DECISION

Fair Work Act 2009
s.418—Industrial action

Commonwealth of Australia represented by the Australian Federal Police
v
Police Federation of Australia – Australian Federal Police Association Branch
(C2024/5850)

COMMISSIONER MCKINNON SYDNEY, 26 AUGUST 2024

Application for an order that industrial action by employees or employers stop etc. - industrial action authorised by protected action ballot – effect of undertakings – whether non-compliance with undertakings renders industrial action unprotected

[1] On Sunday 25 August 2024, the Commonwealth of Australia as represented by the Australian Federal Police (AFP) applied under section 418 of the *Fair Work Act 2009* (the Act) for orders that unprotected industrial action stop, not occur and not be organised. The application was directed at notified industrial action due to commence on 27 August 2024 by the Police Federation of Australia – Australian Federal Police Association Branch (AFPA) and its members who are covered by the *Australian Federal Police Enterprise Agreement 2017 – 2020* (2017 Agreement) and the *Australian Federal Police Executive Level Enterprise Agreement 2019 - 2021* (2019 Agreement). The AFPA and its affected members oppose the application.

[2] The matter was listed for hearing on Monday 26 August 2024 at 4.00pm. Commander Craig Bellis and Ms Daisy Oman gave evidence for the AFP. Mr Alex Caruana and Mr Devin Rudaizky gave evidence for the AFPA.

Background

[3] The 2017 Agreement covers the AFP and AFP staff who are not Executive Level employees. The 2019 Agreement covers Executive Level staff engaged by the AFP.

[4] Negotiations for an agreement to replace the 2017 Agreement and the 2019 Agreement commenced on 26 September 2023 and have been ongoing for approximately 12 months. Bargaining was initiated by a request to bargain from the AFPA on 2 September 2023 and the AFP's agreement to the request (and subsequent issue of a Notice of Employee Representational Rights) on 15 September 2023.

[5] From 24 to 31 May 2024, the AFP requested employees to vote on a proposed agreement to replace the 2017 Agreement and the 2019 Agreement. A majority of employees did not approve the proposed agreement.

[6] A further round of bargaining commenced on 9 July 2024.

[7] On 14 February 2024, the AFPA applied for a protected action ballot order. The order was issued by the Commission on 21 February 2024 and on 8 March 2024, a majority of employees voted to approve protected industrial action.

[8] On 5 April 2024, the Commission extended the 30-day period for taking protected industrial action authorised by the protected action ballot order. The extended period concluded on 5 May 2024.

[9] On 3 July 2024, the AFPA applied for a second protected action ballot order. The order was made by the Commission on 5 July 2024 and on 23 July 2024, the protected action ballot was declared approved by a majority of employees.

[10] On 5 August 2024, the AFPA issued 2 notices of intention to take protected industrial action authorised by the second protected action ballot. The notices were withdrawn on 7 August 2024.

[11] On 13 August 2024, the AFPA issued 1 notice of intention to take protected industrial action authorised by the second protected action ballot. On 16 August 2024, the AFPA advised that it would not take action pursuant to the notice.

[12] On 19 August 2024, the AFPA issued 7 notices of intention to take protected industrial action authorised by the second protected action ballot. It is these notices that are the subject of this application. The notified industrial action involves stoppages of work for up to 4 hours at major Australian airports.

[13] On 20 August 2024, the period for taking industrial action under the second protected action ballot was extended by 30 days. The 30-day period expires on 23 September 2024.

[14] The notified industrial action is the subject of undertakings given to the Commission and the AFP on 23 August 2024. Relevantly for present purposes, the undertakings provide for the AFPA to:

1. By 10.00am on Sunday 25 August 2024, provide the AFP with a list of persons (first names, last names and AFP numbers) "who wish to apply to be able to wear their accoutrements and radios whilst taking the protected industrial action" for the purpose of an exemption from the Commissioner's Order on Operational Safety (CO3) in relation to the use of accoutrements while on duty ("Undertaking 2"), and
2. By 12.00pm on Sunday 25 August 2024, take reasonable steps to communicate the substance of the undertakings to its members engaging in the stoppage by email, text message, and send a copy of the communications to Commander Bellis ("Undertaking 9").

[15] *Redacted*.

[16] *Redacted*.

[17] *Redacted*.

[18] *Redacted*.

[19] *Redacted*.

[20] *Redacted*.

Relevant law

[21] Section 418 of the Act provides as follows:

> "**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."

[22] Section 19 of the Act defines "industrial action". It includes:

(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; and

(d) the lockout of employees from their employment by the employer of the employees, by preventing employees from performing work under their contracts of employment without terminating those contracts.

