



REASONS FOR DECISION

Fair Work Act 2009

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

Searoad Shipping Pty Ltd

v

Construction, Forestry and Maritime Employees Union

(C2024/1610)

DEPUTY PRESIDENT GOSTENCNIK

MELBOURNE, 20 MARCH 2024

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

[1] On 16 March 2024, SeaRoad Shipping Pty Ltd (SeaRoad) applied for an order under s 418 of the *Fair Work Act 2009* (Cth) (Act) directed to the Construction, Forestry and Maritime Employees Union (CFMEU) and certain of its employees who are, or are eligible to be, members of the CFMEU that unprotected industrial action stop and not be organised. On 18 March 2024, I heard the application and decided *ex tempore* to make an order directed to SeaRoad’s employees who are CFMEU members that unprotected industrial action, which was happening in the form of a “go-slow” and overtime restrictions, stop. I declined to make any order directed to the CFMEU which SeaRoad contended was organising the unprotected industrial action. These are my reasons for those decisions.

[2] Section 418(1) of the Act provides that the Commission must order that industrial action stop, not occur or not be organised (as the case may be) for a period, if it appears to the Commission that the industrial action by one or more employees or employers that is not, or would not be, protected industrial action: is happening; is threatened, impending or probable; or is being organised. “Industrial action” carries the meaning ascribed to that phrase by s 19, which is relevantly as follows:

“19 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.

Note: In *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v The Age Company Limited*, [PR946290](#), the Full Bench of the Australian Industrial Relations Commission considered the nature of industrial action and noted that action will not be industrial in character if it stands completely outside the area of dispute and bargaining.”

[3] SeaRoad is part of an Australian shipping and logistics business operating sea freight and transport services. SeaRoad operates the sea freight part of the business including transporting containers, trailers, refrigerated units, cars and other mobile equipment on its two vessels - the Mersey II and Liekut. These services operate between Webb Dock in Port Melbourne, Victoria and Devonport in Tasmania.¹

[4] Relevantly, SeaRoad operates at Webb Dock between Monday to Saturday. Stevedores and foremen are generally allocated to work (except on Saturdays as shifts are limited to 8 hours) one or more of the shifts as follows: 6:00 am to 3:00 pm; 6:30 am to 3:30 pm; 7:00 am to 4:00 pm; 8:00 am to 5:00 pm; and 10:00 am to 7:00 pm. The composition of SeaRoad’s workforce at Webb Dock comprises approximately 74 stevedores, six foremen who are also stevedores, two supervisors, one Port Operations Manager, and one General Manager of Operations. The supervisors work overlapping shifts between 6:00 am to 3:00 pm and 10:00 am to 7:00 pm. On any shift, SeaRoad will generally have 39 stevedores, five foremen and one or two supervisors on site at Webb Dock. Stevedores are organised into “gangs”, which are assigned to a specific area or task, and each gang is led by a foreman.² The stevedores and foremen are covered by the *SeaRoad Shipping Enterprise Agreement (Stevedoring) 2023* (Agreement), which has a nominal expiry date of 30 June 2024.

[5] It is uncontroversial that a preponderance of SeaRoad’s workforce covered by the Agreement are members of the CFMEU.

[6] Robert MacDonald is a member and delegate of the CFMEU and was, until his dismissal on 12 February 2024, employed by SeaRoad. Following SeaRoad’s allegations letter to Mr MacDonald and a show cause process,³ SeaRoad summarily dismissed Mr MacDonald for serious misconduct said to involve multiple incidents of serious bullying, intimidation and other unsafe conduct.⁴ These reasons will doubtless be scrutinised in any hearing of an unfair dismissal application involving Mr MacDonald, which the CFMEU lodged on 29 February 2024.

