DECISION

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

Tiger Airways Australia Pty Ltd T/A Tigerair Australia
v
Australian Federation of Air Pilots
(C2018/7202)

COMMISSIONER SPENCER BRISBANE, 21 DECEMBER 2018

Alleged industrial action at Tiger Airways Australia Pty Ltd T/A Tigerair Australia.

[1] On 19 December 2018, at 1:46pm AEDT, Tiger Airways Australia Pty Ltd (Tiger) made an application pursuant to s.418 of the *Fair Work Act 2009* (the Act). The application sought an order directed at the Australian Federation of Air Pilots (the AFAP) and employees of Tiger who are members of the AFAP (the Employees) and who are covered by the *Tigerair Australia Pilots Enterprise Agreement 2014* (the Agreement). The order sought is an order that the AFAP not "organise" any "industrial action" involving the Employees and that the employees bound by the order stop "engaging" in "industrial action".

[2] The draft order provided that for the purposes of the order the expression "industrial action" means:

> "*...performing work in a manner different from usual by:*
>
> *(a) Imposing any bans on departing any aircraft that has a deferred defect as described in the Minimum Equipment List; or*
> *(b) Imposing any bans on signing-on inside 90 minutes of receiving a call-in off stand-by; or*
> *(c) Imposing any bans on exceeding turbulence penetration speed; or*
> (d) *Imposing any bans on acceptance of track shortening.*"

[3] The Order also sought that the AFAP prepare a written notice of the order and its terms, notify Tiger's representative of the order and take all reasonable steps to advise Union representatives and Employees of the order and "ensure" that they comply with the Order.

[4] Tiger also sought an order for substituted service, which was issued.

[5] The matter was listed for Hearing before the Commission at 10.00am AEST 20 December 2018, with video conferencing facilities to Melbourne.

[6] An Order [PR703373] pursuant to s.418 was issued last night to stop industrial action that was due to commence at 6.00am this morning, 21 December 2018. This Order was issued

to provide certainty between the Parties, in circumstances where industrial action was to commence.

[7] This decision provides the reasons for that Order.

Background

[8] Tiger operates a domestic airline, and currently operates 15 aircraft which transported 4.6 million passengers across Australia in 2017/2018. The airline carries more than 10,000 passengers to various destinations around Australia on a daily basis, across 21 domestic routes. The airline employs approximately 220 pilots based in Sydney, Brisbane, and Melbourne. These pilots operate at various locations across Australia, including Adelaide, Brisbane, Cairns, Canberra, Coffs Harbour, Gold Coast, Melbourne, Perth, Sydney, and the Whitsundays coast.

[9] Tiger's employee pilots are covered by the *Tigerair Australia Pilots Enterprise Agreement 2014*; this Agreement had a nominal expiry date of 15 May 2017.

[10] Tiger, the AFAP and the Employees have been engaged in enterprise bargaining for a replacement enterprise agreement for the Agreement. The bargaining commenced in March 2017. On 29 November 2018, Deputy President Sams made a protected action ballot order,[1] permitting a protected action ballot of the Employees in relation to the following questions:

> *The question(s) to be put to voters in the ballot are:*
>
> *Do you, for the purpose of advancing claims in respect of the proposed enterprise agreement with Tigerair Australia, support protected industrial action in the form of:*
>
> 1. *An unlimited number of indefinite or periodic bans on departing an aircraft with any deferred defect as identified on the Minimum Equipment Lists (MELs)?*
> *Yes [ ] No [ ]*
>
> 2. *An unlimited number of indefinite or periodic bans on any work, including training, associated with an involuntary transfer of aircraft type from the A320 to the B737?*
> *Yes [ ] No [ ]*
>
> 3. *An unlimited number of indefinite or periodic bans on the performance of any duty that is not on the pilot's originally published roster?*
> *Yes [ ] No [ ]*
>
> 4. *An unlimited number of indefinite or periodic bans on the performance of any work on a rostered day off, annual leave day, day free of duty, or available day?*
> *Yes [ ] No [ ]*

[1] PR702748,

5. *An unlimited number of indefinite or periodic bans on departing an aircraft until the full surface area of all tyres has been fully inspected?*
   Yes [ ] No [ ]

