DECISION

Fair Work Act 2009
s.425 - Application to suspend protected industrial action, cooling off

Application by DP World T/A DP World Brisbane Pty Limited, DP World (Fremantle) Limited, DP World Melbourne Limited, DP World Sydney Limited

(B2023/1357)

DEPUTY PRESIDENT BINET PERTH, 13 DECEMBER 2023

s 425 Application to suspend protected industrial action. Cooling off.

[1] On 9 December 2023, DP World trading as DP World Brisbane Pty Limited, DP World (Fremantle) Limited, DP World Melbourne Limited, and DP World Sydney Limited (**DP World**) made an application (**Application**) to the Fair Work Commission (**FWC**) pursuant to section 425 of the *Fair Work Act 2009* (Cth) (**FW Act**).

[2] The Application sought orders that protected industrial action (**PIA**) being engaged in by employees in support of bargaining to replace the following enterprise agreements be suspended for a cooling off period of 90 days.[1]

a. DP World Brisbane Enterprise Agreement 2020;
b. DP World Fremantle Enterprise Agreement 2020;
c. DP World Melbourne Enterprise Agreement 2020; and
d. DP World Sydney Enterprise Agreement 2020.

(**Existing Agreements**)

[3] The employees to be covered by the orders sought are employees of DP World whose employment is currently covered by the Existing Agreements and for whom the Construction, Forestry, Maritime and Energy Union (**CFMEU**) is the bargaining representative for the purposes of s 176(1)(b) of the FW Act (**Employees**).[2]

[4] Directions for the filing of materials in advance of a hearing to determine the Application were issued to the parties on 11 December 2023 (**Directions**).

[5] The Application was listed for conference in Perth at 5pm (AWST) on 11 December 2023. The Application could not be resolved at the Conference and proceeded to a hearing at 5.30pm on 12 December 2023 (**Hearing**).

[6] In reaching my decision, I have considered all the submissions made and the evidence tendered by the parties, even if not expressly referred to in these reasons for decision.

Permission to be represented

[7] The Directions invited the parties to make submissions as to whether the FWC should grant permission to the parties to be represented. A determination of this issue is necessary to ensure that the manner in which any hearing is conducted is fair and just.[3]

[8] DP World and the CFMEU sought permission to be represented at the Hearing.

[9] Having considered the submissions of the parties, leave was granted to DP World and the CFMEU to be represented pursuant to section 596(2)(a) of the FW Act on the grounds that it would enable the matter to be dealt with more efficiently taking into account the complexity of the matter.

[10] At the Hearing, Mr Dan Williams of Minter Ellison (**Mr Williams**) appeared on behalf of DP World and Mr Kamal Farouque of Maurice Blackburn (**Mr Farouque**) appeared on behalf the CFMEU.

Evidence

[11] In accordance with the Directions DP World filed a witness statement setting out the evidence in chief of Mr Mark Shallcross Hulme in advance of the Hearing (**Mr Hulme**).[4]

[12] Mr Hulme is the Senior Director – Operations, Engineering and Infrastructure for DP World, Australia Limited (**DPWAL**) and has been involved in bargaining for agreements to replace the Existing Agreements (**Proposed Agreements**). Mr Hulme was cross examined by Mr Farouque at the Hearing.

[13] The CFMEU filed a witness statement setting out the evidence in chief of Mr Adrian Evans (**Mr Evans**) in advance of the Hearing.[5]

[14] Mr Evans is the Divisional Assistant National Secretary of the Maritime Union of Australia division of the CFMEU. He represents the industrial interests of members of the CFMEU engaged by DP World. He has been involved in the bargaining for the Proposed Agreement since bargaining commenced.

[15] Mr Evans was cross examined by Mr Williams at the Hearing.

[16] The parties jointly prepared and filed a digital court book containing the evidence and submissions of the parties which was admitted at the Hearing and marked as an exhibit (**DCB**).

[17] In reaching my decision I have considered all the submissions made and the evidence tendered by the parties, even if not expressly referred to in these reasons for decision.

