IN THE EMPLOYMENT COURT
AUCKLAND

[2018] NZEmpC 129
EMPC 339/2018

IN THE MATTER OF	applications for injunctions
AND IN THE MATTER OF	an application for an interim injunction
BETWEEN	SECRETARY FOR JUSTICE, FOR AND ON BEHALF OF THE MINISTRY OF JUSTICE Plaintiff
AND	NEW ZEALAND PUBLIC SERVICE ASSOCIATION Defendant

Hearing:	5 November 2018 (Heard at Auckland)
Appearances:	S Turner and B Heenan, counsel for plaintiff P Cranney and F Fitzsimons, counsel for defendant
Judgment:	5 November 2018

ORAL INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] The plaintiff has filed proceedings in the Court seeking orders as follows:

(a) an order restraining the defendant and its officers, employees and/or agents from counselling, procuring, encouraging, aiding and/or abetting unlawful strike action against the Ministry during the current bargaining between the Ministry and the defendant;

(b) an order restraining the defendant from directing, procuring, inducing or encouraging its CSO members to engage in further lightning strike action without providing reasonable notice, being at least 48 hours' notice;

(c) an order restraining the defendant's CSO members from participating or continuing to participate in unlawful strike action;

(d) such further orders as the Court thinks just; and

(e) the costs of and incidental to this proceeding.

[2] In addition to filing the substantive proceedings, the plaintiff has filed a notice of urgent application for interim injunctions against the defendant in respect of industrial action presently being taken by Court Security Officers (who are the CSOs I have referred to already) employed by the plaintiff.

[3] The orders sought under the application are as follows:

(a) an order under clause 21, schedule 3 of the Employment Relations Act 2000 **(Act)** directing that this application be heard urgently;

(b) an order restraining the defendant and its officers, employees and/or agents from counselling, procuring, encouraging, aiding and/or abetting unlawful strike action against the Ministry during the current bargaining between the Ministry and the defendant that relates to members of the defendant that are employed by the plaintiff as Court Security Officers (CSOs);

(c) an order restraining the defendant from directing, procuring, inducing or encouraging its CSO members to engage in further "lightning" strike action without providing reasonable notice, being at least 48 hours' notice;

(d) such further orders as the Court thinks just; and

(e) an order as to costs.

[4] The application is accompanied by an undertaking as to damages. The application is also supported by two affidavits and annexed exhibits sworn by Carl Antony Crafar who is the Chief Operating Officer for the Ministry of Justice.

[5] The application does not seek to restrain the plaintiff's CSOs, its employees, from taking strike action as is sought in the substantive proceedings. The proceedings were originally filed in the Wellington Registry of the Employment Court. On the basis of the evidence provided to the Court in support of the application, Auckland is the place nearest to where the majority of the events giving rise to the cause of action occurred. No actions are alleged to have taken place in or near Wellington. Accordingly, pursuant to reg 24(1)(a) of the Employment Court Regulations 2000, the proceedings have been moved to Auckland and are to be heard there.

[6] As indicated, the plaintiff has applied for urgency in respect of the application for injunctive relief which has been made on notice. Such urgency has been granted and timetabling was set to enable the defendant to respond to the application and if possible, file a statement of defence. I record that the defendant has been able to plead and has filed a statement of defence, notice of opposition and affidavits in support.

Background

[7] The parties to the dispute are currently engaged in collective bargaining in an endeavour to procure the renewal of two expired collective employment agreements. Those agreements expired on 30 June 2018. The defendant seeks to have the two collective agreements consolidated into a single new collective agreement. The two existing agreements (now expired) cover staff, team leaders and managers employed by the plaintiff.

[8] Following the initiation of the bargaining process and before negotiations took place, the parties signed a bargaining process agreement. Under that agreement the parties could request mediation. The parties did not attempt mediation until 29 October 2018 but that has not been successful in resolving the dispute.

[9] Industrial action has taken place, part of which is the subject of the present application for injunctions. This relates to strike action taken and being taken by the CSOs.

