



FAIR WORK
AUSTRALIA

DECISION

Fair Work Act 2009

s.424—Application to suspend or terminate protected industrial action—endangering life etc.

State of Victoria

v

CPSU, the Community and Public Sector Union

(B2011/4108)

COMMISSIONER SMITH

MELBOURNE, 23 DECEMBER 2011

Termination of protected industrial action.

INTRODUCTION

[1] By application dated 20 December, the State of Victoria (Victoria) sought, pursuant to s.424 of the *Fair Work Act 2009* (the Act) to suspend protected industrial action being undertaken by members of the CPSU, the Community and Public Sector Union (CPSU).

[2] The matter was heard on Wednesday, 21 December 2011 and the State of Victoria was represented by Mr S. Wood SC with Ms M. Norton of Counsel. The CPSU was represented by Mr H. Borenstein SC.

BACKGROUND

[3] The *Victorian Public Sector Agreement 2006* (as extended and varied in 2009) [AG847284] (the agreement) is the industrial instrument covering the employees who are the subject of this application. On 5 May of this year the parties began the process of seeking to renegotiate that agreement. This was in anticipation of the nominal expiry date of the agreement which was 30 June 2011.

[4] The Tribunal was invited by the parties to assist the negotiations at various levels towards the later part of 2011 and a series of conferences were held. There were a number of departments and agencies of government which were negotiating particular aspects of the whole agreement. In the result, agreement was reached in all areas except child protection workers and a general wage increase. As with all negotiations, all areas of agreement by either side are conditional upon total agreement being reached.

[5] Given the difficulty experienced by both parties in reaching agreement, the CPSU applied for, and secured, a protected action ballot. This secret ballot was declared on 27 October 2011 with a majority of CPSU members supporting industrial action. By 17 November I was sufficiently concerned at the evolving industrial action that I issued a statement (Attachment 1.) At the same time, and without seeing my statement, Victoria made application pursuant to s.424 of the Act to terminate the industrial action given the bans and

limitations imposed by child protection workers. That matter was heard on Sunday, 20 November 2011.

[6] At that hearing an agreement was reached which introduced a seven day pause to the industrial action and established a concentrated programme for assisted negotiations by the Tribunal. Further, it was agreed that the persons with the highest authority to negotiate the agreement would participate.

[7] On 28 November 2011, a further statement was issued (Attachment 2) as a result of the expiration of the seven day pause agreed to by the parties. In that statement I invited the parties to continue negotiations. All parties maintained the pause and continued negotiations in good faith.

[8] It was not until 15 December 2011 that negotiations reached an impasse, the reasons for which are not appropriate to canvass. A further statement was issued on that day (Attachment 3).

[9] The pause put in place by consent was set aside and the parties returned to their rights under the Act. This in turn led to the application now before Fair Work Australia.

THE EVIDENCE AND JURISDICTION

[10] Before consideration can be given to whether or not to suspend or terminate industrial action it must be established that the prerequisites for the exercise of jurisdiction exist. In this matter, Victoria submits that the prerequisites have been satisfied and the CPSU elected not to put any submissions other than to submit that the Tribunal must be satisfied before any order can be made.

[11] It is trite to observe that the Tribunal should satisfy itself that jurisdiction exists. [*Coal & Allied Operations Pty Ltd v AIRC (2001) 203 CLR 194*]

[12] Section 424 of the Act provides:

“424 FWA must suspend or terminate protected industrial action—endangering life etc.

Suspension or termination of protected industrial action

(1) *FWA must make an order suspending or terminating protected industrial action for a proposed enterprise agreement that:*

(a) *is being engaged in; or*

(b) *is threatened, impending or probable;*

if FWA is satisfied that the protected industrial action has threatened, is threatening, or would threaten:

(c) *to endanger the life, the personal safety or health, or the welfare, of the population or of part of it; or*

