



Fair Work  
Australia

## DECISION

*Fair Work Act 2009*

s.437 - Application for a protected action ballot order

**Australian Maritime Officers' Union, The**

**v**

**Newcastle Port Corporation**

(B2009/14)

VICE PRESIDENT WATSON

SYDNEY, 27 OCTOBER 2009

*Proposed protected action ballot by employees of Newcastle Port Corporation- whether genuinely trying to reach an agreement- whether question ambiguous- Fair Work Act 2009 ss 436, 437, 443.*

### **Introduction**

[1] This decision relates to an application under s 437 of the *Fair Work Act 2009* (the Act) by the Australian Maritime Officers Union (AMOU) for an order for a protected action ballot.

[2] At the hearing before me on 19 October 2009 Mr A Hatcher, of counsel appeared for the AMOU. Mr M Seck, of counsel appeared for the employer, the Newcastle Port Corporation. The parties were permitted to subsequently file written submissions in relation to the matter.

[3] The application seeks an order that a ballot be held of AMOU members employed as marine pilots by the Newcastle Port Corporation. The application seeks that 21 questions be put to the employees effectively asking whether the employees support the taking of various types of industrial action. The AMOU submits that all of the requirements for a ballot application are met.

[4] The Newcastle Port Corporation submits that the statutory requirements for an application are not met on the grounds that the AMOU has not been and is not genuinely trying to reach an agreement and the questions put to the employees for a vote are ambiguous.

### **Relevant Legislation**

[5] Protected action ballots are governed by Chapter 3, Part 3-3, Division 8 of the Act. The object of this Division is expressed as follows:

**“436 Object of this Division**

The object of this Division is to establish a fair, simple and democratic process to allow a bargaining representative to determine whether employees wish to engage in particular protected industrial action for a proposed enterprise agreement.

Note: Under Division 2, industrial action by employees for a proposed enterprise agreement (other than employee response action) is not protected industrial action unless it has been authorised in advance by a protected action ballot.”

[6] Section 437(3) provides:

*“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.”

[7] Section 443(1)-(3) provides:

**“443 When FWA must make a protected action ballot order**

(1) FWA must make a protected action ballot order in relation to a proposed enterprise agreement if:

- (a) an application has been made under section 437; and
- (b) FWA is satisfied that each applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted.

(2) FWA must not make a protected action ballot order in relation to a proposed enterprise agreement except in the circumstances referred to in subsection (1).

(3) A protected action ballot order must specify the following:

- (a) the name of each applicant for the order;
- (b) the group or groups of employees who are to be balloted;
- (c) the date by which voting in the protected action ballot closes;
- (d) the question or questions to be put to the employees who are to be balloted, including the nature of the proposed industrial action.”

### **Genuinely Trying to Reach an Agreement**

[8] The test for determining whether an applicant has been genuinely trying to reach an agreement was recently addressed by a Full Bench of this tribunal in the case of Total Marine Services Pty Ltd v Maritime Union of Australia [2009] FWA 368. The Full Bench said:

“[31] In our view the concept of genuinely trying to reach an agreement involves a finding of fact applied by reference to the circumstances of the particular negotiations. It is not useful to formulate any alternative test or criteria for applying the statutory test because it is the words of s 443 which must be applied. In the course of examining all of the circumstances it may be relevant to consider related matters but ultimately the test in s 443 must be applied.

[32] We agree that it is not appropriate or possible to establish rigid rules for the required point of negotiations that must be reached. All the relevant circumstances must be assessed to establish whether the applicant has met the test or not. This will frequently involve considering the extent of progress in negotiations and the steps taken in order to try and reach an agreement. At the very least one would normally expect the applicant to be able to demonstrate that it has clearly articulated the major items it is seeking for inclusion in the agreement, and to have provided a considered response to any demands made by the other side. Premature applications, where sufficient steps have not been taken to satisfy the test that the applicant has genuinely tried to reach an agreement, cannot be granted.” (Footnote omitted)

[9] The Newcastle Port Corporation submitted that the negotiations have occurred in a number of stages and that the AMOU has not sought to reach agreement with the Corporation since 1 July 2009 as no meetings have occurred with the negotiation team since that time. It admits that various meetings have taken place in relation to the proposed consent arbitration over the salaries and possibly other matters in the proposed agreement and that other technical requirements of the new Act have been addressed. However it submits that these are no more than perfunctory steps to ensure that bargaining took place in accordance with the relevant legislation.