[7] Travis Carlier is SeaRoad’s General Manager of Operations. Mr Carlier gave evidence in which he said that since Mr MacDonald’s dismissal on 12 February 2024, members of the CFMEU employed by SeaRoad at Webb Dock have been involved in industrial action which was unprotected. Specifically, these employees were adopting practices which result in a restriction, or limitation on, or a delay in the performance of work, known in industrial parlance

as a "go-slow". These employees were also refusing to accept offers of overtime work which amounted to a ban, limitation or restriction on the performance of overtime work and the acceptance of overtime work.⁵ The restrictions are said to have resulted in a significant drop in productivity at Webb Dock.⁶

[8] Mr Carlier said that SeaRoad continuously records the rate at which trailers and cassettes are loaded and unloaded as part of its usual operations and this data establishes that, across the 12-month period ending on 12 February 2024, SeaRoad vessels were loaded and unloaded at an average rate of 22 trailers per hour and 24 cassettes per hour. This was a 12-month average, which incorporates all conditions that may be expected to occur throughout the year, including things such as inclement weather, staff shortages and delays.⁷

[9] Mr Carlier said that, in comparison to the 12-month average, from 12 February 2024 to 29 February 2024, loading and unloading of SeaRoad vessels averaged 10-12 trailers per hour and 10 cassettes per hour, and from 1 March 2024 to 15 March 2024, SeaRoad vessels were loaded and unloaded at an average rate of 12 trailers per hour and 10 cassettes per hour.⁸ Mr Carlier said that before 12 February 2024, the Vehicle Desk Discharge Completion Time (to unload) typically occurred at around 10:00 am each day but since Mr MacDonald's dismissal, the completion time shifted to consistently be at approximately 11:30 am. Consequently, an additional 90 minutes on average each day has been added to the discharge time of a vessel. Mr Carlier said that in the result, loading of the vessel does not start until about 2:00 pm each day, leaving only approximately 3 hours for that gang to complete the load. That gang finishes at 5:00 pm. According to Mr Carlier, ordinarily that gang would complete the load from that deck, however, since Mr MacDonald's dismissal, this load has not been completed. Mr Carlier said that at 6:00 pm when the top deck finishes, employees on duty need to come and try to complete the main deck and the freight is not being loaded within the available time.⁹ Mr Carlier's evidence was based on an analysis set out in a spreadsheet.¹⁰ I accept his evidence as to the reduction in load and unload rates per hour and the increase in turnaround time for vessel discharges since 12 February 2024.

[10] Whilst some fluctuations in productivity may be attributed to factors such as absenteeism, weather and other external factors, these do not explain the dramatic negative change in performance shown in Mr Carlier's evidence since 12 February 2024. The most likely explanation is that there is a practice being adopted by a significant portion of SeaRoad's workforce at Webb Dock, the result of which is a restriction, or limitation on, or a delay in the performance of work. And, given the steep decline in the load and unload rates experienced by SeaRoad at Webb Dock since 12 February 2024, it would stretch the bounds of credulity to suggest otherwise. This practice is aptly described as a "go-slow". That the "go-slow" coincides with the dismissal of a CFMEU delegate strongly suggests that those participating in the "go-slow" are members of the CFMEU and the scale of the "go-slow", as evident in the dramatic fall in productivity, suggests a degree of co-ordination amongst, and perhaps acquiescence to participating in the action by, the CFMEU members and a high level of participation by them in the "go-slow" practice. Fifty-eight employees whom Mr Carlier has identified as CFMEU members are said to be engaged in or involved in the "go-slow" or the overtime restrictions,¹¹ to which I will shortly come. I accept this evidence.

[11] It is not seriously contested that the "go-slow" as described is industrial action within the meaning of s 19(1)(a) of the Act. And I am satisfied that CFMEU members employed by

SeaRoad at Webb Dock have, since 12 February 2024, been engaged in industrial action in the form of a “go-slow” and that industrial action is continuing. It is uncontroversial that the action is not protected industrial action and I am so satisfied.

[12] As to the “overtime ban”, Mr Carlier’s evidence was that overtime allocations are made after a call for volunteers and that the number of volunteers responding to each call usually met or exceeded the numbers required. For this reason, SeaRoad maintains an overtime allocation record to ensure that overtime allocations are made fairly across its workforce. This is achieved through a points system to ensure overtime is equitably distributed.¹²

[13] Mr Carlier said that across the 12-month period ending on 12 February 2024, SeaRoad had offered 175 overtime shifts over 28 days which were all worked.¹³ Mr Carlier said that need for overtime shifts has increased since 12 February 2024 because of the reduction in productivity brought about by the “go-slow” practice, which has resulted in SeaRoad offering 168 overtime shifts over 7 days. But only 10 overtime shifts have been accepted and by only 4 employees.¹⁴