- (d) *to cause significant damage to the Australian economy or an important part of it.”*
- (2) *FWA may make the order:*
 - (a) *on its own initiative; or*
 - (b) *on application by any of the following:*
 - (i) *a bargaining representative for the agreement;*
 - (ii) *the Minister;*
 - (iia) *if the industrial action is being engaged in, or is threatened, impending or probable, in a State that is a referring State as defined in section 30B or 30L—the Minister of the State who has responsibility for workplace relations matters in the State;*
 - (iib) *if the industrial action is being engaged in, or is threatened, impending or probable, in a Territory—the Minister of the Territory who has responsibility for workplace relations matters in the Territory;*
 - (iii) *a person prescribed by the regulations.*

Application must be determined within 5 days

- (3) *If an application for an order under this section is made, FWA must, as far as practicable, determine the application within 5 days after it is made.*

Interim orders

- (4) *If FWA is unable to determine the application within that period, FWA must, within that period, make an interim order suspending the protected industrial action to which the application relates until the application is determined.*
- (5) *An interim order continues in operation until the application is determined.*

[13] In this matter, Victoria rely upon s.424(1)(c) of the Act. In relation to how the Tribunal should consider the various elements I was referred to a number of references [*Coal & Allied Operations v CFMEU (1998) 80 IR 14; State of Victoria v HSUA (Print L9810); Metropolitan Ambulance Service v LHMU(Print PR950276)*]

[14] Against this background I now turn to the evidence. Witness statement were produced by Ms Sue Jamison, Manager, Children Youth and Families, Loddon Mallee Region of the Department of Human Services (DHS); Ms Angela Papoutsoglou, Manager, Child Protection, North and West Metropolitan Region of DHS and Ms Elizabeth Armitage, Acting Director of the Child Protection, Placement and Family Services Branch of DHS.

[15] Each of those witness statements outlined the likely impact on the delivery of child protection services to the community as a result of the protected industrial action. Given that these witnesses were not cross-examined, I will not recite the issues raised in the witness statements other than to state that protected industrial action, seen against the volume of work and the critical nature of that work, has the potential to create great stress within that part of the population and put children at risk. During times of protected industrial action the potential for misunderstanding or miscommunication is significantly heightened and that would be distressing to all child protection workers who take their work very seriously.

[16] In addition to child protection workers there were some submissions in relation to other employees of Victoria and impact upon the community.

PROVISIONAL CONCLUSION

[17] At the conclusion of the hearing on 21 December I announced:

“The State of Victoria has made an application pursuant to s.424 of the Fair Work Act 2009 to suspend industrial action which it contends attracts the operation of s.424(1)(c). Its focus is on child protection workers and witness statements have been produced in this connection.

The CPSU did not seek to cross-examine the persons who provided evidence but did not make any concessions in relation to the contentions of the State of Victoria. However, the CPSU submitted that should the Tribunal be satisfied that the jurisdictional prerequisites have been met then it did not believe that a suspension would bear fruit in the negotiations. It cited the history of the negotiations and the statements issued.

The State of Victoria agreed that there was some substance in the submissions of the CPSU and submitted that the Tribunal needed to be satisfied given the long history of the matter and that further conciliation would not immediately assist.

I am also conscious that there is industrial action planned for:

- Prisons
- Youth Services
- Sheriff's Office and
- Public Housing.

The situation, despite the parties best endeavours, has reached a very serious point where, in my view, the jurisdictional prerequisites contained in s.424 of the Act are met.

Therefore the question remains whether or not to suspend or terminate the protected industrial action. In considering this aspect I indicate that I would be optimistic that an agreement is possible in relation to child protection workers. I am not so optimistic in relation to the general wages negotiations.

As my statement of 15 December observed:

“However, the stage has now been reached where both parties have genuine, considered and defensible views and as a consequence agreement eludes them. It follows that it is no longer appropriate for me to ask that the pause remain in place. This would mean that all facets of bargaining can now be accessed by the parties. Given the genuine position of the parties, continuation of discussion appears to me to have reached its natural conclusion. Unless there is a significant change in the bargaining position of both parties, further talks would appear to be futile. I emphasise that this is not a criticism. Every effort has been made in conferences before me to reach an agreement, but reasonable minds differ.”

In all the circumstances I have reached the provisional view that it is more appropriate to terminate the protected industrial action. I appreciate that the parties may still seek to reach agreement and I commend that course.”

[18] Following that announcement there was some discussion about the operative date of any order to terminate should one be made. Given the Christmas period, involving as it does a number of public holidays, together with the availability of negotiators, submissions were made as to the most appropriate course of action.