6. *An unlimited number of indefinite or periodic bans on signing-on inside 90 minutes of receiving a call-in off stand-by?*
   Yes [ ] No [ ]

7. *An unlimited number of indefinite or periodic bans on the performance of work relating to the following group of Flight Related Actions: exceeding turbulence penetration speed; accepting Track Shortening; other than in the event of an emergency?*
   Yes [ ] No [ ]

8. *An unlimited number of indefinite or periodic bans on signing on for duty before 0900 or after 1700?*
   Yes [ ] No [ ]

9. *An unlimited number of single (not consecutive) 4 hour stoppages?*
   Yes [ ] No [ ]

10. *An unlimited number of consecutive 4 hour stoppages?*
    Yes [ ] No [ ]

[11] The ballot was to be conducted by Elections Australia Pty Ltd.

[12] On 13 December 2018, Elections Australia Pty Ltd advised the Commission and relevant persons of the results of that ballot. In relation to each of the questions referred to in [10] above, the action was authorised by a significant majority of voters.

[13] Following receipt of the results, on 13 December 2018 the AFAP purported to give notice to Tiger of protected industrial action. That First Notice provided:

> *In respect of the proposed [agreement], [the AFAP] acts as the bargaining representative for its members.*
>
> *In accordance with s 414 of the Fair Work Act 2009 (Cth), notice is hereby given to you that members intend to engage in the following employee claim actions:*
>
> > *1. An unlimited number of bans on departing any aircraft that has a deferred defect as described in the Minimum Equipment List (MEL).*
> > *2. An unlimited number of bans on signing-on inside 90 minutes of receiving a call-in off stand-by.*
> > *3. An unlimited number of bans on exceeding turbulence penetration speed, other than in the event of an emergency.*
> > *4. An unlimited number of bans on accepting track shortening, other than in the event of an emergency.*
>
> *The Employee Claim Action specified in this notice will commence at 0600 on Friday 21 December 2018 and cease at 2359 on Monday 24 December 2018.*

[14] On 17 December 2018, the AFAP purported to give a further Notice (the Second Notice), which was in materially the same terms as the 13 December Notice save that the action was notified to commence at 6am on Thursday, 27 December 2018 and continue until the AFAP provides further notice.

[15] In summary, Tiger submitted that the Notices were defective, meaning that the proposed industrial action was unprotected industrial action and that the unprotected industrial action was threatened, impending or probable. The dispute was essentially whether the proposed industrial action was protected or unprotected industrial action. If it was found to be unprotected industrial action, an order "must" be made.

Legislation

[16] Section 418 of the Act provides:

> "***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."

[17] Section 414 of the Act provides:

"***Notice requirements for industrial action***

Notice requirements--employee claim action

(1) Before a person engages in employee claim action for a proposed enterprise agreement, a bargaining representative of an employee who will be covered by the agreement must give written notice of the action to the employer of the employee.

(2) The period of notice must be at least:

(a) 3 working days; or
(b) if a protected action ballot order for the employee claim action specifies a longer period of notice for the purposes of this paragraph--that period of notice.
Notice of employee claim action not to be given until ballot results declared

(3) A notice under subsection (1) must not be given until after the results of the protected action ballot for the employee claim action have been declared.

Notice requirements--employee response action

(4) Before a person engages in employee response action for a proposed enterprise agreement, a bargaining representative of an employee who will be covered by the agreement must give written notice of the action to the employer of the employee.

Notice requirements--employer response action

(5) Before an employer engages in employer response action for a proposed enterprise agreement, the employer must:

(a) give written notice of the action to each bargaining representative of an employee who will be covered by the agreement; and
(b) take all reasonable steps to notify the employees who will be covered by the agreement of the action.
Notice requirements--content

(6) A notice given under this section must specify the nature of the action and the day on which it will start."

[18] Section 415 provides:

"***415 Immunity provision***

(1) No action lies under any law (whether written or unwritten) in force in a State or Territory in relation to any industrial action that is protected industrial action unless the industrial action has involved or is likely to involve:

(a) personal injury; or
(b) wilful or reckless destruction of, or damage to, property; or
(c) the unlawful taking, keeping or use of property.

(2) *However, subsection (1) does not prevent an action for defamation being brought in relation to anything that occurred in the course of industrial action*."

