DECISION

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

Sydney Trains, NSW Trains
v
Australian Rail, Tram and Bus Industry Union
(C2025/1055)

DEPUTY PRESIDENT ROBERTS SYDNEY, 16 FEBRUARY 2025

Application for order that industrial action stop – partial work ban by employees – notice by employers under s 471 – failure of employees to attend work – sick leave – increase in levels of sick leave - whether action constituted industrial action – whether evidence established covert campaign of industrial action organised by union – whether action happening, threatened, impending or probable

[1] Sydney Trains and NSW Trains (Applicants) have jointly applied under s.418 of the *Fair Work Act* 2009 (Cth)(Act) for an order to stop industrial action which they say is being taken by employees of the Applicants and organised by the Australian Rail Tram and Bus Industry Union (RTBU or Union).

[2] The application was heard at short notice on 15 February 2025. Prior to the hearing both parties had sought and were granted orders for the production of documents from the opposing party. Material was produced by both parties in response to those orders.

[3] The background to the application is largely uncontroversial. The Applicants and the Union, and other unions, have been involved in protracted negotiations in relation to a proposed enterprise agreement. The negotiations have involved various forms of protected industrial action by employees of the Applicants, including members of the RTBU, and extensive litigation.

[4] On 2 February 2025 the RTBU provided notice to the Applicants under s.414 that its members would engage in a partial work ban, namely:

> *A limitation on the manner in which work is performed in the form of a restriction on the maximum speed Train Crew will operate trains, being 23km/h less than the posted speed limit on sections of track that are 80km/h or higher…* (the go-slow)

[5] The ban was initially to commence on 12 February 2025 but the commencement was pushed back by the Union to 14 February 2025.

[6] On 5 February 2025, the Applicants issued a notice under s.471(4)(c) to all relevant employees – that is, train crew – advising that if they participated in the go-slow ban, the

Applicants would not accept any work from them and they would not be paid for the period of the industrial action.

[7] On 14 February a number of employees failed to attend for work. Of these a number were recorded in the Applicants' roster system as 'sick to advise'. Others were recorded as 'failure no advice'. The first group were employees who had notified that they were absent due to illness. The latter group consists of persons who did not contact the Applicant to advise of their non-attendance and others who contacted the Applicants but did not provide a reason for their absence.

[8] The Applicants contend that the absences on 14 February and following were at levels that exceeded absences that are ordinarily recorded and were 'unprecedented'. They maintained that the employees' absences were part of an organised campaign of industrial action that had been coordinated by the Union. They said the action was unprotected industrial action and that an order should issue restraining the Union and the employees from engaging in industrial action until an agreement is made between the employers and employees.

Evidence

[9] Ms Abbas gave evidence for the Applicants. She said that as at 14 February 2025 there were 394 train crew and guards who had not attended for work. She said of these, 273 had called in sick, that is 'sick to advise' and the balance had given no reason for non-attendance (failure no advice). According to Ms. Abbas, as at 12 noon on 14 February 2025 the total numbers of absences were slightly higher, being 292 persons on sick leave and 229 on failure no advice.

[10] Ms. Abbas said that the absences on 14 February were 'highly unusual' and that there had been a 29% and 24% increase in sick leave for drivers and guards respectively on that day compared to the last six Fridays preceding 14 February. Ms Abbas updated these figures with a further statement prepared on 15 February. According to that statement, as at 5pm on 14 February there had been a 40% and 28% increase in sick leave for drivers and guards respectively compared to the average of the previous 6 Fridays. Ms. Abbas provided further evidence as to the total number of drivers and guards on sick leave as at 8.30am on 15 February. The total number was 210 persons consisting of 115 drivers and 95 guards respectively.

[11] Mr. Dornan, the Assistant Secretary of the Union's New South Wales Branch Locomotive Division, gave evidence for the Union. He said the Union had given advice to its members which included that the s.471 notices issued by the Applicants meant that train crew members were not required to attend work during the period in which the 'go-slow' was active and that if members attended work and did implement the 'go-slow' they would not be paid. He said members were advised that the assessment as to whether an employee had attempted to perform the 'go-slow' would be carried out by their manager who would interpret any actions taken by the employee and determine whether they had participated in the 'go-slow'.

[12] Mr Dornan said the Union did not advise anyone to use sick leave during this period and that there was no reason they would so advise as the employees' choice was either to not engage in the partial work ban or not attend work at all. He said whether an employee attended or not was a matter of choice for them.

