DECISION

Fair Work Act 2009
s.418—Industrial action

Telstra Corporation Limited
v
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia
(C2019/2184)

COMMISSIONER GREGORY MELBOURNE, 4 APRIL 2019

Alleged industrial action at Telstra Corporation Limited.

Introduction

[1] This matter deals with an application made by Telstra Corporation Ltd ("Telstra") under section 418 of the *Fair Work Act 2009* (Cth) ("the Act"). It arises as a consequence of a notice of intention to take protected industrial action issued by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia ("the CEPU") on 1 April 2019.

[2] The Notice was issued following a Protected Action Ballot Order made on 6 December 2018. That Order relevantly stated:

> "Do you, for the purpose of advancing the CEPU claims in the negotiation of an enterprise agreement with Telstra Corporation Limited, endorse the taking of protected industrial action by CEPU members against your employer, which may involve taking separately, concurrently and/or consecutively any or all of the actions set out below:
>
> 1. An unlimited number of periodic stoppages of work?
>
> 2. An unlimited number of stoppages of work of indefinite duration?"

[3] A ballot was subsequently conducted by the Australian Electoral Commission as a consequence of that Order, with the outcome declared on 25 February 2019. It indicated that more than 50% of the persons on the role voted in the ballot, and that more than 50% of those voted in favour of the questions put.

[4] The notice of intention to take protected industrial action relevantly states:

> "In accordance with the requirements of s.414 of the *Fair Work Act 2009*, the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and

> Allied Services Union of Australia (CEPU) provides written notice that CEPU members who are within the scope of the proposed agreement and employed by Telstra Corporation.
>
> 1. A stoppage of work for the period commencing 7:30am and concluding at 8:00am on Friday 5 April 2019, for all employees in all States and Territories of Australia, in which the employees who will be covered by the proposed agreement perform work, and
>
> 2. A stoppage of work for the period commencing 7:30am and concluding at 8:00 am on Monday 8 April 2019, for all employees in all States and Territories of Australia, in which the employees who will be covered by the proposed agreement perform work."

[5] Telstra now claims, in summary, that the industrial action proposed by the CEPU in its notice cannot be protected industrial action because it is not a form of action that has been authorised by the protected action ballot, as required by section 409(2) of the Act. In its submission the forms of industrial action which were put to and approved by the relevant employees in the ballot only extend to stoppages insofar as they are "periodic stoppages of work" or "stoppages of work of indefinite duration." It continues to submit that the action as described in the notice does not fall within either of these descriptions, and the stoppages which make up the proposed action are not "periodic," as they do not occur at specified intervals, nor are they of "indefinite duration" as an end time is specified.

[6] The application is opposed by the CEPU who submit that the ballot did authorise the action now proposed to be taken in the notice issued on 1 April 2019.

The Submissions and Evidence

Telstra Corporation Limited

[7] Telstra submits that it is necessary for the Commission to find that there is a correlation between the forms of proposed industrial action voted on in the ballot and the action now proposed to be taken as a consequence of the notice. In its submission the action now proposed in the notice cannot be said to come within the definition of "an unlimited number of periodic stoppages of work" because the action is not periodic in nature. It made reference to various definitions of the word "periodic" contained in various online dictionaries. It referred in particular to the following definitions:

> "Happening repeatedly over a period of time."
>
> "Occurring or recurring at regular intervals."
>
> "Happening regularly over a period of time."
>
> "Recurring at intervals of time."
>
> "Of, relating to, or resembling a period."

[8] It also referred to the contra proferentem rule, being a rule of construction whereby an ambiguous clause is construed against the party who put forward the clause and now seeks to rely upon it. While acknowledging that this is a rule of construction that generally applies in contract law it also submits that it is relevant in the present case in that the CEPU was the author of the relevant words put to the employees in the ballot, and it should not now be able to rely upon those words if they are found to be ambiguous.

[9] It also made reference to the following extract from the Full Bench decision in *John Holland Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2010] FWAFB 526 at paragraph 19:

> "Moving now to the construction of s.437 itself, seen in its statutory context, all that the section requires is that the questions should describe the industrial action in such a way that employees are capable of responding to them. If the questions are ambiguous or lack clarity there may be consequences for the bargaining representative and the employees if reliance is placed on the result of the ballot in taking industrial action. If the question or questions give rise to an ambiguity, the conclusion may be reached that the industrial action specified in a notice under 414 was not authorised by the ballot and that the action is not protected for the purposes of s.409(2). It is true that ambiguity or lack of clarity in the description of the industrial action is undesirable, but these are matters more appropriate for consideration under other provisions."