[19] Tiger submits that the 13 and 17 December Notices did not comply with s.414(6) of the Act in that the notices did not specify the nature of the action and the day on which it would start.

Consideration

[20] The protected action ballot orders issued on 29 November 2018 form the background for assessment of the Notices. The Notices meet the requirements of s.414(1) to (5).

[21] The Applicant argued that the form of the Notices were inadequate in terms of s.414(6) as they did not provide Tiger with any opportunity to reasonably respond or make any reasonable relevant preparations to the proposed industrial action.

[22] The Applicant submitted:

"*18. Faced with the prospect of the action as defined in the Notices and referred to at paragraph 2 herein, Tigerair will not be able to know with any precision where or when the relevant actions may occur. It will also be unable to predict which property or equipment will be utilised for the purposes of the action, or what third party (if any, and how many) may be impacted by the action.*

19. The Notices do not convey any meaning of when, where, or how often the industrial action could be experienced. The proposed action might involve one person who is a member of the AFAP, or every single one of the employees disclosed on the roll of voters, or any number of members between the lower and upper limits. The action might happen once on a shift in one location. It might happen 20 or 100 times in one location or across 21 locations. It might happen on one flight or every flight.

20. For example, the bans on exceeding turbulence penetration speed might take place continuously throughout one individual shift for one employee on one flight, or on every shift for every employee on every flight, or some other unknown combination.

21. Tigerair's capacity to predict and respond to any action is nigh on impossible. What does it prepare for? A minor disruption by a few employees, which has no real impact on the running of its business that day? Or does it prepare for the worst-case scenario? How does it explain matters to relevant third parties, the regulator, its passengers, Air Traffic Control or the general public?

…

23. The use of imprecise and non-specific language by the AFAP in the Notices means that Tigerair cannot predict and therefore cannot appropriately prepare for the taking of the proposed action: "[t]he uncertainties cast by the language [in the Notices] are not removed by having regard to how the words of the notification may be used in practical workplaces by practical employees".[2]

[23] Evidence was provided by Captain Heaton, for the Applicant. As Head of Flight Operations, he provided evidence that he could not determine from the language of the Notices:

"*a. at what ports each ban will operate;*
b. across what sectors the bans might be implemented;
c. how the proposed bans will be implemented, including whether the ban will operate for the entirety of the flight, if part of the flight, for what part of the flight the bans might be implemented; and
d. what pilots will be engaging in the proposed industrial action including whether it is Captains, First Officers or both".

[24] The evidence of the operational experts, in particular Captain Heaton for the Applicant (but also that of Captain Howard for the AFAP), highlighted the general nature of the notices and that it was near impossible to determine the nature and scope of the action and that effectively preparations would need to require defensive action being taken, potentially for every route/flight, on every port and sector. As above, Captain Heaton queried whether the proposed bans would be implemented to operate for the entirety of the flight, part of the flight, or for what part of the flight the bans might be implemented, and the consequences that would arise from such.

[25] It is not at all the case that the Notices need be that precise to allow an Employer to know, or with certainty be able to predict, the nature and scope of the industrial action. However, the considerable concerns raised regarding the Notices in this matter, are reflected in the conclusions drawn in the case authority of *Telstra Corporation Limited v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia*,[3] as set out below:

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[2] Applicant's outline of submissions dated 20 December 2018, at [18]-[21], [23]; *National Patient Transport Pty Ltd v United Voice and ANMF* [2018] FWC 2068 at [36].

[3] [2009] FWAFB 1698.

