DECISION

Fair Work Act 2009
s.418—Industrial action

Royal Flying Doctor Service (Queensland Section) Limited
v
Australian Nursing and Midwifery Federation
(C2023/7957)

DEPUTY PRESIDENT DOBSON BRISBANE, 21 DECEMBER 2023

Application for an order to stop unprotected industrial action – Notice not compliant with s.409(2) – Order issued

[1] An application for an order under s.418 of the *Fair Work Act 2009* (the Act) was made to the Fair Work Commission (the Commission) on 19 December 2023 by Royal Flying Doctor Service (Queensland Section) Limited (the Employer/Applicant). The application was accompanied by the notices sent by the Australian Nursing and Midwifery Federation (ANMF/the Union/Respondent) regarding industrial action and the Employer's response to these.

History

[2] This is the third application pursuant to s.418 of the Act filed in respect of these parties and the history of the matters was set out in [2023] FWC 3106. The first previous matter dealt with an issue regarding the vote conducted by the ballot agent and the notice produced prior to a correction. I ordered that no planned industrial action on the basis of the notice given occur and that it would be open to the Union to produce another notice. The second previous matter dealt with a second notice of intention to take protected industrial action and specifically whether the notice was defective. In that matter, I found that the notice was defective in respect of some of the actions that were to be taken. That is that they did not provide sufficient information to enable the Applicant to take action to mitigate the impact of that action and I issued orders to stop some of the intended industrial action deriving from the Respondent's Notice of 20 November 2023.

[3] The present application has been made by the Employer as a result of a notice of protected industrial action issued by the Respondent on 14 December 2023 (Notice).[1]

[4] On 19 December 2023, Deputy President Lake issued directions for the filing of material by the parties and listed the application for hearing at 10:30am on 21 December 2023. Evidence was provided by the Employer at 9:38 am on 20 December 2023 and at 5:00pm on 20 December 2023 by the Respondent. On 21 December 2023 the matter was reallocated to me to be heard.

[5] At the hearing, Mr J.E Murdoch KC, appeared as counsel for the Employer, instructed by Ms Cheryl-Anne Laird & Mr Jack Fuller of Mazars, together with Ms Judy Hawkins, Executive General Manager People and Culture of the Employer. Ms Courtney Trevascus & Mr Simon Ong, Industrial Officers of the Union, appeared for the Respondent.

Permission to appear

[6] The Applicant sought leave to be represented before the Commission by counsel and their lawyers. The Respondent had no objection to the Applicant being legally represented.

[7] Relevantly, section 596(1) of the FW Act provides that a party may be represented in a matter before the Commission by a lawyer or paid agent only with the permission of the Commission.

[8] Section 596(2) provides that the Commission may grant permission for a person to be represented by a lawyer or paid agent in a matter before the Commission only if:

(a) it would enable the matter to be deal with more efficiently, taking into account the complexity of the matter; or

(b) it would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively; or

(c) it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter.

[9] The decision to grant permission is not merely a procedural step but one which requires consideration in accordance with s.596 of the FW Act.[2] The decision to grant permission is a two-step process. First it must be determined if one of the requirements in s.596(2) have been met. Secondly, if the requirement has been met, it is a discretionary decision as to whether permission is granted.[3]

[10] Considering the potentially complex nature of the matter, I determined to grant leave to the Applicant to be represented on the basis it would assist the Commission to deal with the matter more efficiently,[4] *inter alia*, in light of the expeditious requirements to deal with this particular application under statute. Further, I note that it would be unfair for the Employer given they lacked the expertise to represent themselves[5] and finally, that the Union were very experienced in matters of this nature and it would be unfair not to allow representation taking into account fairness between the parties.[6]

Procedural matters

[11] The application sought orders be made by the Commission against:

(a) Members of the Australian Nursing and Midwifery Federation (ANMF) employed by the Royal Flying Doctor Service (Queensland Section) Limited;

(b) The ANMF;

(c) Kate Veach; and

(d) All other officers, officials, employees of the Queensland Branch of the ANMF.