Background

[18] DPWAL is the parent company for DP World's Australian container stevedoring operations. DPWAL had a reported annual total revenue of over $540 million each year since 2015. DPWAL's other subsidiaries include:[6]

a. DP World Sydney Ltd, which operates a terminal at Port Botany, New South Wales;
b. DP World Brisbane Pty Ltd, which operates a terminal at the Port of Brisbane, Queensland;
c. DP World (Fremantle) Ltd, which operates a terminal at the Port of Fremantle, Western Australia; and
d. DP World Melbourne Ltd, which operates a terminal at the Port of Melbourne, Victoria.

[19] DP World is one of only two corporate groups that operates in more than two Australian ports, the other being Patrick Terminals. Of the other container stevedoring operators, Hutchison Ports operates in Sydney and Brisbane, and Flinders and VICT operate in one port each (Adelaide and Melbourne, respectively). Together, DP World and Patrick handle the vast majority (>75%) of containerised freight moving through Australian ports.[7]

[20] DP World employs the Employees to perform the work associated with Terminal operations. This includes driving the cranes used to load and discharge ships, 'lashing' and 'unlashing' containers held in the hold of a ship, driving vehicles which transport containers around the Terminals' staging yards and to receival and delivery points, maintenance, clerical work, and specific duties relating to reefer containers.[8]

[21] The majority of the Employees are members of the CFMEU. Subject to certain limited exceptions, typically protected industrial action notified by the CFMEU is engaged in by all Employees.[9] For example, cargo care workers are routinely excluded from PIA to avoid adverse impacts to the perishable products they handle.[10]

[22] While each DP World Terminal operator currently has its own enterprise agreement specific to that port, the agreements are structured in two parts – Part A and Part B. Part A contains provisions which are common to all four Terminals, and are negotiated at a national level. Part B in each case contains Terminal-specific terms and conditions, and is negotiated at a Terminal level with the relevant Branch of the CFMEU.[11]

[23] On or about 30 March 2023, DP World commenced bargaining for replacement Agreements with the Employees and the CFMEU.

[24] Between 18 April 2023 and 28 September 2023 (inclusive) 13 bargaining meetings were held in relation to the Part A negotiations. [12] During the same period 3 or 4 meetings have been held in each Terminal in relation to the Part B negotiations for the Terminal. The negotiations made very limited progress and the parties remained apart on a large number of matters. [13]

[25] On or about 4 September 2023, the CFMEU applied and were granted protected action ballot orders in respect of each of the individual Terminals.[14] The respective PABOs require the CFMEU to provide five clear days of notice of any PIA. Generally the MUA has provided more than five clear days of notice of the PIA it has undertaken.[15]

[26] On 30 September 2023, the Agreements passed their nominal expiry date.[16]

[27] Employees engaged in PIA in form of partial work bans and full work stoppages at one or more Terminals between 7 October 2023 and 10 December 2023:[17]

[28] The bans are typically two hours duration in an eight hour shift.[18]

[29] DP World's consistent position has been that they would refuse to participate in bargaining on days when PIA is underway.[19] DP World have also declined to meet on dates when PIA is not underway.[20]

[30] On 10 November 2023 DP World suffered a cyberattack which led to it closing all Terminals until 13 November 2023.

[31] The cumulative effect of the Terminal closures due to the cyberattack and the ongoing PIA has been to reduce Terminal capacity. The CFMEU assert that the backlog caused by the cyberattack was cleared within a week notwithstanding contemporaneous PIA. DP World reports that currently the Terminals have a backlog of about 44,000 containers nationally.[21]

[32] On 14 November 2023, the CFMEU made an application under section 240 of the FW Act for the FWC to deal with a bargaining dispute in order to further progress the negotiations in light of DP World's refusal to meet while PIA was occurring. The application was allocated to my Chambers. I convened conferences on 15 November 2023 and 16 November 2023 at the conclusion of which the parties agreed:[22]

a. to participate in facilitated bargaining for six days in person in Perth commencing on Monday 4 December 2023;
b. that if, at the end of the first day of bargaining (and at the end of each subsequent day of bargaining) I was satisfied that the parties were making progress in bargaining I would recommend that the parties engage in bargaining the following day and that PIA should cease for that period.

