Federal Court of Australia

Construction, Forestry, Maritime, Mining & Energy Union v Boggabri Coal Operations Pty Ltd [2021] FCA 719

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| File number(s): | NSD 751 of 2020 |
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| Judgment of: | **JAGOT J** |
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| Date of judgment: | 29 June 2021  |
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| Catchwords: | **INDUSTRIAL LAW** – taking industrial action – where respondent deducted pay for hours in which second applicant took steps to secure and make safe machinery in preparation for taking protected industrial action – whether such steps, which occurred before the commencement time of the protected industrial action, constituted industrial action – operation of ss 474(1), 19(1)(a) and 19(2)(a) of the *Fair Work Act 2009* (Cth) – application dismissed  |
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| Legislation: | *Fair Work Act 2009* (Cth) ss 19(1)(a), 19(2)(a), 474(1), 539  |
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| Division:  | Fair Work Division |
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| Registry:  | New South Wales |
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| National Practice Area:  | Employment and Industrial Relations |
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| Number of paragraphs: | 32 |
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| Dates of hearing: | 22 June 2021 |
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| Counsel for the Applicants:  | Mr S Crawshaw SC with Mr S Mueller |
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| Solicitor for the Applicants: | Construction, Forestry, Maritime, Mining & Energy Union Northern Mining & NSW Energy District |
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| Counsel for the Respondent:  | Mr Y Shariff SC with Ms C Robertson  |
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| Solicitor for the Respondent: | Ashurst Australia  |

ORDERS

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|  | NSD 751 of 2020 |
| BETWEEN: | CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNIONFirst ApplicantDAVID ERROL BOXSELLSecond Applicant |
| AND: | BOGGABRI COAL OPERATIONS PTY LTD ACN 600 191 455Respondent  |

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| order made by: | jagot j |
| DATE OF ORDER: | 29 JUNE 2021 |

THE COURT ORDERS THAT:

1. The originating application be dismissed.

Note:    Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

JAGOT J:

1. These reasons for judgment concern a narrow dispute about the operation of ss 474(1), 19(1)(a) and 19(2)(a) of the *Fair Work Act 2009* (Cth) (the **Act**).
2. Section 474(1) provides:

If an employee engaged, or engages, in industrial action that is not protected industrial action against an employer on a day, the employer must not make a payment to an employee in relation to:

(a) if the total duration of the industrial action on that day is at least 4 hours - the total duration of the industrial action on that day; or

(b) otherwise - 4 hours of that day.

1. Section 474(1) is a civil remedy provision: s 539 of the Act.
2. Section 19(1)(a) provides:

***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;

…

1. Section 19(2)(a) provides:

However, ***industrial action*** does not include the following:

(a) action by employees that is authorised or agreed to by the employer of the employees;

…

1. The material facts are not in dispute.
2. The applicants and respondent were covered by the *Boggabri Coal Operations Pty Ltd 2016 Enterprise Agreement* (**2016 Agreement**) which was an enterprise agreement made pursuant to the provisions of the Act.
3. The respondent’s employees who were members of the first applicant, the Construction, Forestry, Maritime, Mining and Energy Union (the **Union**), were authorised under the Act to take protected industrial action on a number of occasions in 2019, including insofar as the second applicant, Mr Boxsell, is concerned, for periods of two hours commencing as follows:
* 30 September 2019 – 8.00am, 12.00pm, and 4.00pm;
* 2 October 2019 – 8.00am; and
* 3 October 2019 – 12.00pm.

(Together, the **notified commencement times**).