[23] Industrial action does not include action by employees that is authorised or agreed to by the employer of the employees; action by an employer that is authorised or agreed to by, or on behalf of, employees of the employer; or employee action based on the employee's reasonable concern about an imminent risk to his or her health or safety, where the employee has not unreasonably failed to comply with directions to perform other safe and appropriate available work. Industrial action is also not protected industrial action under the Act if it is taken in the period after an enterprise agreement is approved by the Commission until its nominal expiry date.

[24] Section 408 of the Act deals with protected industrial action. Relevantly, industrial action is protected industrial action for a proposed enterprise agreement if it is "employee claim action for the agreement".

[25] Section 409 describes "employee claim action for the agreement" as follows:

"Employee claim action

(1) ***Employee claim action*** for a proposed enterprise agreement is industrial action that:
(a) is organised or engaged in for the purpose of supporting or advancing claims in relation to the agreement that are only about, or are reasonably believed to only be about, permitted matters; and
(b) is organised or engaged in, against an employer that will be covered by the agreement, by:
(i) a bargaining representative of an employee who will be covered by the agreement; or

(ii) an employee who is included in a group or groups of employees specified in a protected action ballot order for the industrial action; and

(c) meets the common requirements set out in Subdivision B; and

(d) meets the additional requirements set out in this section.

Protected action ballot is necessary

(2) The industrial action must be authorised by a protected action ballot (see Division 8 of this Part).

Unlawful terms

(3) The industrial action must not be in support of, or to advance, claims to include unlawful terms in the agreement.

Industrial action must not be part of pattern bargaining

(4) A bargaining representative of an employee who will be covered by the agreement must not be engaging in pattern bargaining in relation to the agreement.

Industrial action must not relate to a demarcation dispute etc.

(5) The industrial action must not, if it is being organised or engaged in by a bargaining representative, relate to a significant extent to a demarcation dispute or contravene an FWC order that relates to a significant extent to a demarcation dispute.

Notice requirements after suspension order must be met

(6) If section 429 (which deals with employee claim action without a further protected action ballot after a period of suspension) applies in relation to the industrial action, the notice requirements of section 430 must be met.

(6A) Each bargaining representative who applied for a protected action ballot order for the protected action ballot for the industrial action must not have contravened any order made under section 448A (which is about mediation and conciliation conferences) that related to the protected action ballot order.

Officer of an employee organisation

(7) If an employee organisation is a bargaining representative of an employee who will be covered by the agreement, the reference to a bargaining representative of the employee in subparagraph (1)(b)(i) of this section includes a reference to an officer of the organisation."

[26] The "common requirements" for industrial action to be protected industrial action are found in s 413 of the Act:

"Common requirements

(1) This section sets out the common requirements for industrial action to be protected industrial action for a proposed enterprise agreement.

Type of proposed enterprise agreement

(2) The industrial action must not relate to a proposed enterprise agreement that is a greenfields agreement or a cooperative workplace agreement.

Genuinely trying to reach an agreement

(3) The following persons must be genuinely trying to reach an agreement:

(a) if the person organising or engaging in the industrial action is a bargaining representative for the agreement--the bargaining representative;
(b) if the person organising or engaging in the industrial action is an employee who will be covered by the agreement--the bargaining representative of the employee.

Notice requirements

(4) The notice requirements set out in section 414 must have been met in relation to the industrial action.

Compliance with orders

(5) The following persons must not have contravened any orders that apply to them and that relate to, or relate to industrial action relating to, the agreement or a matter that arose during bargaining for the agreement:
(a) if the person organising or engaging in the industrial action is a bargaining representative for the agreement--the bargaining representative;
(b) if the person organising or engaging in the industrial action is an employee who will be covered by the agreement--the employee and the bargaining representative of the employee.

No industrial action before an enterprise agreement etc. passes its nominal expiry date

(6) The person organising or engaging in the industrial action must not contravene section 417 (which deals with industrial action before the nominal expiry date of an enterprise agreement etc.) by organising or engaging in the industrial action.

No suspension or termination order is in operation etc.

(7) None of the following must be in operation:

(a) an order under Division 6 of this Part suspending or terminating industrial action in relation to the agreement;

(b) a Ministerial declaration under subsection 431(1) terminating industrial action in relation to the agreement;
(c) an intractable bargaining declaration in relation to the agreement."

Is the action 'industrial action'?

[27] The stoppages of work described in the 19 August 2024 notices amount to a ban on the performance of work. They meet the description of industrial action for the purposes of s.19 of the Act.

Is the industrial action unprotected?

[28] Stoppages of work for up to 1 shift in duration are authorised by the protected action ballot declared on 23 July 2024 and extended for a 30-day period on 20 August 2024. Accordingly, notified stoppages of up to 4 hours fall within this ambit and are authorised by the ballot.

[29] The action is being organised against the AFP (who will be covered by the proposed agreement) for the purpose of advancing claims in relation to the proposed agreement to replace the 2017 and 2019 Agreements. The action is being organised by the AFPA which is a bargaining representative for employees who will be covered by the proposed agreement.