[33] From Monday 4 December 2023 to Saturday 9 December 2023 (inclusive) I facilitated bargaining between the parties. The discussions succeeded in significantly reducing the number of the matters in dispute between the parties however no final or "in principal" agreement was reached between the parties at the conclusion of these conferences and the parties remained resolutely apart on a number of key issues.[23]

[34] On 10 December 2023, the CFMEU provided notice to DP World of protected industrial action to be taken at all terminals from 18 to 23 December 2023 in the form of partial work bans and full work stoppages.[24]

[35] DP World has a capacity to mitigate some of the PIA which has been notified. For example, by subcontracting the work affected by the PIA to other stevedoring companies, although this is commercially unattractive to DP World. [25]

[36] The CFMEU have indicated that they will suspend notified PIA on days on which bargaining occurs.[26]

[37] DP World has not yet taken any employer response action in respect to the PIA.

Relevant Statutory Provisions

[38] Section 425 of the FW Act states that:

> ***"s.425 FWC must suspend protected industrial action--cooling off***
>
> *(1) The FWC must make an order suspending protected industrial action for a proposed enterprise agreement that is being engaged in if the FWC is satisfied that the suspension is appropriate taking into account the following matters:*
>
> *(a) whether the suspension would be beneficial to the bargaining representatives for the agreement because it would assist in resolving the matters at issue;*
>
> *(b) the duration of the protected industrial action;*
>
> *(c) whether the suspension would be contrary to the public interest or inconsistent with the objects of this Act;*
>
> *(d) any other matters that the FWC considers relevant.*
>
> *(2) The FWC may make the order only on application by:*
>
> *(a) a bargaining representative for the agreement; or*
>
> *(b) a person prescribed by the regulations."*

Consideration

[39] The Application was made by DP World in its capacity as a bargaining representative for the Agreement. DP World therefore has standing to make the Application.

[40] There is no dispute and I am satisfied that the PIA being engaged in by the Employees is "protected industrial action" as defined by s 409 of the FW Act.

[41] DP World seeks an order that that PIA be suspended for 90 days.

What are the requirements to grant an Order?

[42] In order to grant the Application and make the order sought by DP World, the FWC must be satisfied that the suspension is appropriate taking into account the following matters:

a. whether the suspension would be beneficial to the bargaining representatives for the agreement because it would assist in resolving the matters at issue; and
b. the duration of the protected industrial action; and

c. whether the suspension would be contrary to the public interest or inconsistent with the objects of the FW Act; and
d. any other relevant matters.

[43] It is well accepted that the FWC should not lightly reach a state of satisfaction that it is appropriate to suspend protected industrial action and that a persuasive rational must be established as to why it is appropriate to do so on the facts of a particular application.[27]

[44] The legislative intent of the FW Act is that the statutory right to take PIA is not to be readily interfered with.[28] It follows that a suspension order should not be issued lightly, and only in circumstances where it is appropriate to do so.[29]

Is the suspension beneficial to the bargaining representatives because it would assist resolution of the issues?

[45] DP World says that granting the order sought will or is likely to lead to the following consequences:[30]

a. It will allow DP World "to take stock and assess the consequences of industrial action".
b. Employees "will return to full duties and full remuneration, which may allow a more objective evaluation of the DP World's bargaining proposals".
c. The 'threat of external intervention will be at least temporarily neutralised" leaving the parties to resolve the matters between themselves.
d. It will provide a 'circuit breaker'.

[46] The CFMEU says that granting the order sought will or is likely to lead to the following consequences:[31]

a. The industrial pressure which takes significant time to build will be lost and Employees will lose the benefit of that industrial leverage.
b. Employees will be delayed in receiving any pay increase or improved condition obtained via bargaining at a time when Employees are already heavily impacted by interest rate and cost of living increases.
c. DP World will be devoid of pressure to resolve the outstanding Employee claims.
d. DP World will proceed to implement foreshadowed roster changes before Employees can secure alternative arrangements via bargaining.

[47] PIA has been a feature of bargaining on the waterfront for decades. DP World's bargaining representatives are highly experienced industrial relations practitioners. It is difficult to accept that DP World would not have assessed the likelihood, and consequences, of industrial action prior to this bargaining round commencing and that they would not be continuing to do so while PIA occurs. In fact in Mr Hulme's witness statement, he provides extensive evidence with respect to the impact of the PIA. I do not accept that the cessation of industrial action is necessary for DP World to 'take stock' of the consequences of the PIA or to revise its position.