[14] Mr Carlier set out the following examples of calls for overtime and refusals in the period 1 March to 14 March 2024:

- 1 March 2024, 40 stevedores were asked to work overtime but only 3 agreed;
- 4 March 2024, 21 stevedores were asked to work overtime but only 3 agreed;
- 5 March 2024, 21 stevedores were asked to work overtime but only 1 agreed;
- 6 March 2024, 7 stevedores were asked to work overtime but only 1 agreed;
- 8 March 2024, 44 stevedores were asked to work overtime but only 4 agreed ;
- 9 March 2024, 13 stevedores were asked to work overtime but only two agreed and so overtime was not able to be worked as there was an insufficient number of employees;
- 13 March 2024, 30 stevedores were asked to work overtime but only three agreed; and
- 14 March 2024, 21 stevedores were asked to work overtime but only one agreed.¹⁵

[15] Mr Carlier’s evidence was that of the 74 stevedores in SeaRoad’s employ at Webb Dock, only 5 have agreed to extend (that is to work overtime) since Mr MacDonald's dismissal. And this is an insufficient number to create an additional gang to complete required tasks. Mr Carlier said that, as overtime was not being worked, freight is not being completely loaded onto vessels. Mr Carlier said that the refusal to extend is very unusual and that, generally, there are more than enough volunteers for overtime.¹⁶

[16] Mr Carlier also gave evidence that he had observed written messages around Webb Dock referring to “overtime rats” and that “the noose is tightening for the rats”.¹⁷ Mr Carlier said that on 29 February 2024 he sent a letter to all employees covered by the Agreement, highlighting the reduction in productivity and that this may be the consequence of employees engaging in unprotected industrial action. He referred to both the “go-slow” and the overtime restrictions and set out some of the consequences for employees who engaged in unprotected industrial action.¹⁸ He said that the letter did not have the desired impact – of a return to normal work.¹⁹

[17] Mr Carlier’s evidence was that on 14 March 2024, SeaRoad asked some of its employees to provide reasons why they were unable to work the overtime offered. This resulted in one

additional employee agreeing to work overtime on that occasion and 10 employees refused, citing either “personal reasons” or “family obligations” as the reason for refusing overtime.²⁰ On 15 March 2024, all employees working at Webb Dock were asked why they were unable to work overtime. SeaRoad’s documented responses given by the employees set out various personal, family, recreational and social reasons.²¹

[18] I accept Mr Carlier’s evidence. The steep decline in overtime uptake since 12 February 2024 from a workforce usually inclined to accept and work overtime shift suggests much more than a football game needing attendance or a family, social or other commitment as standing in the way. While doubtless on some occasions such reasons might legitimately explain a refusal, the systematic nature and scale of the refusals as set out in Mr Carlier’s evidence, together with the not too subtle messaging to the few “rats” accepting overtime shifts, points strongly to a departure from the practice of accepting overtime shifts, often by employees oversubscribing for the overtime available, to a collective ban or limitation on the acceptance of overtime shifts by employees who are CFMEU members.

[19] There is no real dispute that a restriction on working overtime of the kind the evidence describes is industrial action within the meaning of s 19(1)(b) of the Act.

[20] On the evidence, I am satisfied that SeaRoad’s employees at Webb Dock who are members of the CFMEU are engaging in industrial action in the form of a ban, limitation or restriction on the performance of overtime work and on the acceptance of overtime work. It is also uncontroversial that this action is not protected industrial action and I am so satisfied.

[21] SeaRoad also contends that the CFMEU is organising the industrial action in which its members are engaging. To make good its contention, SeaRoad relies largely on an inferential case.

