REASONS FOR DECISION

Fair Work Act 2009

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

Downer EDI Rail Pty Ltd
v
Australian Rail, Tram and Bus Industry Union
(C2017/2570)

DEPUTY PRESIDENT COLMAN MELBOURNE, 19 MAY 2017

Order to stop the organisation of industrial action at Downer EDI Rail Pty Ltd

[1] On the evening of Monday 15 May 2017, an application was made by Downer EDI Rail Pty Ltd (Downer) under s418 of the *Fair Work Act 2009* (the Act). The application sought an order from the Commission that unprotected industrial action not occur and not be organised. The order sought was directed at the Australian Rail, Tram and Bus Industry Union (RTBU), office-holders of that union, and employees of Downer engaged in performing rolling stock movements at the company's rail facility at Champion Road Newport, Victoria.

[2] Section 420(1) of the Act requires that as far as practicable, an application under s418 be determined within 2 days after it is made. The matter was listed for hearing on Tuesday 16 May 2017. Downer was represented, with the Commission's permission under s596, by Mr Harrington of counsel. The RTBU was represented by its industrial officer, Ms Mekhael.

[3] On Wednesday 17 May 2017, after considering the evidence and the submissions of the parties, I made an order under s418(1) that unprotected industrial action not be organised (Order), and indicated to the parties that I would provide written reasons for making the Order in due course. This decision sets out those reasons.

[4] Downer provides engineering and infrastructure management services to the public and private transport sectors. The company operates a rail facility at Champion Road Newport, where it employs 173 employees. The functions undertaken at the facility include maintenance and shunting. The latter entails moving rolling stock to and from the main rail line, and into and out of maintenance sheds. Shunting work is undertaken by six permanent employees of Downer, as well as five labour hire employees. The employment of the six Downer employees is covered by the *Downer EDI Rail Newport Facility Enterprise Agreement 2016-2020* (Downer enterprise agreement).

[5] 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."

[6] The grounds set out in Downer's application stated the following:

'(a) The Applicant engages the Employees under the Agreement at the Newport Facility.

(b) The Agreement was approved by the Fair Work Commission (Commission) on 11 April 2017.

(c) The nominal expiry date of the Agreement is 30 June 2020.

(d) On the morning of 15 May 2017 the Applicant dismissed two employees at the Newport Facility for misconduct based on a breach of the Applicant's Cardinal Rules relating to workplace safety.

(e) At approximately 11:05am on 15 May 2017 and shortly after those dismissals, Bryan Evans, RTBU Organiser informed Joshua Milne (HR Advisor) that:

(i) the Applicant had 48 hours to retract the dismissals; and

(ii) if the dismissals were not retracted by Thursday (18 May 2017) the shunting crews would suddenly come down with "fitness for duty" issues.

(f) The shunting crews perform rolling stock movements of wagons/locomotives for the Applicant. The crews move at least 20 wagons/locomotives per day across two shifts (day and afternoon), 7 days a week.

(g) The Applicant carries out the rolling stock movements pursuant to its services contracts with Metro Trains Melbourne and Siemens.

(h) If the shunting crews came down with "fitness for duties" (i.e. incapacity for work) the Applicant would be unable to carry out the rolling stock movements.

(i) The industrial action is threatened, pending or probable and constitutes a breach of section 418 of the *Fair Work Act 2009* (Cth) (the Act).

(j) The Applicant is the employer of the persons threatening to engage in the industrial action.

(k) The threatened industrial action would not be protected industrial action under the Act.

(l) The threatened industrial action is otherwise contrary to the dispute resolution procedure of the Agreement.

(m) Such other grounds as the Commission considers sufficient.'

[7] The RTBU opposed the application. In submissions at hearing, the union contended that Mr Evans had not uttered the words attributed to him in Downer's application, or (apparently alternatively) that Mr Evans' comments had been misunderstood by Mr Milne. The union contended that there was no evidence that employees had threatened or proposed to take industrial action. It denied that the union was threatening to engage in or organise industrial action, and submitted that it has a good working relationship with the company.

Evidence before the Commission

[8] Downer led evidence in support of its application from Mr Joshua Milne, the company's Human Resources Advisor for Victoria, South Australia and Tasmania. An outline of evidence was handed up.[1] Downer's counsel adduced oral evidence from Mr Milne, and he was cross-examined by Ms Mekhael.