[10] During the period that bargaining has taken place, the defendant and its members, who are employed by the plaintiff, have also engaged in partial strike action as that is defined in s 95A of the Employment Relations Act 2000 (the Act), which has included a ban on working overtime and working to rule by taking common tea breaks, and a ban on working outside normal standard hours of work or attending periodic weekly meetings. In addition, the CSOs have taken strike action in the form of the "lightning strikes". These lightning strikes have been in the form of one- or two-hour strikes involving a total withdrawal of labour by CSOs during the period notified. The action has taken place at District Courts in Auckland, Christchurch and north of Auckland. In compliance with the requirement of s 86A of the Act, to give prior notice

of the strike, the CSOs in each instance have given written notice 30 minutes prior to the action being taken.

[11] According to the affidavits of Mr Crafar, the partial strike action, and the lightning strikes in particular, have resulted in court buildings being closed and the public being removed from the buildings for the period of the strike. It appears that during the 30-minute notice period, the CSOs in conjunction with other Court staff may have responsibly assisted with the closure of the buildings and the removal of the public.

[12] The substantive proceedings for permanent injunctions and the application for interim injunctions, so far as they relate to the actions by the CSOs, proceed on the basis that the plaintiff alleges that the period of notice of 30 minutes is "wholly inadequate" and therefore unlawful in not meeting the requirements of s 86A(1)(b) of the Act. It is claimed that the 30 minutes' notice does not give the plaintiff time to respond.

[13] In Mr Crafar's affidavits in support of the application for interim injunctions, he sets out the impact of the strikes from a health and safety point of view. His assertions may be summarised as follows:

(a) The Ministry has legal obligations to keep court premises safe, healthy and secure, and without alternative cover being available during the course of the partial strike action there is no option but to clear and close the courthouses.

(b) The evacuation of the premises which results, increases the risks to health and safety of those who do business in the court.

(c) Attending court is stressful and the process of exiting a large number of people increases that stress, and it also gives rise to a risk among those facing criminal charges who become confused and angry.

(d) After evacuation, people lingering outside the courthouse results in them coming into close contact with others they would prefer not to such as rival gang members, opposing parties in litigation, estranged family members, and that this gives rise to a potential danger.

(e) The Police cannot be counted upon to replace the CSOs on every occasion when they are asked to do so.

[14] Having regard to the issues relating to health and safety, it is alleged in the application that the strike action by the CSOs being taken on 30-minutes' notice is unlawful because:

(a) The plaintiff is unable to consider its response or make appropriate arrangements to keep the affected courts open; it must therefore clear and close the court premises.

(b) This clearing process carries the significant health and safety risks for the public and Ministry employees because of the diverse populations occupying a court premises at any one time.

(c) The short notice means that the parties do not have a period of time to attempt to resolve their differences through mediation as required by cl 24 of the bargaining process agreement and that this causes the statutory scheme to become compromised or frustrated.

(d) The plaintiff cannot consider whether to make proportionate pay deductions under the Act.

[15] In addition, the plaintiff claims that the damage to its reputation, which will be suffered by the actions being taken by the staff, will be impossible to quantify. I agree with the submissions of Ms Turner, counsel for the plaintiff, that in the circumstances involved in this case, it is unlikely that damages would ever be an appropriate remedy.

[16] An interlocutory application to the Court for interim orders needs to be based upon substantive proceedings filed in either the Employment Relations Authority or

the Court and seeking permanent orders. In this case, as the proceedings are based on strike action, they have been commenced in the Court by way of a statement of claim which curiously contains pleadings which could only relate to the interlocutory application for interim orders. The pleadings contain matters, for instance, which relate to factors the Court would take into account in deciding whether an interim injunction should issue, such as whether an arguable issue is raised, the balance of convenience and the overall justice of making an interim order. It is also noted that the relief sought in paragraph 5(a) of the statement of claim relates to strike action by employees generally rather than just CSOs and is not supported by any other pleading. The various relief sought in both the statement of claim and the interlocutory application is somewhat confusing and in parts contradictory. The second head of relief would appear to imply that the plaintiff accepts that the lightning strikes are legal strikes but for the period of notice being given, which it proposes be 48 hours' notice. If the substantive proceedings are to be continued by the plaintiff, Ms Turner accepts that amendment to the statement of claim will be necessary.