1. Mr Boxsell was rostered to work on those days as follows:
* 30 September 2019 – 6.00am to 6.00pm with an authorised break from 10.56am to 11.52am;
* 2 October 2019 – 6.00am to 6.00pm; and
* 3 October 2019 – 6.00am to 6.00pm with an authorised break from 9.58am to 11.06am.
1. On each day, Mr Boxsell was operating a dozer.
2. Mr Boxsell, on the occasion of each protected industrial action and before the notified commencement times, took a series of steps which he described as the process of “parking up and finishing the process of working at the mine” including parking the dozer, logging out of a tablet system, turning the dozer off, and walking to a pick-up area to be transported to the administration area. He put the dozer into operational standby and turned the engine off (as detailed below) before each protected industrial action at the following times:
* 30 September 2019 – at 7.55am, 11.52am, and 3.53pm;
* 2 October 2019 – at 7.52am; and
* 3 October 2019 – at 11.51am.
1. Mr Boxsell agreed that:
2. the steps he described as involved in “parking up and finishing the process of working at the mine” were those he took at the end of his shift;
3. on other occasions when the respondent directed him to cease work during a shift, he would act in accordance with the respondent’s directions;
4. the respondent had not directed him to cease work at or before the notified commencement times;
5. he took the steps he described as involved in “parking up and finishing the process of working at the mine” before the notified commencement times for the purpose of engaging in the protected industrial action; and
6. if he had not been taking the protected industrial action on the days in question, he would not have taken those steps before the notified commencement times but, rather, would have continued to operate the dozer, performing clean-up duties on the excavator floor or dump where the hydraulic excavators were working.
7. Mr Boxsell further agreed that:
8. he understood that by a memorandum dated 26 September 2019 (the **memorandum**) the respondent had required him to continue working as normal up until the notified commencement times;
9. he decided not to comply with that requirement; and
10. he spoke to and agreed with other employees who were Union members that they would not comply with the respondent’s requirement that they continue working as normal up until the notified commencement times.
11. The respondent, on the basis that the actions of Mr Boxsell before the taking of each protected industrial action were (non-protected) industrial action, deducted four hours’ pay from Mr Boxsell’s income for 30 September and 2 and 3 October 2019 as the respondent said it was required to do by s 474(1)(b) of the Act.
12. According to the applicants, the respondent was wrong to deduct four hours’ pay from Mr Boxsell, as:
13. for the purposes of s 19(1)(a) the relevant comparison is not between (a) the work Mr Boxsell would normally be performing at the relevant times if protected industrial action were not being taken and the steps he took before the notified commencement times, but rather is between (b) the steps Mr Boxsell would normally be performing before ceasing work and the steps he took before the notified commencement times;
14. on the basis of the proper comparison, there was no industrial action taken by Mr Boxsell before the notified commencement times as there was no performance of work by him “in a manner different from that in which it is customarily performed” and no adoption of a practice in relation to work by him “the result of which is a restriction or limitation on, or a delay in, the performance of the work”;
15. in this regard, it is not relevant that the respondent did not direct or require Mr Boxsell to take the protected industrial action;
16. in any event, considered objectively, the respondent must be taken to have authorised Mr Boxsell to take such steps as required to secure and make safe the dozer before he took the protected industrial action;
17. the memorandum did not direct Mr Boxsell not to take such steps as required to secure and make safe the dozer before he took the protected industrial action;
18. the reference to “work as normal” in the memorandum must include the steps normally taken by Mr Boxsell to secure and make safe the dozer before he ceased work;
19. in the ordinary course, Mr Boxsell took the steps of securing and making safe the dozer during work hours meaning these steps were a normal part of his work taken before ceasing work;
20. accordingly, given that Mr Boxsell could take the protected industrial action as identified, he was continuing to “work as normal” before taking the protected industrial action by taking the steps he would normally take to secure and make safe the dozer before he ceased work;
21. the evidence of Mr Williscroft that he did not require or expect Mr Boxsell to take the steps he would normally take to secure and make safe the dozer before Mr Boxsell took the protected industrial action should not be accepted;
22. the evidence of Mr Boxsell is that the steps involved in “parking up and finishing the process of working at the mine” may take up to 40 minutes. If the respondent is correct, the protected industrial action would commence at different times which would “lead to uncertainty”; and
23. if the respondent is correct, it must have contravened s 474(1)(b) of the Act in respect of earlier protected industrial action when employees did the same thing and were paid without deductions as made in the present case.
24. I do not accept the applicants’ arguments.
25. The taking of protected industrial action engages the immunity in s 415 of the Act.
26. In the present case, the protected industrial action was able to take place for each two hour period commencing at the notified commencement times. The respondent could have but did not direct or require Mr Boxsell to make the dozer he was operating safe and secure before the notified commencement times. As a result, in ascertaining whether Mr Boxsell took industrial action from 7.55am to 8.00am, 11.52am to 12.00pm, and 3.53pm to 4.00pm on 30 September 2019, 7.52am to 8.00am on 2 October 2019, and 11.51am to 12.00pm on 3 October 2019, the relevant comparison is between the work Mr Boxsell would have customarily performed in those periods without the protected industrial action and the work he in fact performed.
27. The misconception in the arguments for the applicants is that, implicitly at least, they assume that the taking of the protected industrial action was “authorised” by the respondent. The respondent did not authorise the protected industrial action. The employees, in taking the protected industrial action, have the immunity provided for in s 415 of the Act. That immunity relates only to the protected industrial action. In this case, that action as notified under s 414 of the Act was (relevantly) confined to the two hour periods commencing at the notified commencing times. The protected industrial action did not commence at any earlier time. That is, there could be no protected industrial action preparatory to the taking of the protected industrial action occurring before the notified commencement times.