Legislative context

[12] The application has been made pursuant to s.418 of the Act. Section 418 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."

[13] The meaning of industrial action is contained at s.19 of the Act:

> **"419 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.
>
> (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.'

[14] Section 409(2) sets out what constitutes employee claim action:

> …
> (2) The **industrial action** must be authorised by a protected action ballot (see Division 8 of this Part) .... **(Emphasis added)**

[15] Section 437 sets out the requirements for an application for a protected action ballot"

…

Matters to be specified in application

(3) The application must specify:

(a) the group or groups of employees who are to be balloted; and

(b) **the question or questions** to be put to the employees who are to be balloted, including the nature of the proposed industrial action; … **(Emphasis added)**

[16] Section 459 sets out the circumstances in which industrial action is authorised by a protection action ballot:

(1) Industrial action by employees is authorised by a protected action ballot if:

(a) the action was the subject of the ballot; and

(b) at least 50% of the employees on the roll of voters for the ballot voted in the ballot; and

(c) more than 50% of the valid votes were votes approving the action; and

(d) the action commences:

(i) during the 30-day period starting on the date of the declaration of the results of the ballot; or

(ii) if the FWC has extended that period under subsection (3)--during the extended period.

…. **(Emphasis added)**

[17] Section 460 sets out the circumstances for which immunity is given for persons who act in good faith on protected action ballot results:

…

(1) This section applies if:

(a) the results of a protected action ballot, as declared by the protected action ballot agent for the ballot, purported to authorise **particular industrial action**; and

…. **(Emphasis added)**

Applicant's Submissions

[18] The Applicant submitted that the notice and the proposed ban therein is outside the scope of the question which went to ballot in accordance with the PABO. The notice stated specified a "ban on recording the following data on the Electronic Heath Record (HER): (a) The time that the door of the aircraft closes at the base. (b) The time that the crew is ready." The PABO included a question which was:

"A ban or partial ban on correctly recording non-clinical data, including:

(a) The times for "crew read". "aircraft door close at base", "arrival at handover destination" and "patient handover date/time" in the patient journey logs on Electronic Health Records

(b) "Medicare Item No/Medical Chest/WorkCover details" and start and finish times on Clinic Patient Record (CPR) forms.

(c) Aviation Flight Record (AFR) data

[19] The Applicant submitted that all data recorded by nurses in the course of their duties is recorded in a clinical context and is clinically relevant, and that there was no identification of the criteria to be used by the ANMF to distinguish between clinical and non-clinical.

[20] The Applicant relied on my previous decision of 25 November 2023 and submitted that the circumstances of the present application were comparable. The Applicant submitted that a ban as proposed in the notice would not be protected action because it falls outside of the scope of the relevant question in the PABO. The data that would be subject to the ban, is considered by the Applicant to be clinical data and the Applicant submitted that this was consistent with my previous decision.[7]

Mr Poole's evidence

[21] Mr Lee Poole is the Executive General Manager Nursing and Clinical Services at the Applicant. Mr Poole has over 10 years of senior leadership and Board experience and holds qualifications in Nursing, Business Management, Emergency Nursing, Midwifery and in Nurse Practitioner Studies (Aviation)

[22] Mr Poole stated that the purported action in the notice is a ban on recording clinically relevant data which could not be properly characterised as a ban on recording "non-clinical data".

[23] The Employer provides a retrieval service, and Mr Poole stated that the time that the Employer is ready and capable of providing this service, and the time of patient handover is all clinically relevant data.

[24] Mr Poole identified that other services, such as the Queensland Ambulance Service, also record information referred to in the notice as "non-clinical" as the details recorded are clinically relevant.

