<sup>13</sup> Ibid 8.

<sup>14</sup> Ibid 22.

<sup>15</sup> Ibid 21.

<sup>16</sup> Ibid 9.

<sup>17</sup> Ibid 11.

<sup>18</sup> Ibid 9-10.

<sup>19</sup> Ibid 71.

<sup>20</sup> Ibid 19.

<sup>21</sup> Ibid 138.

<sup>22</sup> Closing Submissions of the CFMMEU filed on 30 October 2023. At 8.

<sup>23</sup> [\[2021\] FWC 6561](#).

<sup>24</sup> Transcript of Proceedings, 12 October 2023, PN815.

<sup>25</sup> Closing Submissions of CFMMEU filed on 30 October 2023 at page 6.

<sup>26</sup> Transcript of Proceedings, 12 October 2023 PN48 - PN51.

<sup>27</sup> [PR768831](#).