[13] Mr Dornan said the union did not have a strategy of encouraging people not to attend although it was possible that a subset of the union's delegates (called convenors) may have actively encouraged employees not to attend. He said a specific example of this was a text message that was in evidence and was apparently sent to a group of rail employees from one such convenor which said, amongst other things, *"The go slow is on tomorrow…If you can afford to take a hit to your pay you don't have to show up to work at all…Let's fuck the network up"*. Mr. Dornan said the convenor in question had strong feelings about the state of the negotiations but in the case of the text message, he was speaking for himself and not the union. He said if the union wanted to disrupt the rail network it would simply notify a stoppage.

[14] Mr Dornan said he contacted the convenor responsible for the text message on 14 February to check on his welfare and was told by the convenor that he was mentally unwell and unfit for work and that he had a medical certificate to confirm this was the case. He also gave evidence about speaking with four union members about their non-attendance for work on 14 February. He said these discussions indicated that employees were stressed and fatigued and that the people he spoke to had medical evidence supporting their absence on sick leave. Mr. Dornan also gave the following evidence:

> *The feedback I received from our members was that they were concerned about attending work with the intention of complying with normal operations, only to be inadvertently delayed by external factors—such as track conditions, adverse weather, or another driver operating at a reduced speed. They feared that management might wrongly interpret such delays as participation in the Go-Slow protected industrial action and subsequently withhold their pay. Given the Rail Agencies' apparent rigid enforcement of the s 471 notices, members were unwilling to take this risk.*

[15] A circular from the Union to its members dated 13 February was also in evidence. It describes the s.471 notice as a 'lock-out notice.' It included the following:

> *Some key facts about the s.471 lock-out notice:*
>
> 1. *You don't have to tell anyone of your intention at any time – silence is golden.*
> 2. *You can simply not go to work*
> 3. *You don't have to tell anyone you are coming back the next day, you just have to turn up.*
> 4. *You will not be paid for the entire shift that you either don't show up for, or enforce the go-slow. If you are found to have been enforcing the go-slow you may lose your full shift of pay.*
> 5. *If you choose to apply a ban or don't show up you only lose that shift's pay not the full 2 week period.*

Submissions

[16] The Applicants submitted that it was well-established that employees taking sick leave en masse in a coordinated and collective way meets the definition of industrial action in s.19 of the Act. They referred to cases in which orders had been made under s.418 that such action

cease.[1] The Applicants said that the cases showed that a significant increase in the taking of the relevant leave could be regarded as sufficiently persuasive evidence of a campaign which amounted to industrial action. They said the extraordinary taking of leave without another compelling explanation supported by evidence has been sufficient for the Commission to conclude that industrial action is occurring.

[17] The Applicants said the context of the protracted negotiations, the other forms of protected action that had been notified and taken and the coordinated nature of the absences leads to an inference that the industrial action has been organised by the Union. They said the note from the Union convenor was objective evidence that the Union's officers had been involved in and had organised the industrial action.

[18] The Applicants said that the evidence of Ms. Abbas as to the increase in the sick leave taken in combination with the actions of the convenor were enough for the Commission to conclude that industrial action was happening and that once this conclusion was reached the application of s.418(1) compelled the conclusion that the action which was not authorised by a ballot within the meaning of s.409(2), was unprotected and was happening, threatened, impending and probable. In the circumstances, the Applicants contended that an order must issue under s.418(1).

[19] The Applicants also maintained that the fact that the employees may otherwise have been taking deemed employee claim action within the meaning of s 471(4A)(c) had they not called in sick was of no consequence because "calling in sick amounts to a separate and distinct limitation on the performance of work within the meaning of s 19(1)(b) (or refusal to perform work within the meaning of s 19(1)(c)) of the FW Act in any case."[2]

[20] The Applicants further submitted that it could not be reasonably argued that the employees were simultaneously taking deemed employee claim action within the meaning of s.471(4A)(c) at the same time as the sick leave was taken but that even if this were the case, the purported sick leave was nonetheless a '*failure or refusal by employees to attend for work*' within the meaning of s 19(1)(c) of the Act, or is '*a ban, limitation or restriction*' to which s 19(1)(b) of the Act applies and/or '*a practice in relation to work*' to which s 19(1)(a) of the Act applies.

