



FAIR WORK  
AUSTRALIA

## DECISION

*Fair Work Act 2009*

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

### Minister For Tertiary Education, Skills, Jobs And Workplace Relations (B2011/3816)

Airline operations

JUSTICE GIUDICE, PRESIDENT  
SENIOR DEPUTY PRESIDENT WATSON  
COMMISSIONER ROE

MELBOURNE, 31 OCTOBER 2011

[1] The Minister has made application for an order under s.424 of the *Fair Work Act 2009* terminating, or in the alternative suspending for a period of 90 days, protected industrial action being engaged in and/or threatened impending or probable by Qantas Airways Ltd (Qantas), QCatering Limited (QCatering), The Australian Licensed Aircraft Engineers Association (ALAEA), Transport Workers' Union of Australia (TWU) and the Australian and International Pilots Association (AIPA). We refer to Qantas and QCatering collectively as Qantas.

[2] Section 424(1) reads:

**“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.”

**[3]** The AIPA, the TWU and the ALAEA have been negotiating with Qantas for three separate enterprise agreements to apply to pilots on long haul routes, ramp, baggage handling and catering employees and licensed aircraft engineers. The relevant circumstances relating to the negotiations and to the protected industrial action taken by the three unions are summarised in an attachment to the application, which we shall also attach to this decision. No real challenge was mounted to the material. We add the following information extracted from Qantas' final submissions.

**[4]** In the case of the ALAEA negotiations it appears that:

- (a) Qantas has been in negotiations since August 2010
- (b) there have been 47 formal bargaining meetings
- (c) there have been other meetings between the bargaining representatives
- (d) there have been 9 conferences of the parties conducted by Kaufman SDP
- (e) since May 2011 there have been 18 conferences in Fair Work Australia, the most recent on 24 October 2011
- (f) one of the central claims of the ALAEA has been about job security;
- (g) since May 2011, the ALAEA has organised and engaged in industrial action.

**[5]** As to the AIPA position:

- (a) Qantas has been in negotiations since August 2010
- (b) there have been 35 formal negotiating meetings held
- (c) there have been mediation sessions conducted by Watson VP
- (d) one of the central claims of AIPA has been about a proposed job security
- (e) since July 2011, AIPA has organised and engaged in protected industrial action.

**[6]** As to the TWU position:

- (a) Qantas has been in negotiations since May 2011
- (b) there have been 17 formal negotiating meetings held
- (c) one of the central claims of TWU has been about site rates
- (d) since 20 September 2011, TWU has organised and engaged in protected industrial action, the latest being engaged in on 28 October 2011.

[7] Qantas produced material indicating that the protected action taken by the unions prior to 29 October had affected 70,000 passengers, led to the cancellation of 600 flights, the grounding of 7 aircraft, \$70 million in damage. That protected action was associated with significant reductions in forward bookings and decline in market share.

[8] On Saturday 29 October 2011 Qantas gave notice of a lock out of pilots, ramp, baggage handling and catering employees and licensed aircraft engineers to be covered by the proposed enterprise agreements. The lock out will take effect from 8pm on Monday 31 October. On making the announcement of the lockout Qantas grounded its fleet worldwide. It has indicated that the lock out will continue until the three unions abandon a number of identified claims. Qantas contend that if it granted those claims the airline's commercial viability would be seriously impaired or destroyed.

[9] We heard unchallenged evidence from Mr Mrdak, Secretary, Department of Infrastructure and Transport and Mr Clarke, Secretary, Department of Resources, Energy and Tourism as to the importance of airline passenger and cargo transport to the economy and the effect of the grounding of the Qantas fleet on the aviation and tourism industries. The tourism industry, including aviation, was estimated as contributing 2.6 per cent to GDP and as having 500,000 employees. The value of inbound tourism is estimated at \$24 billion per year.

[10] It is unlikely that the protected industrial action taken by the three unions, even taken together, is threatening to cause significant damage to the tourism and air transport industries. The response industrial action of which Qantas has given notice, if taken, threatens to cause significant damage to the tourism and air transport industries and indirectly to industry generally because of the effect on consumers of air passenger and cargo services. The Qantas evidence was that the cost to it alone is \$20 million per day.

