



Summary of Decision

3 May 2013

Lend Lease Project Management & Construction (Australia) Pty Ltd

[2013] FWCFB 2568

C2013/470

1. On 11 March 2013 a Senior Deputy President of the Fair Work Commission made an interim order under s.420(2) of the *Fair Work Act* 2009 ordering 20 named employees (Employees) of Lend Lease Management & Construction (Australia) Pty Ltd (Lend Lease) to cease and not engage in industrial action. Fourteen of the Employees appealed against the making of that interim order. The Full Bench found that the interim order had been made beyond power, and that the Employees had been denied procedural fairness. Permission to appeal was granted, the appeal was upheld, and the interim order the subject of the appeal was quashed.
2. Under s.418(1) of the *Fair Work Act*, the Commission is required, where non-protected industrial action is happening, or is threatened, impending or probable, or is being organised, to make an order that the industrial action stop, not occur or not be organised. Section 420(1) requires the Commission to determine an application for a s.418(1) order within two days as far as practicable. If the Commission is unable to determine the application in that period, it is required to make an interim order that the industrial action to which the application relates stop, not occur or not be organised. However, under s.420(3), such an interim order must not be made if it would be contrary to the public interest to do so.
3. Lend Lease applied for an order under s.418(1) at about 2.30 pm on 11 March 2013 in relation to non-protected industrial action which it alleged was being engaged in by the Employees. It also applied for an interim order under s.420(2) in the event that its primary application could not be determined in two days.
4. At about 6.10 pm on the same day (11 March), the Senior Deputy President made the interim order under s.420(2) which was the subject of the appeal. In his reasons for the making of the order, he stated that Lend Lease's application for a s.418(1) order could not be determined in two days because the Employees would not have sufficient time to consider the application and seek representation, and because the Commission could not be expected to contact each of the Employees to determine their individual circumstances. The Senior Deputy President further found that the making of the interim order would not be contrary to the public interest.
5. The Full Bench found that there was nothing before the Senior Deputy President which could form the basis of a conclusion that the condition precedent for the making of an interim order under s 420(2), namely that the application could not be determined in two days, was satisfied in this case. The interim order was made less than four hours after the application was first filed by Lend Lease. The Employees were aware of the application, and their union had contacted the Commission seeking details of the hearing of the application. Lend Lease had supplied the mobile telephone number of each of the Employees, enabling them to be notified of any listing of the application for hearing. Any concern about the capacity of the Employees to consider the application and obtain representation was misplaced, because any respondents to a s.418(1) application have to expect that they will be required to appear and respond to such an application within a short timeframe by reason of the s.420(1) requirement. Consequently, the Senior Deputy President had no power to make the interim order.

6. The Full Bench also found that the Employees had been denied procedural fairness. The Employees had not been informed that the Senior Deputy President was considering making an interim order, and did not have the opportunity to make any submission about it. Had the Employees been heard, there were substantial submissions they could have put as to whether Lend Lease's application could be heard in the required two day period, and whether the making of an interim order would be contrary to the public interest.

7. Because there was a risk that the Employees could be the subject of civil enforcement proceedings in respect of the interim order, which was found by the Full Bench to have been made beyond power, if it was maintained, and because there was otherwise no good reason to maintain it, the Full Bench considered it appropriate to grant permission to appeal and to quash the interim order.

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- ***This statement is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission's reasons.***

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