[25] Mr Poole stated that the data in question recorded in the EHR of a patient (as per the Employer's procedures) makes the data available in the instance of a review conducted internally by the Employer or externally by authorised enterprises (such as a coroner).

[26] I am satisfied that Mr Poole is eminently qualified, and I found his evidence to be credible and considered. I accord appropriate weight to his opinions particularly given the nature of the Applicant's operations.

Respondent's Submissions

[27] The Respondent submitted that the Applicant has avoided references to the Act in their application and submissions and referred to s409 which provides that for action to be protected it must be authorised by their members through the ballot. The Respondent submitted that there

is no reference to "scope" of a protected action ballot. The wording of s409 would be satisfied, in the Respondent's submissions, if the action in the notice is authorised by the Union. I reject this submission. There are a number of sections of the Act that require the PABO itself to authorise the action that is taken. These include section 437 (which requires the question or questions to be put to the employees who are balloted), section 459 which requires that the industrial action is authorised by a protected action ballot, inter alia, if the action was the subject of the ballot and section 460 which provides immunity for persons who act in good faith on protected action ballot results where the results authorise particular industrial action.[8]

[28] The Respondent rejects the Applicant's submission that the Notice falls outside the scope of the PABO and attributes the Applicant's understanding to their own subjective use of "non-clinical data" used in the ballot questions and that the Respondent disagrees with this understanding.

[29] The Respondent submitted that the question to be determined is more appropriately framed in the following terms "Was the Action Notified authorised by the relevant ANMF members through the PABO" and that the Commission is not required to make a finding on the definition of "non-clinical data" as a stand-alone term.

[30] The Respondent submitted that the meaning of non-clinical data is only relevant in relation to whether the ANMF members who were voters for the PABO understood the meaning of the questions and therefore are capable of authorising the action. The Respondent referenced the decision in *John Holland Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union and The Australian Workers' Union*[9](John Holland). The Respondent submitted that the definition of "non-clinical data" could not be considered outside of the context of the ballot question.

[31] In relation to question 4 of the PABO, the Respondent submitted that it unambiguously specified the nature of the action to be endorsed by the voters. The name of the electronic application used by ANMF members on daily basis is specified in part (a) of question 4 as the EHR. Further, question 4 gives the exact wording for the data fields within this application as "crew ready" and "aircraft door close at base".

[32] The Respondent submitted that the language in this question is both specific and familiar to their members and that there could be no doubt that the employees were capable of understanding and responding to the question. The Respondent further submitted that "non-clinical data" covers any data that is not specifically clinical data, with its ordinary meaning being "data which is concerned with the observation and treatment of disease in a patient".

[33] The Respondent relied on the decision in John Holland, submitting that the Full Bench cautioned against a pedantic and technical approach to interpretations of questions. Further, the Respondent referenced that a pedantic and technical approach might render a question meaningless.

[34] The Respondent also relied on the decision in *Telstra Corporation Limited v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (Telstra)[10] in their argument that the ordinary industrial English meaning of the action to be taken over the subjective understanding of the Applicant's witness.

[35] The Respondent submitted that the Commission was not required to make a finding as to the definition of "non-clinical data" as a stand-alone term removed from the examples contained within question 4 of the PABO.

[36] The Respondent, in their consideration of Mr Poole's Affidavit, considered that there was no definition provided and further considered that the term 'clinically relevant' ought not be considered as it was not use in their PABO question.

[37] The Respondent submitted that the ordinary meaning of the words, provided in the Macquarie dictionary that it would refer to information that is concerned with the observation and treatment of disease in a patient. They submitted that neither of the pieces of data referred to in the notice are concerned with the observation and treatment of disease in a patient. The Respondent further stated that as the information does not relate to the persons' condition or health, it would have no effect whatsoever on any patient's health if not recorded.

[38] The Respondent drew a comparison between the cabin door close time and the take-off time, submitting that Mr Poole's evidence that crew depart time is not the data that is the subject of the Notice. The "crew ready" time nor the "aircraft door closes at base" time are not used for sending an estimated time of arrival to the patient or the destination hospital.