Interim injunction tests

[17] The factors that the Court must take into account in considering whether to grant interim injunctions are now well established and I refer in particular to the decision of *Harvest Bakeries Ltd v Klissers Farmhouse Bakeries Ltd*.[1] These factors are as follows:

(a) whether there is an arguable issue to be tried;

(b) where the balance of convenience lies;

(c) whether damages are an adequate remedy for the plaintiff; and

(d) the overall justice of the case.

[18] As stated in *Car Haulaways Ltd v First Union Inc*, if the application for interim injunction orders would effectively dispose of the defendant's substantive rights to strike on the basis of a notice issued, something more than a barely arguable case is required.[2] The full Court in *Tasman Pulp & Paper Co Ltd v NZ (with exceptions)*

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1 *Harvest Bakeries Ltd v Klissers Farmhouse Bakeries Ltd* [1985] 2 NZLR 129 (CA).
2 *Car Haulaways Ltd v First Union Inc* [2017] NZEmpC 158 at [22].

Shipwrights etc Union observed that where the proposed action is incapable of being deferred without effectively being cancelled, the grant of interim relief amounts to a grant of a summary judgment.[3] The closer the Court comes to effectively giving summary judgment on the interlocutory application, the more caution the Court must exercise and the more relevant the strengths and weaknesses of the parties' case must be. That applies for both sides in the present case. The consideration of whether there is an arguable case to be tried involves an analysis of whether the industrial action being taken by the CSOs amounts to a lawful strike. If, in carrying out the analysis, the Court decides that the industrial action is lawful under ss 83 and 84 of the Act, then pursuant to s 100(3) of the Act, the proceedings seeking the grant of an injunction, whether it is an interim or permanent injunction, must be dismissed.

[19] Section 100(3) of the Act states as follows:

> (3) Where any action or proceedings seeking the grant of an injunction to stop a strike or lockout or to prevent a threatened strike or lockout are commenced in the court, and the court is satisfied that participation in the strike or lockout is lawful under section 83 or section 84,—
>
> (a) the court must dismiss that action or those proceedings; and
>
> (b) no proceedings seeking the grant of an injunction to stop that strike or lockout or to prevent that threatened strike or lockout may be commenced in the District Court or the High Court.

Is there an arguable case to be tried?

[20] Effectively only one ground of unlawfulness is raised in this case. That is that inadequate notice of the lightning strikes has been or is being given. The requirement to give notice in the case of strikes not involving essential services is now contained in s 86A of the Act which reads:

> **86A Notice of strike**
>
> (1) No employees may strike—
>
> (a) unless participation in the strike is lawful under section 83 or 84; and
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> (b) without having given to the employees' employer and to the chief executive notice of the employees' intention to strike; and

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[3] *Tasman Pulp & Paper Co Ltd v New Zealand (with exceptions) Shipwrights etc Union* [1991] 1 ERNZ 886 (LC) at 898.

(c) before the date and time specified in the notice as the date and time on which the strike will begin.

(2) The notice required under subsection (1) must—

(a) be in writing; and

(b) specify the following information:

(i) the period of notice given; and

(ii) the nature of the proposed strike, including whether or not it will be continuous; and

(iii) the place or places where the proposed strike will occur; and

(iv) the date and time on which the strike will begin; and

(v) the date and time on which, or an event on the occurrence of which, the strike will end.

(3) The notice—

(a) must be signed by a representative of the employees' union on the employees' behalf:

(b) need not specify the names of the employees on whose behalf it is given if it is expressed to be given on behalf of all employees who—

(i) are members of a union that is a party to the bargaining; and

(ii) are covered by the bargaining; and

(iii) are employed in the relevant part of the workplace or at any particular place or places where the work is carried on.