[48] Contrary to the submission made by DP World that a suspension would cause Employees to be more willing to make concessions my observation of members of the

bargaining teams and my experience of similar disputes in the same and comparable industries is that the longer the period during which employees are on strike without pay the more likely that they will be to make concessions in relation to their bargaining claims not the reverse.

[49] If the desire to resolve the outstanding issues can be assessed by willingness of the parties to make themselves available to participate in bargaining it would appear that the CFMEU appears to be more highly motivated by the impact of the PIA to conduct and conclude the negotiations before the end of the year. Furthermore, the insistence of DP World for a period of suspension of 90 days and nothing shorter also might arguably be suggestive of a lack of motivation for a speedy resolution of the outstanding issues in the absence of the pressure of PIA.

[50] Contrary to the views of DP World my assessment is that the 'threat of external intervention' is a strong driver for compromise by both parties which will be lost if the suspension is granted.

[51] DP World submit that suspension of the PIA would be beneficial because the PIA is distracting the parties from effectively negotiating a resolution of the issues between them. I am not satisfied that the PIA creates an inherent impediment to the parties meeting and bargaining. The CFMEU have committed to suspending notified PIA on each day negotiations are undertaken. If inclined to do so, DP World could commit to meeting with the CFMEU (who have indicated a willingness to do so) on the remaining consecutive days in the lead up to Christmas without PIA. This would spare DP World and its clients the adverse business consequences associated with the PIA in the lead up to Christmas.

[52] At the Hearing, DP World sought to argue that progress in the negotiations has only occurred because the industrial action was suspended during the facilitated bargaining and that therefore suspension of PIA will lead to further compromise. I do not accept that correlation is necessary established on the evidence. Since September, DP World had refused to meet while PIA was occurring. It is obvious that progress could not be made when the parties were not meeting. The fact that progress was made during the facilitated bargaining must to a significant extent be a function of the fact that it provided the parties with a period of six lengthy days of consecutive bargaining facilitated by a third party.

[53] Mr Evan's evidence is that in his experience limited progress will be made in the negotiations without PIA.

[54] There is no doubt that the suspension would benefit DP World financially, commercially and operationally. However, s 425(1)(a) is concerned with the benefit to all bargaining representatives in the resolution of issues. As DP Colman noted in *Orora Packaging Australia Pty Ltd t/a Orora Bag Solutions v Australian Manufacturing Workers' Union* (**Orora Case**) at [27]:[32]

> *"…The consideration in s 425(1)(a) is concerned with the benefit of a suspension to all bargaining representatives, not just one of them. Clearly a suspension would benefit the company as it would be relieved of the economic and operational pressure arising from the protected action. But I do not see how suspension of the protected industrial action would benefit the other bargaining representative, namely the union, which is seeking*

to use its rights under the Act precisely to exert pressure on the company in support of the bargaining claims that the union and its members are advancing."

[55] The identified benefit must be causative – that is, beneficial because it would assist in resolving matters, as DP Colman explained in the *Orora Case* at [28]:

"The consideration in s 425(1)(a) has a causative element. It is concerned not simply with whether the suspension would be beneficial to the bargaining representatives, but whether the suspension would be beneficial because it would assist in resolving the matters at issue. I do not consider that a suspension order would have this effect. The evidence does not establish that the protected industrial action is preventing bargaining meetings from occurring. I accept that the industrial action makes it more difficult for the company to participate in bargaining, but not that it is a significant impediment. The company is evidently prepared to engage in further discussions and is able to do so. The union confirmed during the hearing that it too is willing to negotiate further. In my view, suspension of the protected industrial action would not result in an increased likelihood that the matters at issue would be resolved."

[56] Mr Evans has given evidence as to how PIA is relied upon to give Employees bargaining leverage. I accept that suspension of the PIA will remove the bargaining power the Employees have been authorised by the FW Act to utilise.

[57] In *Australian Manufacturing Workers' Union v Paper Australia Pty Ltd (t/as Australian Paper),*[33] the Full Bench said that evidence about loss of bargaining power is "invariably a significant piece of evidence" and a "material factual consideration which directly oppose[s] the view that a cooling-off period would be beneficial to the bargaining representatives."

[58] Rather than hasten the progress towards resolution, the removal of bargaining power from the Employees appears more likely to extend the period of time to resolve the outstanding issues as they will have no bargaining leverage.