[19] In the result, the CPSU gave an unequivocal undertaking to move to cease all industrial action as soon as that could be achieved. Victoria sought that an interim order be issued suspending the protected industrial action until the Tribunal was in a position to make a final determination. I accepted the undertaking given and nothing has happened since that time which would call into question that undertaking.

DETERMINATION

[20] On 21 December 2011, I found that that the requirements of s.424(1) were made out by Victoria in relation to the proposed enterprise agreement.

[21] The issue now is whether or not the protected industrial action should be suspended or terminated. On 21 December I held the provisional view that termination of the protected industrial action was the most appropriate course.

[22] Having considered the long history of negotiations and the reasons expressed by the parties for the impasse reached, I conclude that termination is the appropriate course. Nothing has been advanced which would lead me to have any confidence that a suspension for a further six weeks would bring about a resolution of the matter. All factors in relation to the negotiations are known and I had earlier reached the conclusion that the position of each of the parties was—*“genuine, considered and defensible”*. A suspension for a further six weeks, where no party submitted that their bargaining position had altered to an extent that agreement was in prospect, is not warranted.

[23] There also needs to be certainty for the some 11 Departments of State and 20 Agencies that this period of bargaining, with its attendant disruptions and deterioration of relationships at the workplace, has come to an end.

[24] I will issue an order terminating the protected industrial action from 9.00 a.m. tomorrow morning. In doing so I am also confident that the CPSU has taken all required action to cease industrial action and have normal work resume.

[25] The order is attached.

FUTURE PROGRAMMING

[26] In relation to the general wages dispute, I indicate that I would be prepared to assist the parties, if that is sought, from 6 January 2012. However, the child protection workers dispute is multi-faceted and assisted negotiation appears to me to be the most appropriate way forward. If the parties share that view, the matter will be listed for conference on 6 January 2012 at 10:30 a.m.

COMMISSIONER

Appearances:

Mr S. Wood, Senior Counsel with *Ms. M. Norton* of Counsel on behalf of the State of Victoria.

Mr H. Borenstein, Senior Counsel for the CPSU, the Community and Public Sector Union.

Hearing details:

2011.

Melbourne:

December, 21.

ATTACHMENT 1

STATEMENT

Fair Work Act 2009

s.240—Applications to deal with a bargaining dispute

CPSU, the Community and Public Sector Union

v

State of Victoria

(B2011/3233)

State of Victoria

v

CPSU, the Community and Public Sector Union

(B2011/3206)

State and Territory government administration

COMMISSIONER SMITH

BRISBANE, 17 NOVEMBER 2011

State of Victoria (Department of Treasury and Finance)/CPSU Bargaining.

[1] Since the notifications by both the CPSU, the Community and Public Sector Union (CPSU) and the State of Victoria (Victorian Government), a number of conferences have been conducted in relation to the renegotiation of the enterprise agreement. These conferences have led to a narrowing of the issues between the parties although it would be inappropriate to go into any detail. Regrettably, there are a very small number of outstanding issues which have not been resolved; the most important of which is salaries.

[2] On 27 October 2011 a protected action ballot, conducted by the Australian Electoral Commission, was declared and a majority of Victorian Government employees (members of the CPSU) voted in favour of taking industrial action in support of their claims. As a result, employees of the State of Victoria have, during the last two weeks, been imposing bans and limitations on the performance of work to seek to persuade their employer to improve their position on salary increases. These bans and limitations will have an increasing impact upon the services provided by the Victorian Government.

[3] Whilst it is true that an application can be made to end that industrial action on the basis provided for under the *Fair Work Act 2009* (the Act), it would be regrettable if this very serious state of affairs was reached between the bargainers and therefore I have given consideration to how that may be avoided.

[4] Against this background I propose to reconvene the conferences which concluded some weeks ago when it appeared that a stalemate had been reached and that the processes provided for under the Act could take their course. The aim of the conference is to further explore with the parties options for possible resolution before the matter escalates further.