[9] Mr Milne gave evidence that a meeting took place on 15 May 2017 in which the employment of two employees of Downer was terminated for safety-related reasons. Mr Milne said that Mr Evans attended the termination meeting and that near the end of the meeting said words to the effect that he would give the company 48 hours to retract the dismissals, and if that did not occur, there would be further action.[2]

[10] Mr Milne attested that Mr Evans told him that he would speak with the shunt crew; that Mr Evans returned shortly afterwards and said he was able to give the company 48 hours' notice before any action was taken; and that if the dismissals were not retracted, the shunt crew may have 'fitness for duty' issues going forward.[3] Mr Milne said that he interpreted these words to be an attempt to 'stronghold' the business by the taking of sick leave.[4] It was apparent to me from the context of the evidence that by 'stronghold' Mr Milne meant 'strong-arm'.

[11] Mr Milne also gave evidence that, under clause 28.3 of the Downer enterprise agreement, employees are entitled to be absent on sick leave without a medical certificate for four single day absences per year.

[12] I asked Mr Milne precisely what words Mr Evans had used in connection with what would occur on Thursday - whether it was that employees 'might not attend', as per his earlier oral evidence, or 'will not attend', as indicated in his outline of evidence. Mr Milne said that '*it was definitely an intimidation factor and 'it will' – 'they will'*"[5].

[13] Under cross-examination by Ms Mekhael, Mr Milne was asked whether it was possible that he misunderstood Mr Evans' comments, and that in fact Mr Evans was simply expressing the view that the shunting crew was unhappy with the company's decision to dismiss the two employees, and that the company should reconsider its decision. Mr Milne rejected this possibility.[6]

[14] The RTBU did not lead any evidence in this matter. I asked the RTBU's representative whether the union intended to call any evidence, and in particular whether it intended to call Mr Evans, to which the answer in both cases was no. I asked the RTBU's representative where Mr Evans was at the time of the hearing, and was told that he was in enterprise bargaining negotiations that day.

[15] It is open to the Commission to draw a negative inference where there is an unexplained failure to call evidence.[7] It is appreciated that the application was called on at short notice and that the competing priorities of Mr Evans and his union might be an explanation for the union not calling him as a witness on the afternoon of 16 May 2017. However, the union made no request for the matter to be heard at another time. It did not suggest that it would have led evidence from Mr Evans if the Commission could have accommodated Mr Evans' prior commitments. I note that Downer's counsel advised the

Commission that Downer had served Mr Evans with a copy of its application on the morning of 16 May.

[16] In the present circumstances I considered it appropriate to draw an adverse inference, namely that Mr Evans' testimony would not have assisted the union's case. However, it remained necessary for Downer to establish that the requisite jurisdictional facts existed for the making of an Order under s418.

Factual findings

[17] The evidence before the Commission supported a finding that industrial action was being organised. Downer led sworn evidence from Mr Milne that Mr Evans, an office-holder of the RTBU, said he would give the company 48 hours to retract the dismissals, and that if that did not occur, employees would have 'fitness for duty' issues. The RTBU put to Mr Milne that he may have misunderstood Mr Evans. Mr Milne rejected this suggestion.

[18] I accept the evidence of Mr Milne. I found that his evidence was given openly and honestly, to the best of his recollection, and that he made appropriate concessions.

[19] Mr Milne's evidence has not been contradicted.

[20] In my view, Mr Evans' comments to Mr Milne did not simply convey that employees would themselves decide to have 'fitness for duty issues' from Thursday if the company did not retract the dismissals. This might have constituted a threat of industrial action engaged in by employees, but would not necessarily have involved any organisation on the part of the union. Rather, it appears to me that Mr Evans, an RTBU office-holder, was organising a response by employees that would occur if the company did not change its mind and retract its decision to dismiss the two employees. That response would be to raise 'fitness for duty' issues, namely non-genuine sick leave. This would constitute a ban, limitation or restriction on the performance of work, and amount to unprotected industrial action.[8]

[21] Of particular relevance is the evidence that Mr Evans said *he* would give the company 48 hours to respond before any action was taken. Mr Evans was not a neutral messenger, simply conveying information between employees and Downer.

[22] Accordingly, I was satisfied at the time of making the Order that industrial action was being *organised* by the RTBU's officer-holder, Mr Evans, and hence by the RTBU.