[59] There remains available to DP World various remedies including Employee Response Action which it can utilise in order to counter-balance the bargaining power of the Employees and encourage Employees to resolve the outstanding issues without the need to remove all bargaining power from Employees.

[60] There also remains available other remedies if the impact of the PIA worsens leading to significant economic harm or risk to the economy or third parties.

[61] These considerations weigh against the Application being granted.

Is the suspension appropriate given the duration of the protected industrial action?

[62] The PIA has been occurring over a period just over two months. DP World submit that the duration of the PIA weighs in favour of granting the Application given the impact of the PIA on its operations, its clients and the Australian community.[34]

[63] There is no decision rule as to what duration weighs in favour for or against a suspension. This is because the duration must be considered in the context of the particular negotiations.[35]

[64] For example, the conduct of the parties over the course of the industrial action may be a relevant consideration. In *Patrick Stevedores Holdings Pty Limited v Maritime Union of Australia*[36] industrial action had been occurring since December 2010 and suspended in February 2011. No further industrial action was taken until April 2011. From April 2011, Patrick adopted the position that it would not negotiate while industrial action was occurring. Senior DP Kaufman said at [17]:

> *"…Insofar as the duration of the protected industrial action is concerned, it seems to me that although it has now been occurring since April this year, this factor would have borne greater weight had Patrick been prepared to negotiate during this period."*

[65] Notwithstanding its good faith bargaining obligations to attend and participate in bargaining meetings, DP World refused to negotiate with the Unions while the Employees was exercising their statutory right to undertake PIA. The issues between the parties cannot be resolved if a party refuses to bargain. It is appropriate to take the period during which DP World refused to negotiate into account when considering what weight should be attached to the duration of the PIA.

[66] It is also important to consider whether the duration of the industrial action indicates what impact continued industrial action might have on resolving the issues between the parties. In the circumstances of this particular Application I am not satisfied that the duration of the industrial action has been so long that a suspension of the PIA at this point in time will trigger the resolution of the outstanding issues.

[67] On the evidence before me I am satisfied that the duration of the PIA is of not of an inordinate duration. It is not such that it is futile or excessive, however the duration to date weighs slightly towards, rather than against, the granting of the Application.

Is the suspension contrary to the public interest?

[68] DP World submit that declining to grant the Application is contrary to the public interest because of the harm caused and likely to be caused by the PIA to DP World, its customers and the broader Australian community. The relevant statutory consideration is whether the suspension would be contrary to the public interest.

[69] The CFMEU submits that given that the FW Act authorises the taking of industrial action, and confers an immunity on parties who do so from the legal consequences that would otherwise flow from such industrial action, the FW Act recognises a public interest in allowing parties to bargain. This is so even if it means doing so in a way that is likely to cause some degree of harm to employers, employees, third parties, and the broader economy.

[70] The CFMEU also submits that suspension would be contrary to the public interest, as it would reward a party who has refused to negotiate due to the taking of protected industrial

action, in circumstances where the FW Act promotes enterprise bargaining, underpinned by the right of employees and their bargaining representatives to take protected industrial action.

[71] A party's refusal to bargain while protected industrial action is on foot is relevant to s 425(c) and will count against a suspension order. As the Full Bench stated in *Australian Manufacturing Workers' Union v Paper Australia Pty Ltd (t/as Australian Paper)*[37]:

> *"It is difficult to envisage how the Respondent's refusal to bargain during protected industrial action could conform with the objects of the FW Act. The FW Act allows for "employer response action", but this does not include the capacity to unilaterally withdraw from the bargaining process…"*

[72] The Full Bench continued:

> *"We accept the Appellant's submission that suspending protected industrial action at the Respondent's request in order to encourage parties to resume bargaining, when it was the Respondent's own decision to stop bargaining in the first place because the applicant was engaging in protected industrial action, would be to "reward" non-compliance with the requirements of the FW Act. It is contrary to the public interest and inconsistent with the objects of the FW Act for the Commission to condone such conduct, even when the application before it is not for a bargaining order nor to deal with a bargaining dispute."*[38]

[73] With the exception of day one of the facilitated negotiations DP have consistently maintained a position that it will not bargain while PIA is underway.