[21] The Union argued that the failure of the employees to attend for work is deemed employee claim action under s.471(4A) and is therefore not unprotected action irrespective of the reason provided for the absence. They said it was not seriously disputed that the refusal to attend work was employee claim action. They said that in cases where employees were not genuinely ill and entitled to be absent on personal leave but are simply refusing to attend, this absence was the relevant industrial action captured by the definition of industrial action in s.19(c). The Union argued that in that case it was the refusal to attend that constituted the action which was the industrial action and not the 'misdescription' of the absence as sick leave. They said in the present case the relevant action was the absence which, on any view, was employee

[1] *Hillsbus Co Pty Ltd v Bajwa* [2018] FWC 6861, *AGL Loy Yang Pty Ltd v CFMEU* [2017] FWC 432 , *Patrick Stevedores v MUA* [2013] FWC 4391 and *Orora Packaging Australia Pty Ltd t/a Orora Bag Solutions Pty Ltd v. Ahmad (Khodr) El-Chami and Ors* {2020] FWC 224.

[2]Submissions paragraph [19]

claim action and therefore protected action and that what remained, namely the employee reporting in sick, was not something that fell within the bounds of s19.

[22] The Union contended that there was no evidence that the absences were not legitimate sick leave so that even if the failure to attend work had not been captured by s.471(4A) the absences could not be characterised as industrial action.

[23] Further and in the alternative, the Union submitted that the evidence simply did not establish that the Union had organised a 'sick-out' and that given the relevant employees were all covered by a s.471 notice entitling them to refuse to attend work there was no reason why they would do so. They said that there was no communication from the Union proposing employees absent themselves on sick leave. There was, on the other hand, a detailed description from the Union to its members advising that they were entitled to refuse to attend work in response to the notice and some (limited) evidence that employees who had notified that they were ill were in fact unwell and had supporting medical evidence.

[24] 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.

[25] As is apparent from s.418(1) the first step in the process is to determine what relevant action is occurring and whether that action is industrial action. Industrial action is defined, exhaustively, in s.19 as follows:

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).*

[26] Industrial action is action of a particular kind. "Action" is also defined in s.12 of the Act to include an omission.

[27] In this instance it is not disputed that the relevant employees have notified of their intention to take sick leave and thereafter absented themselves from work for the day. The cases to which I was taken by the Applicants as to the 'covert' and coordinated taking of sick leave contain only a limited discussion as to how or where such action meets the description of industrial action in s.19. In *Hillbus* the Commission took the view that action of that kind could fall within any one of subsections (a), (b) or (c) of s.19(1).[3] In *Orora*[4] the Commissioner said the action was a practice the result of which is a limitation on or delay in the performance of work, and thereby placed reliance on s.19(1)(a) for the making of the order that ultimately issued.

[28] For my own part I think it most likely that such coordinated sick leave/absence, where it occurs, might most readily be captured by s.19(1)(c) on the basis that it would be a '*failure or refusal by employees to attend for work'*. Subsections (a) and (b) appear to relate to restrictions or limitations imposed in relation to work that is being performed as opposed to not attending for work at all.

[29] Given the limited time available to deal with this application and for the purpose of dealing with the arguments that have been advanced, I think it is only necessary to come to a view that the action in question comes within one of the subsections in s.19(1). If the Applicant's first argument about the action itself, that is the absence from work, being protected action, is correct, then it would apply equally to industrial action under each of subsections (a),

[3] Op cit at [17].

[4] Op cit at [24].

(b) and (c). The same can be said in relation to the alternative argument that the evidence is insufficient to enable me to conclude that the action is happening, threatened, impending or probable, or is being organised. I am of the view that a coordinated campaign of the non-bona fide taking of sick leave and not attending for work falls within the definition of industrial action in s.19(1)(c) and proceed to deal with the matter on that basis.

[30] I propose to next deal with the evidence as to whether industrial action is happening, threatened impending or probable, or is being organised. The Applicants relied on the increase in sick leave on 14 and 15 February and the broader context in which the taking of sick leave occurred to establish that industrial action was happening etc., and was being organised by the Union.

[31] In relation to the organisation of the action by the union it was acknowledged that there was no direct evidence that the Union was orchestrating such action. Mr. Dornan denied that it was. While it may be accepted that in any 'covert' campaign by employees there will be difficulties for an employer in obtaining evidence that such a campaign is underway, in this instance there is a distinct lack of evidence to support a conclusion that the Union was organising a deliberate and covert campaign of sick leave.