[30] There is no submission to the effect that the claims advanced are not about permitted matters or involve unlawful terms. Nor is there any suggestion of pattern bargaining by the AFPA or any other employee bargaining representative in the circumstances of this case. The industrial action does not relate to any demarcation dispute. No suspension order has been made in relation to the dispute. There is no assertion of any contravention by the AFPA of an order made under s 448A in relation to the protected action ballot order.

[31] That leaves the question of whether the common requirements are met.

[32] The industrial action does not relate to a greenfields agreement or a cooperative workplace agreement. It relates to a single enterprise agreement covering the AFP and AFP members up to Executive Level.

[33] The AFPA, who is organising the industrial action, is genuinely trying to reach an agreement with the AFP. The parties have reached a difficult point in the negotiations such that the AFP considers there to be an 'impasse' (although this is denied by the AFPA). Each remains intent on reaching an agreement but on or near to their own terms. As noted above there is no indication on the materials that there is any claim for matters that would not be permitted.

[34] The notice requirements in s 414 have been met in relation to the industrial action. As noted above, the AFPA is organising "employee claim action". It gave written notice of the action to the AFP on 19 August 2024. This was at least 5 working days' notice of the action, as required by the protected action ballot order issued on 5 July 2024. The notice was not given until after 23 July 2024 when the results of the protected action ballot were declared.

[35] The AFP submits that the AFPA's notice of protected industrial action is qualified by the undertakings given on 23 August 2024. It submits that industrial action other than in accordance with the undertakings will be industrial action that is not in accordance with the notice. The difficulty is that no such limitation is found in the Act, which contains a detailed set of requirements and processes that must be met for industrial action to be protected, including the notice requirements in s 414. For example, there is no provision either for the giving of undertakings in relation to a notice of industrial action, or for the variation of such notices, either unilaterally or by agreement.

[36] There is a separate requirement in s.409(2) of the Act for industrial action to be authorised by a protected action ballot. But for similar reasons, a failure to comply with undertakings given only after industrial action has been authorised by a protected action ballot does not render what would otherwise be protected industrial action unprotected. That is not to say that undertakings have no work to do. In the present case, the undertakings were given in connection with an application under s.424 of the Act. They form part of the factual matrix in that case, relevant to whether the Commission can be satisfied that the conditions for making an order to suspend or terminate industrial action have been met.

[37] There are no orders that apply to the AFPA as the organiser of industrial action and that it has contravened relating to the proposed agreement, or industrial action relating to the agreement, or a matter that arose in bargaining for the agreement. The dispute is instead about the AFPA's compliance with undertakings it gave both to the Commission and to the AFP in connection with a related application by the AFP under s.424 of the Act for a suspension or termination of the industrial action.

[38] I agree with the AFP that the AFPA has not fully complied with the undertakings in two respects. Firstly, the AFPA did not provide the AFP with "a list of persons who wish to apply to be able to wear their accoutrements and radios whilst taking the protected industrial action". It gave the AFP a list of AFPA members that its records seemed to indicate were assigned to work in airports. It did not take what seems an obvious additional step of seeking to identify who on the list would ordinarily wear accoutrements while on duty, and who was not eligible to take protected industrial action. Some latitude can be afforded in the circumstances of a legal case of some significance which is affected by short statutory timeframes. But even so, the AFPA's approach to compliance with Undertaking 2 was cursory at best.

[39] Secondly, the AFPA did not adequately communicate the substance of the undertakings to its membership as required by Undertaking 9, and did not send a copy of this communication to Commander Bellis until the agreed time for doing so had passed and a query was raised by the AFP.

[40] These are matters that will arise more substantively for consideration in the AFP's separate application under s.424. Suffice to say for present purposes that the undertakings are not orders of the Commission and accordingly no finding can be made that the AFPA has not complied with the common requirements because of its non-compliance with the undertakings.

[41] The nominal expiry dates for the 2017 Agreement and the 2019 Agreements are 24 May 2021 and 11 April 2021 respectively. No industrial action was organised by the AFPA until after these dates had long since passed.

[42] Finally, and as things presently stand, there is no order under Division 6 of Part 3-3 of the Act suspending or terminating industrial action in relation to the proposed agreement. There is no Ministerial declaration under s.431(1) terminating industrial action in relation to the agreement or any intractable bargaining declaration in relation to the agreement.

[43] It follows that the common requirements for industrial action have been met.

Conclusion and order

[44] For the reasons above, it does not appear to me that the notified industrial action is not, or would not be, protected industrial action. Accordingly, the conditions for making an order under s.418 of the Act are not made out.

[45] The application is dismissed.

COMMISSIONER

Appearances:

D Trindade of Clayton Utz for the applicant.
L Saunders with *J Martin* of Counsel for the respondent.

Hearing details:

2024.
Sydney (by video):
August 26.

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