[5] In convening a conference I propose to invite those persons with the highest authority to negotiate a resolution. This is not a criticism of those who have been at the front line of negotiations to date, but given the seriousness of any escalation of the matter it is appropriate that all those who are necessary to reach agreement be participants directly. I am confident that there is a mutual desire to reach an amicable settlement and so it would not be necessary to do anything other than invite participation.

[6] A conference will be held at Fair Work Australia at 11.00 am on Monday, 21 November 2011. It would be appropriate for the Secretary of the CPSU, Ms Karen Batt to attend and also the Deputy Secretary of the Department charged with the responsibility of negotiating the agreement – the Department of Treasury and Finance. It would be appropriate for Mr Dean Yates to attend. Of course the parties should bring their respective advisors so that the conference may seek to address and finalise all outstanding issues. Sufficient time will be set aside to seek to bring about an amicable agreement.

[7] In light of this conference I ask both sides not to escalate the dispute. In particular I invite the CPSU not to impose or strengthen the bans and limitations which have been approved by the secret ballot. Hopefully a pause may provide a more conducive environment in which to seek resolution.

ATTACHMENT 2

STATEMENT

Fair Work Act 2009

s.240—Applications to deal with a bargaining dispute

CPSU, the Community and Public Sector Union

v

State of Victoria

(B2011/3233)

State of Victoria

v

CPSU, the Community and Public Sector Union

(B2011/3206)

State and Territory government administration

COMMISSIONER SMITH

MELBOURNE, 28 NOVEMBER 2011

State of Victoria (Department of Treasury and Finance)/CPSU Bargaining.

[1] On Sunday 20 November the State of Victoria and the CPSU, the Community and Public Sector Union (CPSU) reached an agreement in relation to the future conduct of enterprise bargaining negotiations. A significant ingredient of that agreement was pausing bans 20 and 21 (applying to child protection officers) unconditionally for a period of not less than 7 days.

[2] Since that time, central negotiations have continued and particular negotiations have taken place with the State of Victoria and child protection officers. The 7 days concluded yesterday. However, there is still work to be done and the child protection negotiating parties are looking to continue those discussion into this week.

[3] I have asked the CPSU to provide me with the variations it seeks to the operating model proposed by the Department of Human Services (DHS). I am advised by CPSU that there can be some adjustments which may deal with supervision and workload issues. The CPSU bargaining team has agreed to provide a formal document by 5.00 p.m. today. I have also been advised that, whilst DHS is supportive of its current proposition, it is prepared to consider proposals and arguments for change. DHS should respond to the issues raised by CPSU by close of business on Wednesday.

[4] DHS has not adopted a take it or leave it approach at this stage of the negotiations and anything said to the contrary does not reflect the true position.

[5] I am grateful that the parties are continuing to meet and genuinely consider each other's views and I will assist where necessary. Each party should continue those negotiations in the spirit of the "pause" identified on 20 November and not take any steps which might add an element of confusion to the negotiations.

[6] I have asked DHS to forward this statement to each of the child protection officers so that they may be kept up to date, by me, of the current situation.

ATTACHMENT 3

STATEMENT

Fair Work Act 2009

s.240—Applications to deal with a bargaining dispute

CPSU, the Community and Public Sector Union

v

State of Victoria

(B2011/3233)

State of Victoria

v

CPSU, the Community and Public Sector Union

(B2011/3206)

State and Territory government administration

COMMISSIONER SMITH

MELBOURNE, 15 DECEMBER 2011

State of Victoria (Department of Treasury and Finance)/CPSU Bargaining.

[1] The *Victorian Public Service Agreement 2006* (as extended and varied in 2009) has passed its nominal expiry date. The State of Victoria and the CPSU, Community and Public Sector Union (CPSU) have been seeking to negotiate an agreement to replace it. Consistent with the provisions of the Fair Work Act 2009 (the Act), the CPSU sought a secret ballot of its members to discover if they wanted to engage in industrial action to support their claims.

[2] The ballot was declared and a majority of employees expressed the view that such action could be used. This meant that both members of the CPSU and, in particular circumstances, the State of Victoria could use their economic power as a legitimate pathway to reaching agreement.