[39] The Respondent submitted that the data is used by the Employer primarily to assess the efficiency of the business and that it is reported to the Queensland Government as a key performance indicator under the Employers new contract. The Respondent provided a "FAQ" document that had been provided to employees by the Employer. The Respondent provided this to Mr Poole during cross-examination. The Respondent submitted that this document demonstrated that the relevant data was merely a requirement for the Queensland Health arrangements for which the Applicant would be penalised if it failed to meet those requirements. I reject this submission and prefer the submission of the Applicant that these requirements are not mutually exclusive with also being clinical data requirements that had a direct impact on patient outcomes.

[40] The Respondent referred to submissions made by the Applicant in relation to the previous matters before the Commission. The Respondent submitted that the only comment made by the Employer concerning Question 4 of the PABO was in Ms Laird's submission that:

> "In relation to Item4(a) in the draft order, the information identified is not information belonging to the RFDS. It is information belonging to Queensland Health and is merely collected by the RFDS on behalf of Queensland Health.
>
> The failure to collect this information may cause significant economic harm to the RFDS. Further, the information identified as "patient handover date/time" is clinical information and is collected for a number of reasons including the protection of clinical staff, including nurses, should an adverse outcome subsequently arise for a patient."

[41] The Respondent submitted that the Applicant did not argue that there was any ambiguity in the wording of Question 4 and that the Employer had acknowledged that the question met the requirements of s443. I find that this argument is of no consequence. The proposition that

there is no ambiguity in the wording of Question 4 does not have any bearing on whether the action foreshadowed in the Notice is protected by virtue of the PABO. I will deal more on this later.

[42] The Respondent also submitted that the Applicant did not suggest that the Actions Notified were clinical in nature.[11] This is plainly wrong. Mr Poole's evidence did just that and further, it was also the subject of previous findings in my earlier decision.[12]

[43] The Respondent further submitted that the Applicant's reliance on my previous decisions is misplaced. The previous decision related to the notice in that application being insufficiently clear so as to enable the Applicant to mitigate the effects of the actions. That may well be true, but it doesn't mean that findings in relation to what is clinical or non-clinical data are not relevant. It is my view that they are.

[44] The Respondent also submitted that the Notice had no reference to "non-clinical data" and that any comments made in the previous decision should be viewed as in obiter. The Respondent concluded that the Notice meets each requirement of the Act and that the action proposed is protected.

Consideration

[45] I accept the Applicant's submissions that the industrial action is authorised only where it is particularised in the protection ballot order (PABO)[13]. In this case it is clear in the PABO, that the industrial action that was authorised at Question 4 was:

> "A ban or partial ban on correctly recording **non-clinical data**, including:
>
> (a) The times for "crew ready", "aircraft door close at base", "arrival at handover destination" and "patient handover date/time" in the patient journey logs on Electronic Health Records (EHR).
> (b) "Medicare Item No/Medical Chest/WorkCover details" etc " **Emphasis added**

[46] Whilst there was no specific evidence before me, I accept the Respondent's submissions that those who voted on the PABO questions were not confused about what they voted on. I accept that a nurse is knowledgeable about the importance of clinical versus non-clinical factors as such knowledge would be fundamental to the nature of their profession. The issue before me is to determine whether the particular industrial action that was authorised by the PABO, protects the action proposed to be taken in the Notice.[14] The action proposed to be taken in the Notice does not define whether it is clinical or non-clinical but rather refers to the actual data that will be banned from being recorded. (Specifically, the time that the door of the aircraft closes at the base and the time that the crew is ready).