[10] The Newcastle Port Corporation also submits that the AMOU has not provided a specific claim for salaries since 1 July 2009, and that it failed to attend a meeting proposed by the Corporation to occur on 19 October 2009. It also submits that it pursued non permitted matters in negotiations by pressing for an income protection clause pending a Full Federal Court Decision which subsequently overturned a previous decision of Justice Cowdroy, and that its claim for payment of the costs of marine pilots revalidating their Masters certificates is a non permitted matter.

[11] The AMOU submits that the Corporations approach is a narrow pedantic exercise which fails to involve an assessment of the circumstances in the context of the real world. It submits that the evidence establishes that since 1 July the AMOU has provided a revised agreement which involves the clear continuation of claims regarding salaries, it has met with the responsible NSW Minister, has met with the Chief Executive Officer on at least three occasions and that there is no evidence that the discussions were confined to the terms of a consent arbitration.

[12] The AMOU submits that it has persisted in its salary claims and proposed two alternative settlement proposals in mediation proceedings and with the Minister and that the suggestion that the salary claim has not been specified is an artificial construct. It submits that given the Full Federal Court decision on income protection, the proper view is that the AMOU has never pursued a non-permitted matter. It also submits that the revalidation costs claim is a permitted matter the status of which has never been questioned by the Corporation and that it is an agreed matter in the negotiations.

[13] I have considered the evidence in the matter before me and the submissions of the parties in relation to that evidence. I do not believe that the contention of the Corporation that the AMOU is not genuinely trying to reach agreement has substance. It appears to me that the negotiations have been occurring for a considerable time. All relevant matters have been canvassed, the negotiations have been difficult and protracted, various senior responsible people including the Chief Executive Officer and the Minister have been involved, mediation has occurred before a member of the Australian Industrial Relations Commission, and alternative methods of resolution such as consent arbitration have been considered.

[14] I do not consider that the pursuit of income protection insurance and reimbursement of the costs of revalidating certificates involves the pursuit of non-permitted matters.

[15] In all of the circumstances I find on the evidence that the AMOU has been and is genuinely trying to reach an agreement and the requirement in s 441(1)(b) is satisfied.

### **The Requirement for Clarity**

[16] The relevant statutory provisions are similar but not identical to the corresponding provisions of the *Workplace Relations Act 1996*. In relation to those provisions a Full Bench of the Australian Industrial Relations Commission in *Country Fire Authority v United Firefighters' Union of Australia* said:

“As noted above, the requirement in s.452(1)(a) is that the application for a protected action ballot must include the question or questions to be put to the relevant employees in the ballot, including the nature of the proposed industrial action. If industrial action is approved by a secret ballot, and all other pre-requisites for protected action are present, a written notice to the employer of intended industrial action is required to state the nature of the intended action and the day when it will begin (see s.441(6)). It was submitted by Mr. Parry SC, who appeared with Mr O’Grady for the CFA, that the use of the same words in s.441(6) and s.452(1) requires a similar approach - albeit that the notices are directed on the one hand to an employer, and on the other, to employees. As a matter of construction we believe this is correct. Further, while the intention of the legislature can only be gleaned from the provisions of the legislation in this case, it appears logical that when employees are asked whether to authorise industrial action in a protected action ballot, the nature of the proposed industrial action is expressed clear enough to enable them to make an informed choice.”<sup>1</sup>

[17] The Corporation submits that the use of the words “separately, concurrently and/or consecutively” in the preamble to the 21 questions concerning alternative forms of industrial action create an ambiguity because employees are not informed of the way in which the action

will be taken. It also submits that various references to proposed industrial action are vague and not sufficiently clear.

[18] The AMOU submits that the questions are not ambiguous and the types of industrial action described are well understood by the employees who will be asked to vote.

[19] I have reviewed each of the proposed questions and consider that they are sufficiently clear to enable employees to make an informed choice. It may be that if particular forms of industrial action are authorised and are proposed to occur they should be better described in a notice of intended industrial action. In my view, apart from a minor grammatical matter in the preamble which I will rectify in the order I issue, the questions are in an acceptable form.

### Conclusion

[20] I will make an order for a protected action ballot essentially in the form attached to the application. The order issued is PR990223.



VICE PRESIDENT WATSON

#### *Appearances:*

*Mr A Hatcher*, of counsel for The Australian Maritime Officers' Union

*Mr M Seck*, of counsel for Newcastle Port Corporation

#### *Hearing details:*

2009.

Sydney.

19 October

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<sup>i</sup> (2006) 158 IR 120 at [20]. See also *National Union of Workers v Blue Circle Transport Pty Ltd* PR973654 at [40]; *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Woolworths Limited* PR973708 at [16]-[29]; *Construction, Forestry, Mining and Energy Union v Caelli Constructions (Vic) Pty Ltd* [2009] AIRC 543 at [27]-[32]. *Total Marine Services v Maritime Union of Australia*.