[32] Orders for production of documents was directed to the union and documents were produced in response. A response from the Union in the nature of an answer to interrogatories was also provided by way of statutory declaration. This material did not make its way into evidence. The union circular that did form part of the evidence was consistent with the evidence of Mr. Dornan. It advised about the significance of the s.471 notice. It said that employees would not be paid if they elected not to attend or if they attended and implemented the go-slow. It made no mention of sick leave or any other kind of leave.

[33] I do not think the evidence in relation to the convenor's message, even considered in the broader context of the ongoing dispute, takes the argument about union organisation of sick leave much further. It makes no mention of sick leave and in fact refers to employees taking a 'hit to their pay' by simply not attending for work. That is consistent with the messaging the Union gave its members in the circular. Aside from the fact that the message had found its way to the media, there was no conclusive evidence as to whom or how many people it was sent and nothing to suggest it was sent with the Union's imprimatur. In my view the message reflected the personal views of the sender.

[34] I also note that in circumstances where the s.471 notice would have permitted the Union to actively campaign to have their members not attend work at all, the evidence shows that they did not take that option but rather left the decision about whether to attend, to attend and implement the go-slow or to not attend at all, to the employees themselves.

[35] In summary, I am not satisfied on the evidence that I can infer from any increase in sick leave numbers that the union has organised or is organising a covert campaign of sick leave amongst its members and I would decline to make orders against the Union on that basis.

[36] In relation to the employees themselves Ms. Abbas said she was unable to confirm how many of the employers who had notified 'sick to advise' on 14 February were not actually legitimately absent and entitled to personal leave. There was also some lack of clarity in the

evidence as to whether employees who had elected not to attend work because of the effect of the s.471 notice and had notified their employer accordingly may have also been included in the 'sick to advise' category thereby inflating the numbers in that category.

[37] I also observe that it is not a sufficient basis for the making of an order under s.418 to conclude that industrial action has at some point in the past occurred. The action must be happening, threatened, impending or probable. In this respect I note that unlike a number of the other matters in which sick leave absences have been the subject of orders under s.418, there is no history of such action in this case. The focus of the application was on the sick leave event of 14 February and extending into 15 February. In that respect it is noteworthy that the evidence in relation to train crew absenteeism on 15 February (as at 8.30am) was limited to the raw number of absences and showed that the total number of absences on sick leave at that time had dropped considerably from an updated total of 320 for 14 February, to 210.

[38] I am unable to conclude on the evidence that industrial action is now happening amongst the employees. Nor do I think that such action is threatened, impending or probable. There was no evidence that either the Union or the employees had threatened further action or that such action was contemplated. The Union eschewed that possibility. There was no evidence that there was any communication amongst the employees themselves to coordinate such action on an ongoing basis.

[39] To the extent the number of sick absences was high on 14 February I think this is at least partially explained by the fact that this was the day the go-slow was to commence. This is likely to have generated some uncertainty in the workforce as to how they might be affected and whether or not it was in their interest to attend on the day. There was some evidence that employees were concerned that they would attend for work and not take any protected action but nonetheless lose payment for the day as a result of the s.471 notice and some external delay on the network unrelated to any protected action on their part. That is a plausible concern. It may in turn have even prompted some illegitimate claims for sick leave on the day, but I do not think that this is sufficient to conclude at this point that there is a probability that such action is presently continuing or will be ongoing.

[40] Because of the view I have come to on the evidence it is unnecessary to determine the point raised by the Union as to whether in circumstances where an absence is protected employee claim action, it could appear to the Commission that there was industrial action that is not, or would not be protected industrial action - a necessary precondition for the making of an order about *the* industrial action. So far as I am aware, the point has not been raised in other proceedings. I simply make the observation that at the very least, the prospect of making orders restraining action described in s.471(4A)(b) and which is likely to be employee claim action even in circumstances where the action is coupled with a request for, or notification of, sick leave, seems problematic given the requirements of s.418(1). If, as the Union argued, the absence and the request for sick leave can and should be regarded as separate things, and assuming the latter to constitute industrial action as defined, given the need to frame an order that enjoins *the* industrial action[5], the prospect of directing such an order at requests for sick leave would not be without its difficulties. Nonetheless, these are matters for further consideration at a later date.

[5] *Esso Australia Pty Ltd v. Australian Workers' Union* (2016) 258 IR 396 at 486 per Bromberg J.

[41] The application is dismissed.

DEPUTY PRESIDENT

Appearances:

J. Darams SC of Counsel for the Applicant

L. Saunders of Counsel for the Respondent

Hearing details:

Sydney

15 February 2025

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<PR784408>