[74] I am satisfied that the public interest in not interfering in the statutory right to take protected action without good reason, and the public interest in parties observing the good faith bargaining principles, weigh against granting the Application.

Is the suspension inconsistent with the objects of the FW Act?

[75] DP World has refused to participate in bargaining while PIA is being undertaken.

[76] Section 228(1) of the FW Act expressly requires bargaining representatives to attend and participate in meetings at reasonable times. Part 3-3 authorises the taking of industrial action, and largely confers an immunity on parties who do so from the legal consequences that would otherwise flow from such industrial action.

[77] In the present circumstances I consider it would be inconsistent with the objects of the FW Act in particular section 3(f) of the FW Act to suspend the PIA.

Are there any other relevant matters to consider?

[78] While not a matter that I am expressly required to consider I have considered the impact of the PIA on DP World and the broader Australian community noting:

a. there are other provisions of the FW Act which provide a specific mechanism to deal with the impact of industrial action on a business and the Australian community;

b. opportunities for mitigation are available to DP World;
c. the period of notice of PIA provided by the CFMEU to DP World of 7 to 14 days provides DP World with a significant opportunity to take steps to mitigate the impact of the PIA; and
d. the CFMEU have offered to suspend PIA during negotiations.

[79] That the parties bargain is a requirement of the FW Act. I would commend them to continue to do so promptly, efficiently and effectively.

[80] Notwithstanding that industrial action is made lawful by the FW Act it inevitably has adverse consequences for everyone involved. The deterioration of the relationship between the parties caused by prolonged and extensive industrial action can take months or even years to repair. Ironically industrial action can undermine the key issue that the Unions continue to press, namely providing employees with some confidence about the security of their employment. It is in everyone's interest that the parties reach agreement on the outstanding issues as quickly as possible.

Conclusion

[81] While it may be the case that that it may be appropriate to suspend the PIA for a period of time in the future, I am not satisfied that suspension of the PIA is appropriate at this point in time taking into account the matters set out in section 425(1).

[82] The Application is therefore dismissed. An Order[39] to this effect will issue with this Decision.

DEPUTY PRESIDENT

Appearances:
Mr D Williams, for the Applicant.
Mr K Farouque, for the Respondent.

Hearing details:
2023
PERTH
12 December

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[1] Digital Court Book (**DCB**), 6.

[2] DCB 9.

[3] *Warrell v Walton* (2013) 233 IR 335, 341 [22].

[4] DCB, 7-27.

[5] Digital Court Book, 268-281.

[6] Ibid 8, 279.

[7] Ibid 8.

[8] Ibid 9

[9] Ibid.

[10] Ibid 280.

[11] Ibid 10.

[12] Ibid 11.

[13] Ibid 12-13.

[14] Ibid 13.

[15] Transcript Cross Examination of Mr Hulme; Ibid 274.

[16] DCB (n 1) 13.

[17] Ibid 13-14.

[18] Ibid 281.

[19] Ibid 14, 275.

[20] Ibid 275.

[21] Ibid 25-26, 281.

[22] Ibid 275-276.

[23] Ibid 16-17.

[24] Ibid 16.

[25] Ibid 21-22, 281.

[26] Ibid 278; see for example page 312 of the DCB.

[27] [2020] FWC 49 at [34].

[28] See paragraphs [1708] to [1709] of the Explanatory Memorandum to the Fair Work Bill 2008 (Cth).

[29] *Patrick Stevedores Holdings Pty Limited v MUA* [2011] FWA 3059 at [15]; *ASCPty Ltd v CEPU* [2017] FWC 5295 at [21].

[30] Ibid, 3-5.

[31] Ibid, 278.

[32] *Orora Packaging Australia Pty Ltd t/a Orora Bag Solutions v "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union* [2020] FWC 49.

[33] [2018] FWCFB 2011.

[34] DCB (n 1) 4.

[35] [2020] FWC 49.

[36] [2011] FWA 3059.

[37] (2018) 278 IR 237; [2018] FWCFB 2011 at [35].

[38] *Australian Manufacturing Workers' Union v Paper Australia Pty Ltd (t/as Australian Paper) VP*, Hamberger SDP, Commissioner Riordan (2018) 278 IR 237; [2018] FWCFB 2011 at [37].

[39] PR769404.