(4) To avoid doubt, this section does not apply if notice is required under any of the following provisions:

(a) section 90 (strikes in essential services):

(b) section 93 (procedure to provide public with notice before strike in certain passenger transport services):

(c) section 74AC of the State Sector Act 1988 (strikes in schools to be notified).

[21] In *Car Haulaways*, which involved different circumstances relating to the notice given from the present case, Judge Corkill considered the purposes of the legislature in introducing the requirements for notice and the accompanying provisions primarily relating to pay deductions when employees take strike action. He stated as follows:

> [30] However, the introduction of s 86A must be considered alongside other statutory amendments that were made at the same time. One of the other provisions which was introduced is s 95B. It enables an employer to make

specified pay deductions in relation to partial strikes, subject to certain exceptions.

[31] In introducing these provisions, the decision was taken to require the giving of notice for any strike action other than those relating to essential services, with the Minister of Labour stating:

> Notification for all strikes will ensure that employers are aware of the nature of the strike and are able to decide how they will respond to it including making proportionate pay reductions. The notice will also provide employers with information to assist them with calculating any proportionate pay reductions.

[32] The original proposal to require the giving of such notices was restricted to strikes and did not include lockouts. However, in the course of the legislative process, s 86B was enacted which has parallel notice provisions for lockouts. The Minister of Labour stated that the latter notice requirement was to "help ensure the new requirements are balanced and fair".

[33] In my view, it is strongly arguable that having regard to the deliberative process which accompanied the introduction of these provisions, Parliament intended that the notice provisions for strikes and lockouts would be effective. They are there for a reason. It is strongly arguable that s 86A and 86B reflect the Minister's intention that employers be aware of an upcoming strike, which will include the ability to decide how they will respond to making proportionate pay reductions in the case of a partial strike. Where there is an intended lockout, employees are to begiven a prior notice of intention to lockout, so that they can prepare themselves. All the statutory provisions are meant to be complied with.

[34] On a preliminary basis, therefore, I conclude that the Court's assessment of the notice in this case must consider carefully whether there has been proper compliance with the provisions of s 86A – albeit bearing in mind that the exercise of considering the technicalities of a strike (or lockout) notice is one of common sense rather than one of pedantry.

(footnotes omitted)

[22] Judge Corkill footnoted in his judgment parliamentary materials supporting his findings. Mr Cranney, counsel for the defendant, in his helpful submissions, refers to other material such as a Hansard report and a departmental report on the legislation.[4] Explanatory notes on the Amendment Bill when introduced made no comment on any period of notice. These materials provide insight into the approach the Court should take in this case.

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[4] First reading, Employment Relations Amendment Bill (4 June 2013) 690 NZPD 10710; Ministry of Business, Innovation and Employment *Departmental Report for the Transport and Industrial Relations Committee* (October 2013).

[23] While the notice given in *Car Haulaways* was clearly ineffective notice, having considered the nature of the actions of the defendant and its members in the present case, I am not satisfied the notice given by them has been ineffective such as to result in the strike action being unlawful as the plaintiff claims. I do not consider that the inability of the plaintiff to consider its response to make appropriate arrangements to keep the affected courts open is a valid argument that the strikes by the CSOs are unlawful. The whole purpose of the strike action, which is common in other cases as well, is to cause such inconvenience and it is a valid bargaining tool where carried out in accordance with the statutory requirements.

[24] The rights to strike and lockout, so long as they meet the requirements of the statutory provisions, are well enshrined in employment law and protected by the provisions of the Act. The rights to strike and lock out are part of ensuring a balance to the relative negotiating positions of the parties in industrial bargaining. Any step to reduce their effectiveness is not to be taken unless there are sound principled reasons for doing so.