[11] We find that the requirements of s.424(1) have been made out with respect to the action of which Qantas has given notice in relation to the three proposed enterprise agreements. In the circumstances we are required to make an order either terminating or suspending the protected action. We have a variety of proposals before us which we now set out.

- The Minister's primary position is the termination of the protected industrial action. His alternative position is the suspension of the protected industrial action for a period of not less than 120 days;
- Qantas seeks termination of the protected industrial action;
- The Victorian and New South Wales Ministers' seek the termination of the protected industrial action;
- The Queensland Minister supports the position of the Federal Minister.
- AIPA's primary position is the suspension of the protected industrial action for a period of not less than 120 days. It seeks a provision that within 4 weeks of the date of the Full Bench decision a report back be provided to Fair Work Australia on the progress of discussions between the parties, leave being granted to any party to apply on 48 hours notice for extension or termination of the suspension.

- ALAEA's position is for a suspension of the protected industrial action for a period of not less than 90 days but has no objection to a period of 120 days and otherwise supports AIPA's proposal.
- The TWU seeks a suspension of the protected industrial action for a period of not less than 90 days. It is prepared to provide an undertaking that it will participate in conciliation before Fair Work Australia.
- The ACTU's position is for the suspension of the protected industrial action for a period of with 90 or 120 days, as judged appropriate. It also supports the additional safeguards proposed by the AIPA and TWU.

[12] It is apparent that a suspension of all action on an interim or short term basis is not appropriate and in the end no party supported that course. Some of the principal issues in the negotiations have so far proved very difficult to resolve. Other matters may be easier to resolve.

[13] On the evidence there is significant uncertainty arising from the protected action initially of the unions but in particular arising from the lockout and the grounding of the airline. We should do what we can to avoid significant damage to the tourism industry.

[14] There is a need to balance this issue against the fact that protected industrial action is permissible under our system and has been now for many years and has been taken relatively frequently in the airline industry with successive bargaining rounds. It is also important that encouragement of enterprise bargaining is also part of the system. In that respect, what we have heard indicates there are still prospects for a satisfactory negotiated outcome in all three cases. The prospect of a negotiated resolution in relation to the three proposed enterprise agreements still remains.

[15] In this case the primary consideration, however, as required by s.424(1), is the effect of the protected action on the wider aviation and tourism industries. We have decided that in the particular circumstances of this case, which on the evidence include the particular vulnerability of the tourism industry to uncertainty, suspension will not provide sufficient protection against the risk of significant damage to the tourism industry and aviation in particular. Suspension is necessarily temporary - it leaves open the possibility there may be a further lock out with its attendant risks for the relevant part of the economy. That is, a risk the situation we are now dealing with will recur.

[16] For these reasons we have decided to terminate protected industrial action in relation to each of the proposed enterprise agreements immediately.

[17] Termination does provide an opportunity for further negotiation during a period of 21 days, extendable for a further 21 days, if the parties agree that progress is being made. Fair Work Australia will be available to assist the parties during post-industrial action negotiating period.

[18] We request the Minister's representatives to file draft orders to give effect to our decision by 9am today.

PRESIDENT

*Appearances:*

*T Howe QC* and *R Niall SC* with *A Berger* and *S Wright* for the Minister for Tertiary Education, Skills, Jobs and Workplace Relations.

*V Gostenik* and *J Tuck* for the Minister of Employment and Industrial Relations for the State of Victoria and the Minister for Industrial Relations for the State of New South Wales.

*A Herbert* of counsel with *B Leahy* for the Minister for Education and Industrial Relations for State of Queensland.

*F Parry SC* and *A Gotting* of counsel with *B Dudley* for Qantas Airways Ltd and Qantas Catering Limited.

*A Hatcher SC* with *A Doherty* and *M Gibian* for the Transport Workers' Union of Australia.

*A Moses SC* and *T Slevin* of counsel with *A Mahendra* for the Australian and International Pilots Association.

*J Nolan* of counsel with *S Purvinas* for the Australian Licensed Aircraft Engineers Association.

*D Oliver* and *M Decarne* for the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU).

*L White* for the Australian Municipal, Administrative, Clerical and Services Union.

*T Lyons* with *J Lawrence* and *J Fetter* for the Australian Council of trade Unions.

Hearing details:

2011.

Melbourne.

October 29, 30 and 31.

Printed by authority of the Commonwealth Government Printer

<Price code C, PR516213>