[10] Telstra continues to submit that this is precisely the situation that arises in the present matter, and that the Commission should now find that as a result of the ambiguity that exists the action proposed in the notice has not been authorised by the questions voted on in the ballot.

The CEPU

[11] The CEPU notes in its submissions that there is no issue about the nature of the matters endorsed in the ballot, and the question is simply about whether the ballot can be said to authorise the proposed industrial action set out in the notice.

[12] It noted that a previous notice of intention to take industrial action issued on 6 March 2019 proposed a stoppage of work on a single day, being 12 March 2019, and there was no issue taken in regard to that action, or any suggestion that it had not been authorised by the questions voted on in the ballot. It also referred to the definition of the word "periodic" and made particular reference to the definition contained in the Macquarie Dictionary. It referred, in particular, to the following definitions:

> "Occurring or appearing at regular intervals."
>
> "Intermittent."

[13] It continues to submit that these definitions make clear that "periodic" can describe either something that occurs at regular and specified periods, or something that occurs intermittently, and in the present matter the action proposed is characterised by a period, being 7.30 am and 8.00 am, on each of the relevant occasions.

[14] It also seeks to rely on the Full Bench decision in *John Holland,* and notes that in that matter the Full Bench was considering a series of questions to be put in a protected action ballot, including question eight which was stated in the following terms, "Indefinite or periodic bans on overtime?"

[15] It referred, in particular to the following extracts from the Full Bench decision at paragraphs 20 and 21:

> "The appellant's criticism of the questions in the AMWU application is based on a technical and pedantic approach. The expression "separately, concurrently and/or consecutively" does not deprive the question of meaning. Those expressions apply, as far as there is scope, to the types of industrial action specified. We have already noted the terms of s.459(2) which gives separate justification for the term "consecutively." While it is possible to construct extreme examples of the number of types of industrial action which might be authorised by an affirmative answer to the questions, in practical terms the question is do no more than identify eight types of industrial action and the possible options for taking each of those types of actions.
>
> The criticism of question eight is unfounded. It might have been clearer to split that question into two parts, one dealing with indefinite bans on overtime and one with periodic bans. But the question is not meaningless. Seen in its full context the question asks whether employees will endorse bans on overtime which are rather indefinite or periodic. An affirmative answer would indicate endorsement of both types of ban."

[16] The CEPU submits, in conclusion, that the word "periodic" can mean two things, being regular or intermittent, and it follows that the words of the ballot order do authorise the action that is now proposed in the notice.

Consideration

[17] In coming to a decision in this matter it is noted at the outset that previous Full Bench decisions have concluded that it is generally sufficient for a party to set out the intended industrial action to be taken in a notice in what has been described as "ordinary industrial English."

[18] It has also been noted that whether a particular notice meets the relevant requirements will depend upon the terms of the notice and the particular industrial context, and that every case is different and each notice must be looked at having regard to all of the relevant considerations.

[19] I have also had regard to the decision of the Full Bench in *John Holland*. Whilst it was dealing with issues arising from the questions put in a protected action ballot it cautions against a technical and pedantic approach to interpreting the words of a question. It also cautions against an approach which might render a question meaningless on the same technical or pedantic grounds. I am satisfied that it is appropriate for a similar approach to be taken when considering whether a protected action ballot has authorised a notice of intention to take protected industrial action issued subsequently.

[20] However, at the same time section 409(2) makes clear that the industrial action proposed in a notice must be authorised by a protected action ballot.

[21] Telstra seeks to place particular reference on the word "periodic" and those definitions which suggest it involves something which occurs at repeated or regular intervals of time. However, other definitions of the word make reference to something that is repeated at irregular intervals, or something that is intermittent.

[22] I am satisfied that the action now proposed, which involves two periods of industrial action on separate days, both involving the same period of stoppage of work, being from 7.30 a.m. to 8.00 a.m. on each of those days, can be said to come within the definition of "periodic" and within the question authorised by the ballot, particularly when considered in the context of "ordinary industrial English."

[23] I am also not satisfied that the question authorised in the ballot can be said to be ambiguous when considered in this context.

[24] I am accordingly satisfied, in conclusion, that the industrial action now proposed in the notice issued on 1 April 2019 has been authorised by the protected action ballot, as required by section 409(2).

[25] The application is accordingly dismissed.

COMMISSIONER

Appearances:
Mr C Dowling QC and Mr Y Bakri of Counsel for the CEPU.
Mr M Follett of Counsel for Telstra.

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