[25] In this case the plaintiff relies heavily upon the health and safety aspects arising from the process of having to clear the courts during the CSO's strikes. Mr Crafar, in his affidavits, has enunciated these as I have set out earlier in this decision. The defendant has filed affidavits in support of its notice of opposition to the plaintiff's application which present a different picture from that predicted by Mr Crafar. Three of those affidavits are from CSOs who have described the reactions of users of the Courts where lightning strikes have taken place and the circumstances when the courts are cleared. I regard Mr Crafar's predictions as speculative and overstated. He did not point to any instance where his predicted consequences have actually occurred. These strikes have been taking place now for well over a month.

[26] If health and safety considerations arise, it is for the plaintiff to manage them and on the basis of the evidence before me, it has managed to do so to this point.

[27] The issue raised as to mediation is particularly weak. While notice of strike action is to be provided to the Chief Executive of Ministry of Business, Innovation and Employment (MBIE) under s 86A(1)(b) of the Act, that does not mean that

mediation services are to be provided as soon as possible unless the strike is taking place in an essential service. In any event, the plaintiff in the present case could have requested mediation services at any time. The strikes by CSOs commenced nearly a month before the present application was filed. No attempt was made to convene mediation until very recently.

[28] The argument that the plaintiff cannot consider whether to make proportionate pay deductions under the Act is similarly very weak.

[29] The proportionate pay deductions referred to relate to partial strikes. As Mr Cranney has submitted, the action by the CSOs are not partial strikes but are a total withdrawal of labour during the period of the strike. That would mean that the suspension of the striking workers would need to precede the deduction of wages. However, whichever way the deduction from wages proceeds, such deductions would not need to take place until the end of the relevant pay period and the amount of notice of any strike would not affect the plaintiff's ability in that respect as alleged by Mr Crafar.

[30] As pointed out by Mr Cranney, the materials he has referred me to confirm the reasons why provisions as to strike notices contained in s 86A of the Act do not specify the period of notice required, nor require reasonable or adequate notice. He also pointed out that to introduce such a requirement in the present case would have a significant downstream effect in other cases in that in the case of every strike the parties would be unsure as to what was reasonable or adequate. Uncertainty would prevail. It would result in applications being made to the Court in almost every case and this cannot have been the intention of the legislation. Mr Cranney also pointed out that a requirement as to a period of notice would also have confusing consequences where the notice was then withdrawn before the industrial action commenced.

[31] For these reasons, I have reached the conclusion that there is no arguable case that the lightning strikes by the CSOs are unlawful. Pursuant to the requirement of s 100(3) of the Act, the application must be dismissed. Even if I were to have held that there was an arguable case, I would nevertheless have held that the balance of convenience favoured the defendant and its members who are taking the strike action

in this case. If arguable, the plaintiff's case would nevertheless be weak. What amounts to inconvenience to the plaintiff needs to be weighed against depriving the employees of a substantial right to strike. The proposal by the plaintiff to require notice of 48 hours would seriously and unjustifiably affect the relative bargaining positions of the parties at this stage in their negotiations. To require the defendant and its members to give 48 hours' notice, which is two days, would negate the effectiveness of the actions it is presently taking and reduce the strike action to being merely symbolic.

[32] Similar considerations come into play in considering the overall justice of the case. In that consideration, there is nothing in my view which would lead to a finding that the injunctions should nevertheless be granted.

[33] The defendant and its members are required to comply with the requirements of s 86A of the Act and they have done so. Participation in the strikes is not unlawful under ss 83 and 84 of the Act. There is no evidence that the notices have not been given, or not received. Such notices contain the requirement set out in the section. The strikes are not occurring in an essential industry or other industry where specific periods of notice are required. While the period of notice is short, the plaintiff has received the notices before the strikes have commenced. The notices are therefore, in my view, effective notices.

Costs and continuation of substantive proceedings

[34] Costs should follow the event. The plaintiff is ordered to pay costs calculated under Category 2B of the Court's Guideline Scale. The substantive proceedings are obviously undermined by this decision. They do, however, cover employees other than the CSOs and remain extant. Some amendments to pleadings will be required. If they are discontinued, costs issues will immediately arise. A directions conference is to be convened to decide how those proceedings should now be advanced.

M E Perkins
Judge

Judgment delivered orally at 4.24 pm on 5 November 2018