[22] Mr Carlier’s evidence was that the CFMEU’s involvement in organising the “go-slow” and overtime ban is apparent from four matters. First, the proximate timing between Mr MacDonald’s dismissal and the commencement of the unprotected industrial action. Second, the widespread and elongated nature of the “go-slow” and overtime ban, which he says is likely the result of central coordination as opposed to a coincidence. Third, the past industrial action in which the CFMEU was involved which was in immediate response to disciplinary action taken against a CFMEU member. Fourth, the admission made by Michael Ryan, a SeaRoad Shipping employee and CFMEU delegate on 7 September 2022, to the effect that “there’s always a reaction for your action”. This utterance was said to have been made in response to Lucas Hall (stevedore) failing to follow a direction issued by SeaRoad which it maintains was lawful and reasonable.²²

[23] The incidence of past industrial action in which the CFMEU was said to have been involved occurred on:

- 20 October 2023, said to be responsive to bullying allegations made by Mr MacDonald against a SeaRoad’s foreman - stevedores ceased work at approximately 12:30 pm, for a duration of approximately 1.5 hours when they were rostered to work and were not authorised to do so and failed to return to work when instructed by SeaRoad;²³

- 7 September 2022, in the incident earlier noted involving Mr Hall and Mr Ryan, 43 stevedores rostered to work ceased work at approximately 1:00 pm without authorisation and failed to return to work when instructed by SeaRoad;²⁴ and
- 10 April 2021, said to be in response to a SeaRoad direction about random drug and alcohol testing, Mr MacDonald told Mr Doug Turnbull SeaRoad's Port Operations Manager – Webb Dock, that CFMEU members would not be following the direction issued. Five stevedores ceased work at 09:00 hours on their own accord, for a period of approximately 40 minutes; and failed to return to work when instructed by SeaRoad.²⁵

[24] Both as propensity and inferential evidence, the case for the CFMEU organising the industrial action about which complaint is made is very weak. The proximate timing of the industrial action and Mr MacDonald's dismissal is just as likely explicable by responsive industrial action by CFMEU members aggrieved by a delegate's dismissal as it is by any organisation of the action by the CFMEU. Similarly, the widespread and elongated nature of the "go-slow" and overtime ban is equally explicable by a coordinated determination by the CFMEU members to protest the dismissal as it is of any CFMEU organisation. The evidence of past industrial action is equivocal about CFMEU organisation, as opposed to some involvement in the action by delegates, while the so-called admission is not an admission that the CFMEU is organising the industrial action that is happening.

[25] Against this there is positive evidence that the CFMEU has not been and is not organising the industrial action about which complaint is made. And that it has been taking steps to ensure that its members work in accordance with the Agreement.

[26] Adrian Evans is the Assistant National Secretary MUA Division of the CFMEU. Mr Evans gave evidence that, following some concerns raised by Phil Jones SeaRoad's General Manager Safety & People about possible industrial responses to Mr MacDonald's dismissal, Mr Evans arranged with Mr Jones for Robert Lumsden the CFMEU's Victorian Branch Secretary to attend Webb Dock to meet with members and to reinforce that members are to work in accordance with the Agreement. That such an arrangement was made is clear also from an email message from Mr Jones to Mr Lumsden and others sent on 13 February 2024 at 11:05 am which provided:

"As per our recent discussion.

You can have a 30 min meeting with the employees/members from 11.00 to 11.30am.

At that meeting you agreed (due to the circumstances of the ships delayed arrival of 90mins and the 30min meeting you) that you would reinforce with the workforce that they should continue to comply with the EA including the call for extensions and OT."²⁶

[27] Mr Evans said that he had a subsequent discussion with Mr Lumsden, who confirmed that he delivered the message as agreed to the union's members.

[28] Mr Evans gave evidence that following SeaRoad's 29 February 2024 letter to employees, he sent an email to Mr Jones dated 6 March 2024 as follows:

“You called me with similar allegations a week prior to you issuing this letter to employees and I assured you that the MUA have not been directing any Searoad employees to work outside of the norm. You agreed and said that you were not suggesting that was occurring.

I am sure your supervisors have a handle on the reasons behind the issues you raise in your letter and that there are legitimate factors involved. Any comment from me would only be speculation and would be of no value.