[23] As to whether *industrial action by one or more employees is threatened, impending or probable*, I did not make any findings of fact in relation to the conduct or intentions of employees. At the time of making the Order there did not appear to me to be a sound basis to do so. The only evidence as to the conduct or intentions of the employees was hearsay - Mr Milne attested to what Mr Evans told him about employees' reaction to the dismissal of the two employees. Hearsay evidence should be approached with caution. Further, as noted below, employees had not had an opportunity to be heard in this matter.

[24] However, I note that s418 employs the passive voice – *'if it appears to the FWC that industrial action by one or more employees is threatened etc*.' The section appears to contemplate that the threat of unprotected action need not necessarily emanate from the employees who might take the unprotected action, but could be made by another party, such

as a union. In the circumstances of this case, I found, at the time of making the Order, that unprotected industrial action was being threatened by the RTBU.

[25] Finally, I found at the time of making the Order that the industrial action that was being organised and threatened would not be protected industrial action for the purposes of Part 3-3 of the Act. There was no contention to the contrary.

Statutory requirements for an Order under s418

[26] Section 418 is set out earlier in this decision. If it appears to the Commission that unprotected industrial action is happening, threatened, impending, probable, or is being organised, the Commission **must** make an Order that the industrial action stop, not occur or not be organised.

[27] I was satisfied at the time of making the Order that unprotected industrial action was being organised to take place from Thursday 18 May 2017 in the event the Company did not retract its decision to dismiss the two employees. I was therefore required to make an Order that the organisation of this action stop.

[28] I was further satisfied at the time of making the Order that industrial action was being threatened by the RTBU. However, I considered that an Order that the RTBU not organise the action would address the threat of industrial action, and that there was no need for the Order to separately address the threat.

[29] The RTBU submitted that the Commission should not make any Orders against employees. The union argued, rightly, that to do so would deny them natural justice. Employees were not served with the application under s418, and an application was not made for substituted service. Employees were not afforded an opportunity to be heard in the matter. It is well accepted that the making of an Order under s418 is a serious matter with significant consequences for the parties. In particular, breach of Orders made under s418 constitutes a contravention of a civil remedy provision.[9] The Commission would not ordinarily make Orders against a party that has not had an opportunity to be heard. In any event, my findings did not support an Order being made against employees. Had they done so, it would have been necessary to afford employees natural justice.

The Order made

[30] Downer sought for the Order to have a period of operation of two weeks, ceasing to have effect on 31 May 2017. The RTBU argued for a shorter period. In *United Voice v Foster's Australia Limited*[10], the Full Bench noted that there must be a '*rational connection between the period of the order and the purpose for which it was required to be made'* [at 40].

[31] Here, the relevant factual matrix focused on a period of time encompassing the present and the immediate future, namely the organisation of industrial action from Thursday 18 May 2017, in response to a decision by the company to dismiss two employees. I was mindful to cast Orders no more widely than was necessary.

[32] Having regard to the underlying cause of the present matter, however, I considered that a period of operation of two weeks was appropriate, and would allow sufficient time for

the apparent ill feeling over the dismissal to dissipate. I granted the parties liberty to apply to vary, extend or rescind the Order.

[33] Finally, I note that the company's draft Order sought to bind all office-holders of the RTBU. It is appreciated that, for an Order against an organisation to have utility, it will often need to apply to union office-holders, and that it might not be sufficient to name a particular office-holder. However, there appeared to me to be no basis for the Order to apply to officials of the union outside of Victoria. The Order was confined accordingly.

DEPUTY PRESIDENT

Appearances:

N. Harrington of counsel for Downer EDI Rail Pty Ltd
J. Mekhael for the Australian Rail, Tram and Bus Industry Union

Hearing details:

Melbourne, 16 May 2017

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[1] Exhibit D1

[2] Transcript at PN[91]

[3] Transcript at PN[100]

[4] Transcript at PN[104]

[5] Transcript at PN[170]

[6] Transcript at PN[166]

[7] *Jones v Dunkel* (1959) 101 CLR 298. See also *Maritime Union of Australia v Patrick Stevedores Holdings Pty Limited* [2014] FWCFB 657

[8] See definition of industrial action in s19(1)(b), *Fair Work Act 2009*

[9] See s421, *Fair Work Act 2009*; and see generally *CEPU v Abigroup Contractors Pty Ltd* [2013] FCAFC 148

[10] *United Voice v Foster's Australia Limited* [2014] FWCFB 4104