> ***"[12]*** *Before turning to the notice in this case it is appropriate to make some observations about the construction of s.414. The first point to note is that the obligations in ss.414(1) and (6) are not cast in terms of an intention to take industrial action but in more positive terms. This is a point of contrast with the language of s.170MO of the WR Act, exemplified by s.170MO(5) which we have set out above. The second point is that in considering whether the notice meets the requirement to specify the industrial action, it is necessary to have regard to the purpose of the notice requirement and the relevant circumstances, in particular the nature of the employer's undertaking. As to purpose, there is little doubt that the purpose of the notice requirement is to give the employer the opportunity to respond to the action by making relevant preparations. The response may involve making arrangements to deal with unavailability of labour, including making appropriate arrangements in relation to customers, suppliers and other contractors. Whether the notice is adequate may depend on the nature of the employer's operations including their size, the number of employees, the number of locations, the time at which the action is to occur and the employees potentially taking the industrial action. The following passage from the reasons for decision in David's Distribution Pty Ltd v National Union of Workers, a case concerned with the interpretation of s.170MO(5), is apposite:*
>
> > *"[87] We think s 170MO(5) was designed to ensure that industrial disputants who are to become affected by protected action, in relation to which their usual legal rights are significantly diminished, are at least able to take appropriate defensive action. For example, an employer may operate a sophisticated item of equipment that will be damaged if precipitately shutdown. If warned in advance of a ban that might affect the continued operation of that plant, the employer might choose a controlled shutdown during the period of the notice. More commonly, perhaps, an employer might use the notice time to communicate with suppliers and customers, and thereby reduce the consequences for them of the notified industrial action. Very often, the recipient of the notice will respond in a way that has a legal dimension. For example, a union might react to a notice by an employer of intent to lock out some employees by giving notice that all employees will strike indefinitely as from the commencement of the lockout. Similarly, an employer might respond to an employees' notice of bans by giving notice of a lockout of some or all employees."* [3]
>
> ***[13]*** *In considering the adequacy of the notice in this case, the relevant context is that Telstra employs around 34,000 employees in hundreds of work locations throughout Australia. While the evidence does not indicate the number of employees who are members of the CEPU, it is well known that there are many CEPU members and no doubt Telstra would have some idea of at least the areas in which CEPU membership is likely. It is obvious that the potential effect on Telstra's operations of industrial action by CEPU employees could be very significant.*
>
> ***[14]*** *The expression used in the notice of "indefinite stoppages" refers to a concept which is well recognised in workplace relations of a stoppage which is unlimited in time at its commencement. We reject the suggestion, advanced on Telstra's behalf, that a notice of an indefinite stoppage could never comply with the requirement in s.414(6) that the action be specified. Whether it does comply will depend on the context in which it appears in the notice and the surrounding circumstances. In this*

case the use of the expression does very little to shed light on the nature of the action to be taken. First, the expression is used in the plural. This indicates that there will not be one stoppage of all CEPU members, but that there will be a number of them, thereby raising questions about the precise number and the location of the stoppages. Secondly, the expression is used in the notice in conjunction with the words "an unlimited number". Read as a composite phrase the potential for variation in the number, length and location of stoppages is very wide.

[15] *The indication that the action will be taken by CEPU members "in all States and Territories of Australia" might be an adequate specification if the type of action was defined more clearly. As it is, when the notice is read as a whole, the number, length and location of the stoppages which might occur are almost unlimited. The notice does no more than specify that there will be stoppages of an indeterminate number and length at locations at which CEPU members work.*

[16] *We respectfully disagree with the Vice President's conclusion that the notice specifies action involving all CEPU members at all worksites and that such a notice specifies the nature of the industrial action and complies with s.414(6). We refer to the reasons we have already given but some additional comments are appropriate. As we have indicated, it is implicit that the description of the action contained in the notice should be sufficient to put the employer in a position to make reasonable preparations to deal with the effect of the industrial action. In order to prepare for all eventualities contemplated by the notice in this case, Telstra would have to plan on the basis that every CEPU member would be on strike for the whole of the day in question. Yet that is not what the notice says. Given the nature of Telstra's operations some greater specification would be required. Indeed, on one view the notice conceals more than it reveals about the industrial action that will in fact occur*."[4]

[26] Similarly, in *Davids Distribution Pty Ltd v National Union of Workers*[5] The Full Court made the following observations:

"*[84] The question addressed by North J in the lengthy passage just quoted is one of considerable difficult, about which people may reasonably reach different conclusions. Parliament did not indicate what degree of specificity it intended by the term "nature of the intended action". To interpret this term, on the one extreme, as requiring no more than an indication of industrial action, as argued by NUW, would be significantly to devalue s 170MO(5); the notice would provide little information. To interpret it, on the other extreme, as requiring precise details of every future act or omission would be to impose on the giver of a notice an obligation almost impossible to fulfil. Industrial disputes are dynamic affairs. Decisions as to future steps often need to be made at short notice, sometimes in response to actions of the opposing party or other people, including governments, and changing circumstances. It would be a major, and unrealistic, constraint on industrial action to require a party to specify, three clear working days in advance, exactly what steps it would take. An unduly demanding interpretation of s 170MO(5) would seriously compromise the scheme of…the Act; it would be difficult for a party to an industrial dispute to obtain the protection contemplated by the Division*."