I will say that making threats of such a serious nature in your letter to employees without first identifying the underlying reasons through consultation is worst practice and is certainly not conducive to a harmonious workplace.”²⁷

[29] Mr Jones was watching and listening to Mr Evans giving his evidence his during the hearing conducted by Microsoft Teams. He was not called to rebut Mr Evan’s evidence and specifically that he had agreed with Mr Evans that the CFMEU had not been directing any Searoad’s employees to work outside of the norm. Mr Evans explained that the delay in responding to the letter to employees was because he fell behind in reviewing emails as a result of work commitments, including the union’s conference. Mr Evan’s said that once he became aware of this application, he caused to be sent a note to CFMEU members employed by SeaRoad at Webb Dock on 18 March 2024 in the following terms:

“Notice to MUA Members at SeaRoad

SeaRoad have made an application in the Fair Work Commission under s 418 of the Fair Work Act.

In its Application, SeaRoad are seeking orders against:

- the MUA, its officers or delegates; and
- employees of SeaRoad who are members or eligible to be members of the MUA and covered by the SeaRoad Shipping Enterprise Agreement (Stevedoring) 2023.

In its Application, SeaRoad allege that MUA and SeaRoad employees have organised or engaged in unprotected industrial action, being a “go-slow” and a ban or restriction on overtime.

The MUA does not authorise or encourage our members at SeaRoad to engage in any “go-slow”, or ban or restriction on overtime.”²⁸

[30] I accept Mr Evan’s evidence and see no reason to doubt that the instructions that he gave Mr Lumsden were carried out, as Mr Lumsden reported.

[31] This evidence all points one way – that the CFMEU was not and is not organising the industrial action about which complaint is made. Balanced against the equivocal propensity and inferential evidence on which SeaRoad relies, the only rational conclusion that may be reached is that the CFMEU has not and is not organising the industrial action that I have earlier found is happening and being engaged in by CFMEU members employed by SeaRoad at Webb Dock.

[32] For the reasons earlier stated, it appears to me that industrial action in the form of a “go-slow” as earlier described and a ban, limitation or restriction on the acceptance and performance of overtime work by CFMEU members employed by SeaRoad at Webb Dock is not, or would not be, protected industrial action, is happening. Consequently, I must order, and have ordered that that action stop. Having regard to the nature of the industrial action and the issue which appears to have motivated the action I consider that a period of one month is the appropriate period for the stop order. A conciliation conference in connection with Mr MacDonald’s unfair dismissal remedy application has been scheduled for 3 April 2024.

[33] I repeat what I said at the conclusion of the hearing of this application, when I announced my decision – the CFMEU should make good its commitment in not authorising the industrial action in which its members are so evidently engaged by counselling its members to abide by the order I made, and to allow the processes of the Commission, rather than misguided collective self-help, deal with the fairness of Mr MacDonald’s dismissal.

[34] An order was issued on 18 March 2024 in [PR772489](#).



DEPUTY PRESIDENT

Appearances:

A Denton of counsel for SeaRoad Shipping Pty Ltd

H Crosthwaite of counsel for the Construction, Forestry and Maritime Employees Union

Hearing details:

Hearing via Microsoft Teams

18 March 2024

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¹ Exhibit 1 at [3]-[4]

² Ibid ta [6]-[11]

³ Annexures 1-6 to the F14 Application for an order to stop etc (unprotected) industrial action

⁴ Annexure 7 to the F14 Application for an order to stop etc (unprotected) industrial action

⁵ Exhibit 1 at [26]-[27]

⁶ Ibid at [28]

⁷ Ibid at [29(a)]

⁸ Ibid at [29(b)&(c)]

⁹ Ibid at [29(d)]

¹⁰ Ibid at Annexure C

¹¹ Ibid at [26]

¹² Ibid at [30(d)]

¹³ Ibid at [30(a)]

¹⁴ Ibid at [30(b)]

¹⁵ Ibid at [30(c)] and Annexure D

¹⁶ Ibid at [30(d)]

¹⁷ Ibid at [30(e)] and Annexure E

¹⁸ Ibid at [31]-[32] and Annexure F

¹⁹ Ibid at [33]

²⁰ Ibid at [34]-[35]

²¹ Ibid at [36]-[37] and Annexure G

²² Ibid at [43]-[44]

²³ Ibid at [43] and Annexure I

²⁴ Ibid at [44] and Annexure J

²⁵ Ibid at [46]

²⁶ Exhibit 3 at p 5 of 8

²⁷ Ibid at p 3 of 8

²⁸ Ibid at p 2 of 8