[3] On 17 November 2011 I issued a statement which proposed a conference designed to explore options for settlement of the current enterprise bargaining negotiations without the need to escalate tensions between the negotiating parties. The statement recorded:

“In convening a conference I propose to invite those persons with the highest authority to negotiate a resolution. This is not a criticism of those who have been at the front line of negotiations to date, but given the seriousness of any escalation of the matter it is appropriate that all those who are necessary to reach agreement be participants

directly. I am confident that there is a mutual desire to reach an amicable settlement and so it would not be necessary to do anything other than invite participation.

A conference will be held at Fair Work Australia at 11.00 am on Monday, 21 November 2011. It would be appropriate for the Secretary of the CPSU, Ms Karen Batt to attend and also the Deputy Secretary of the Department charged with the responsibility of negotiating the agreement – the Department of Treasury and Finance. It would be appropriate for Mr Dean Yates to attend. Of course the parties should bring their respective advisors so that the conference may seek to address and finalise all outstanding issues. Sufficient time will be set aside to seek to bring about an amicable agreement.

In light of this conference I ask both sides not to escalate the dispute. In particular I invite the CPSU not to impose or strengthen the bans and limitations which have been approved by the secret ballot. Hopefully a pause may provide a more conducive environment in which to seek resolution.”

[4] Regrettably, the statement did not reach the parties in time to avert action taken by child protection workers and, in response, the State of Victoria sought to suspend or terminate that industrial action.

[5] That application was heard on Sunday, 20 November 2011. At that hearing, rather than proceed with the application, the parties reached an agreement as to the future conduct of the negotiations. The agreement recorded an unconditional pause of the bans for 7 days; agreement to meet in accordance with my statement and the withdrawal of the application to suspend or terminate industrial action.

[6] On 28 November 2011, I issued a further statement noting that the 7 day period had expired and observed that the parties were continuing to meet and genuinely consider each other's views. On that basis I invited the parties to continue the negotiations in the spirit of the pause and not to take any steps which would add an element of confusion into the negotiations.

[7] Since that time, the parties have been negotiating and doing so genuinely. There have been some issues during this time, but both parties have sought to minimise action which could disturb sensible negotiation. I have been grateful for the co-operation shown by both the CPSU and the State of Victoria.

[8] However, the stage has now been reached where both parties have genuine, considered and defensible views and as a consequence agreement eludes them. It follows that it is no longer appropriate for me to ask that the pause remain in place. This would mean that all facets of bargaining can now be accessed by the parties. Given the genuine position of the parties, continuation of discussion appears to me to have reached its natural conclusion. Unless there is a significant change in the bargaining position of both parties, further talks would appear to be futile. I emphasise that this is not a criticism. Every effort has been made in conferences before me to reach an agreement, but reasonable minds differ.

[9] In the scheme of bargaining this means that either party is now free to seek to exercise pressure on the other to persuade them to a view contrary to that now held.

[10] Except in particular circumstances under the Act, arbitration is not available and the parties are free to pursue their bargaining aims in accordance with the Act. In relation to the employees of the State of Victoria, there has already been concern expressed and an application made as a consequence of child protection workers taking particular industrial action. There are numerous occupational categories in Victorian Government employment where there may well be significant impact on the people of Victoria if the parties are in conflict.

[11] Section 424 of the Act provides:

“424 FWA must suspend or terminate protected industrial action—endangering life etc.

Suspension or termination of protected industrial action

(1) FWA must make an order suspending or terminating protected industrial action for a proposed enterprise agreement that:

- (a) is being engaged in; or*
- (b) is threatened, impending or probable;*

if FWA is satisfied that the protected industrial action has threatened, is threatening, or would threaten:

- (c) to endanger the life, the personal safety or health, or the welfare, of the population or of part of it; or*
- (d) to cause significant damage to the Australian economy or an important part of it.”*

[12] If the circumstances described in s.424 of the Act are threatened, impending or probably, it may not be necessary for that action to actually occur before the jurisdiction under s.424 of the Act can be invoked. If, indeed, conciliation is at an end between the parties, and the consequences of them exercising their bargaining strengths would have a significant impact, in terms of s.424 of the Act, they can put a common submission to Fair Work Australia to that effect. No time would be lost; no wages would be forfeited; workplace relationships would not deteriorate; conflict impacting upon the public would be avoided and reasoned argument could be the alternative approach.