[4] Ibid at [12]-[16].

[5] (1999) 91 FCR 463.

[27] It is noted that protected industrial action, as per the scheme of the Act, is action which is permitted to cause inconvenience and disruption to an Employer's operations, but that an Employer is able to take some defensive action; taking into account the relevant context of the operations, the size and nature of the undertaking. This Employer operates on a National basis in the safety critical Aviation Industry. Captain Heaton in particular noted his safety concerns, in regard to the text of the Notices, observing:

> "*The notices don't specify that only the PIC or Captain can initiate such action which raises significant concerns as to an AFAP member pilot's ability to take instructions from a non-AFAP member PIC/Captain, if the AFAP member intends to engage in industrial action. It also raises concerns in relation to AFAP member captains directing non-AFAP member pilots to carry out or not carry out duties because of the proposed industrial action.*
>
> *The notices provide no certainty or clarity around these issues that would allow Tigerair to properly prepare or manage these issues…*"[6]

[28] What emerged in the significantly, and necessarily, safety-oriented Aviation Industry is that at its least form, 'tension' could emerge on the flight deck (given the manner in which the proposed action in the notices at points one, three and four in particular, may be implemented). That is, in relation to bans on "exceeding turbulence penetration speed" and bans on "accepting track shortening", and potentially decisions taken in relation to the grounding of aircraft on the basis of a deferred defect on the Minimum Equipment List.

[29] For the reasons set out, the notices lack specificity in terms of an adequately detailed description of the nature of the action, to allow for this Employer in this particular industry to take into account their operations, in order to make reasonable preparations to deal with the effect of the industrial action.

[30] In addition, a live potential safety issue emerged on the basis of the Notices, in relation to point three of the four proposed actions as set out therein. There is a potential for disputes to emerge on the flight deck of an aircraft, between the Captain in Command and the First Officer, in relation to the taking of protected industrial action on the form of the Notices as they currently stand. The speed of an aircraft is a critical safety issue, as is the primacy of direction by the Captain in Command. Whilst the Union considered this was an issue they could remedy by communication to their members, this does not cure the inadequacy of the current text of the Notice that such issues could emerge.

[31] Section 415 (as raised at the Hearing) provides further concern, of the inconsistency that may arise in relation to the hierarchy of command in the aircraft. That is, if in fact an issue did emerge between the Captain and the First Officer on a plane, on the basis that the First Officer, via the Ballot Order, is authorised to take the action in terms of 1, 2, or 3 of the Notices; and that s.415 provides immunity in relation to the taking of protected action. Section 415 therefore provides an inconsistency with the evidence of Captain Howard for the Union, and Captain Heaton for the Employer, whereby they considered the Civil Aviation Legislation provides for the authority of the Captain in Command over the First Officer. That is, in the current circumstances, the First Officer is authorised to take protected industrial

[6] Applicant's outline of submissions dated 20 December 2018, at [27].

action, and on the basis of the protected action ballot order and Notice, to engage in a ban on the action set out in the Notice, and is therefore provided with protection or immunity in engaging in that action via s.415. This immunity provides that 'no other action lies under any law that is protected industrial action…' being inconsistent with the primacy of the Captain in Command's authority.

[32] Any matter that provides for a potential dispute or inconsistency of authority on the flight deck of a plane cannot be sanctioned by this Commission, and provides for a serious safety question. The Notices in their current form are inadequate in terms of the Employer-specific operations, and have been found to be unprotected action on the basis that the Notices were not compliant with s.414(6) of the Act.

[33] I am satisfied that industrial action, on this basis and for the reasons set out, would not be protected industrial action. The action in terms of s.418 is threatened, impending or probable (as per the Notices), and therefore an Order that the action stop is required. For the aforementioned reasons this decision has been prepared in the short time frame available, to allow for an understanding of the issuing of the Order to stop industrial action, which was provided to the parties last night in relation to action notified to commence at 6.00am this morning, and further action to commence on 27 December 2018.

COMMISSIONER
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