28. It does not matter what steps Mr Boxsell would normally take at the end of his shift or before an authorised break. Nor does it matter that those steps themselves constitute a normal part of Mr Boxsell’s work in preparation for the end of his shift or the taking of an authorised break. The commencement of the protected industrial action did not in fact coincide with the end of a shift or an authorised break for Mr Boxsell.
29. As a result, in deciding if Mr Boxsell took industrial action before taking the protected industrial action on each relevant occasion it is necessary to compare the work he would be customarily performing during his shift at those times and the work he in fact performed on the relevant days during those times.
30. The results of that comparison are clear. Mr Boxsell was performing his work during those periods in a manner different from that in which it is customarily performed. That is, during the relevant periods before the protected industrial action, Mr Boxsell was taking industrial action.
31. Considered objectively, the respondent did not authorise Mr Boxsell to take that industrial action or agree to him doing so. The evidence of Mr Williscroft proves only that he did not authorise Mr Boxsell to take that industrial action or agree to him doing so. Nor is there any evidence to support an inference that the respondent authorised Mr Boxsell to take that industrial action or agreed to him doing so.
32. The applicants wrongly assume that there is a choice to be made between employees taking protected industrial action leaving equipment in an unsafe and unsecure manner so that they can commence the protected industrial action at the notified commencement times, and employees necessarily being authorised by employers to ensure equipment is safe and secure before the protected industrial action commences. There is no such choice necessary. Mr Boxsell chose to do what he did before each protected industrial action. He also could have chosen to take the steps he did to make the dozer safe and secure at and after the notified commencement times. In so doing, he would not have been performing his work in the manner he would customarily do so at the time. That is, he would be taking industrial action, but such action at that time would be protected industrial action and subject to the immunity in s 415 of the Act.
33. The applicants’ concern that the steps necessary to make equipment safe and secure may take up to 40 minutes is immaterial. In making equipment safe and secure, the employee is not performing work as they customarily would perform it if, during those same periods on days when protected industrial action is not being taken, the employee would not then be making the equipment safe and secure but, rather, would be operating the equipment (as in Mr Boxsell’s case). That is, in making equipment safe and secure in these circumstances, the employee is taking industrial action and the immunity in s 415 will not apply unless the employee is taking that action within the notified period of the protected industrial action.
34. I accept that an employer could choose to authorise or agree to employees who propose to engage in protected industrial action making equipment they are using safe and secure **before** the employees engage in the protected industrial action. In that event, the action taken in making the equipment safe and secure would not be industrial action by operation of s 19(2)(a) of the Act. But that is not what occurred in the present case. If, as in this case, an employer does not authorise or agree to employees who propose to engage in protected industrial action making equipment they are using safe and secure **before** the employees engage in the protected industrial action, then the employees may be taking industrial action which is not protected industrial action during that period before the protected industrial action depending on the work the employee would otherwise customarily be performing during that period. In Mr Boxsell’s case, he was taking such industrial action.
35. Contrary to the submissions for the applicants, the memorandum is clear. The memorandum says that “every employee who is going to participate in a stoppage must work as normal right up to the scheduled start of the stoppage” and “[a]s an example, if protected action is called for 8am and finishes at 10am, you must continue to work until 8am and be back in the PSI room by 10am”.
36. The reference to “work as normal” does not beg the question. It is obvious it means “work as the employee would normally work as if the employee was not taking protected industrial action” right up until the moment the protected industrial action commences. It was clear that the respondent did not authorise or agree to Mr Boxsell doing what he did from 7.55am to 8.00am, 11.52am to 12.00pm, and 3.53pm to 4.00pm on 30 September 2019, 7.52am to 8.00am on 2 October 2019, and 11.51am to 12.00pm on 3 October 2019. Moreover, Mr Boxsell knew this is what the memorandum meant and that the respondent did not authorise or agree with him doing what he did during these periods, but did it anyway.
37. It is not the case that, on this approach, the protected industrial action would need to start at different times depending on how long it takes an employee to make their equipment safe and secure. It may be the case that a notice identifying different commencement times for different employees could be given under s 414 of the Act, but that is not the present case. Nothing about the current approach necessarily leads to any such potential uncertainty, as suggested by the applicants.
38. Nor is it relevant that the respondent might have contravened s 474(1) of the Act by paying employees when it ought to have deducted pay from them as required by s 474(1). The present case is not about any such alleged contravention, and nor could it be given the terms of s 539 of the Act which confines the person who may take action in relation to any alleged contravention of s 474(1) to a Fair Work Inspector.
39. For these reasons, the applicants cannot obtain the declaration and order they seek. The respondent was required by s 474(1)(b) of the Act to not make a payment to Mr Boxsell for 4 hours in respect of each of 30 September and 2 and 3 October 2019 because, on each of those days, he was engaged in industrial action that was not protected industrial action against the respondent from 7.55am to 8.00am, 11.52am to 12.00pm, and 3.53pm to 4.00pm on 30 September 2019, 7.52am to 8.00am on 2 October 2019, and 11.51am to 12.00pm on 3 October 2019.
40. The originating application must be dismissed.

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| I certify that the preceding thirty-two (32) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jagot. |

Associate:

Dated: 29 June 2021