[47] In my previous decision I made findings that this information was clinical data.[15] In this present matter the Respondent submitted that they had new information that would challenge those findings and, on that basis, they sought to cross examine Mr Poole. I note that while it was open to them to do so, the Respondent did not put further evidence before the Commission in this respect. The cross examination of Mr Poole occurred. The evidence given by Mr Poole under cross examination was that the precise recording of the timing of a particular service was

clinical data and clinically relevant. The information the subject of the Notice, remains in my view to be clinical information.

[48] On that basis it is my view that the Notice warns of its intention to ban the recording of clinical information which is not consistent with the relevant question in the PABO. I don't accept that this is a technical or pedantic interpretation of the words in the PABO question as was submitted by the Respondent.[16] The question in the PABO (at question 4) clearly used the words non-clinical data and yet the Notice sets out two types of information that constitute clinical data. The difference between clinical data and non-clinical data is far from technical or pedantic. In the industrial context of the Royal Flying Doctor Service being a national, charitable, health organisation delivering primary healthcare and 24 hour emergency services for those that live in rural and remote Australia, the ramifications of the difference in this type of information have potentially significant consequences on patient outcomes as Mr Poole's evidence confirmed.

[49] Whilst the word 'scope' may not be specifically set out in the Act, it is true that the intended action the subject of the Notice fails to meet the test at s409(2) in that such action is in my view, not authorised by the PABO.

[50] The Act[17] empowers the commission to make orders to stop industrial action in certain circumstances where that action is not, or would not be protected industrial action. In circumstances where the Notice does not comply with s.409(2) in so far as it fails to fall within the description of the questions in the PABO, I find that the actions foreshadowed in the Notice would not constitute protected action as defined by the Act.

Findings

[51] Having considered all of the material before me including the evidence of Mr Poole, I find that the notice of intention to take protected industrial action by the Union dated 14 December 2023 is defective, and therefore is not protected, in respect of it falling outside of the questions that were asked in the PABO, specifically Question 4.

[52] I have satisfied myself that the Applicant has made out to the requisite degree of satisfaction that the industrial action as set out at in the Notice, would not be protected industrial action for the purposes of s409(2) of the Act. I further find that Notice was given by the Respondent to take such action on 14 December 2023 and that there is no evidence before me that the Union resiles from this intent. I therefore find that industrial action is threatened, impending or probable and/or being organised.

Conclusion

[53] The Act therefore requires me to make an order to stop the intended industrial action deriving from the Respondent's Notice of 14 December 2023. That order will be issued separately.

DEPUTY PRESIDENT

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[1] Digital Court Book pp.8.

[2] *Warrell v Fair Work Australia* [2013] FCA 291.

[3] Ibid.

[4] *Fair Work Act 2009* (Cth) s.596(2)(a).

[5] Ibid s.596(2)(b).

[6] Ibid s.596(2)(c).

[7] *Royal Flying Doctor Service of Australia (Queensland Section) Limited v Australian Nursing and Midwifery Federation* [2023 FWC 3106 [58].

[8] *Fair Work Act 2009* (Cth) s.460(1)(a).

[9] John Holland Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union and The Australian Workers' Union [2010] FWAFB 526 at [19].

[10] Telstra Corporation Limited v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia [2019] FWC 2266.

[11] Respondents outline of submissions dated 20 December 2023 [52]; Digital Court Book p.44.

[12] *Royal Flying Doctor Service of Australia (Queensland Section) Limited v Australian Nursing and Midwifery Federation* [2023 FWC 3106 [58].

[13] *Australian Nursing and Midwifery Federation v Royal Flying Doctor Service of Australia (Queensland Section) Limited* B2023/1153, Commissioner Hunt, 24 October 2023.

[14] Fair Work Act 2009 (Cth) s. 409(2).

[15] *Royal Flying Doctor Service of Australia (Queensland Section) Limited v Australian Nursing and Midwifery Federation* [2023 FWC 3106 [58].

[16] *John Holland Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union* [2010] FWAFB 526 [19].

[17] *Fair Work Act 2009 (Cth)* s.418.