IN THE EMPLOYMENT COURT
WELLINGTON

[2010] NZEMPC 38
WRC 10/10

IN THE MATTER OF	an application for interim injunction
BETWEEN	TIMATA HOU LIMITED Plaintiff
AND	SERVICE AND FOOD WORKERS UNION NGA RINGA TOTA INC First Defendant
AND	MISSY CONNELL Second Defendant

Hearing: 6 April 2010 (by telephone conference call)

Appearances: Paul McBride, Counsel for Plaintiff
Peter Cranney, Counsel for First Defendant
No appearance for Second Defendant

Judgment: 6 April 2010

Reasons: 8 April 2010

REASONS FOR JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] These are the reasons for making interim injunctive orders restraining strike and anticipated strike action at the end of an urgent hearing conducted by telephone conference call during the legal vacation.

[2] The orders made and subsequently sealed for service on the defendants were as follows:

> 1. Until further order of the Court, there is an interim injunction restraining the First Defendant (including by its officers, employees, agents or members) and/or the Second Defendant from participating

in unlawful strike action or unlawful threatened strike action and in particular from:

(a) A "paperwork ban" including a refusal to catch up on paperwork following any period of such ban;

(b) A ban on all work over 80 hours per fortnight; and

(c) A refusal to work sleepovers rostered and/or ordinarily worked.

[3] Costs were reserved and leave was reserved to any party to apply at short notice for further orders or directions.

[4] Timata Hou Limited is a limited liability company wholly owned by IHC Inc. The plaintiff operates three secure residential facilities for the detention and treatment of persons with intellectual disabilities who may pose a danger to themselves and/or others in the community. Many would otherwise be in prison, having been convicted of serious offences, and a smaller number are detained for treatment otherwise than by intervention of the criminal law. The facilities are secured in much the same way as low to medium security penal institutions and staff are required to maintain detailed written records of the inmates' circumstances and treatments. Those detained in the plaintiff's facilities are held pursuant to the provisions of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003. Inmates require 24 hour supervision and close monitoring.

[5] A substantial proportion of the employees of the plaintiff's institutions are members of the Service and Food Workers Union Nga Ringa Tota Inc (SFWU) which has, for some time, been in bargaining for a collective agreement on behalf of its members employed by Timata Hou Limited, by its parent organisation, IHC Inc, and by another wholly owned subsidiary, Idea Services Ltd. Bargaining has encountered difficulties because of the rejection by the employers of any remuneration increases sought by the union. Recently, the first defendant applied to the Employment Relations Authority for bargaining facilitation assistance. That application has been opposed by the employers including the plaintiff and the Authority has yet to consider the union's application for urgency of the hearing to determine whether there should be facilitated bargaining.

[6] As in some other similar cases, the employment relationship is not only bipartite in the sense that it affects the employer and the employees. Also affected by the relationship and events in it, are the 'clients' of the plaintiff whose interests are at the heart of the company's operations. Indirectly affected, also, are broader interests including those of the justice and penal systems and, thereby, the community.

[7] Since about 15 March 2010, SFWU members at Timata Hou facilities, encouraged and abetted by the union, have been undertaking strike action as defined in s 81 of the Employment Relations Act 2000 (the Act). The following acts or omissions have amounted to those "of a number of employees who are or have been in the employment of the same employer … in discontinuing that employment, whether wholly or partially, or in reducing the normal performance of it; or … in reducing their normal output or their normal rate of work; … due to a combination, agreement, common understanding, or concerted action, whether express or implied, made or entered into by the employees." These acts or omissions have included undertaking what has been referred to as a "paperwork ban", being a refusal to keep certain written patient related records, a ban on working more than 80 hours per fortnight, and, from time to time, a refusal to work "sleepovers" rostered and/or ordinarily worked.

[8] These acts or omissions were clearly signalled to SFWU members in a circular publication issued by the union pursuant to resolutions of union members at meetings held in February as a response to the employer's refusal to agree to any wage increase. This was an escalating campaign of strike action beginning with the paperwork bans in the week beginning 15 March 2010, extending to working no more than 80 hours per fortnight from the week beginning 22 March 2010, and the refusal to work sleepovers on 29 March 2010. In the week beginning 5 April 2010, the previous accumulated bans were to continue and union members were advised to "Ban sleepovers on Tuesday 6 and Wednesday 7 April." Further sleepover bans on specified dates were scheduled to take place in the weeks beginning 12 and 19 April 2010.

[9] Section 90 of the Act provides:

90 Strikes in essential services

(1) No employee employed in an essential service may strike—

(a) unless participation in the strike is lawful under section 83 or section 84; and

(b) if subsection (2) applies,—

(i) without having given to his or her employer and to the chief executive, within 28 days before the date of the commencement of the strike, notice in writing of his or her intention to strike; and

(ii) before the date specified in the notice as the date on which the strike will begin.

(2) The requirements specified in subsection (1)(b) apply if—

(a) the proposed strike will affect the public interest, including (without limitation) public safety or health; and

(b) the proposed strike relates to bargaining of the type specified in section 83(b).

(3) The notice required by subsection (1)(b)(i) must specify—

(a) the period of notice, being a period that is—

(i) no less than 14 days in the case of an essential service described in Part A of Schedule 1; and

(ii) no less than 3 days in the case of an essential service described in Part B of Schedule 1; and

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

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

(d) the date on which the strike will begin.

(4) The notice—

(a) must be signed by a representative of the employee's union on the employee's 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 essential service or at any particular place or places where the essential service is carried on.

[10] There can be little doubt that the employees concerned are employed in an essential service as defined in cl 14 of Part A of Schedule 1 ("**Essential services**") to the Act. This includes "[t]he operation of a residential welfare institution or prison." A similar institution was held to fall within what Parliament intended to be the broad definition of a "welfare institution" in *Healthlink South Ltd v National Union of Public Employees Inc*[1] and followed in proceedings between the same parties.[2] On

[1] CEC34/93, 8 July 1993.
[2] CEC26/95, 14 June 1995.

the facts of this case, also, I would find that Timata Hou's facilities are residential welfare institutions.

[11] The real question in this case is whether, pursuant to s 90(2)(a) of the Act, "the proposed strike will affect the public interest, including (without limitation) public safety or health …".

[12] The only case of which I am aware that this phrase has arisen for consideration involved the provision of firefighting services: *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union Inc*.[3] In that case an intended strike would have included a ban on making, creating or maintaining manual and electronic records. Given that the employer's enterprise was the provision of firefighting and other public emergency rescue services, this Court had little difficulty in concluding that the proposed strike would affect the public interest including public safety.

[13] In this case I find that the effect on 'clients' of the current and intended strike action will affect the public interest. It is in the interests of the community generally that persons detained compulsorily for reasons of public safety and for treatment be restrained only to the extent that the law permits. The ascertainment of this can only be determined properly by the maintenance of current and accurate records which will be compromised by the strike action. Further, refusing to provide what is known as "sleepover" coverage of these institutions may endanger the welfare of the inmates. This will affect adversely the public interest. Finally, it is arguable also that other non-striking staff or other persons responsible for the detention and treatment of inmates may be put at risk by the strike action and this would also affect the public interest in the safe operation of such institutions.

[14] I have referred already to the union's application to the Employment Relations Authority for bargaining facilitation. This includes, as a ground: "The strike action if it occurs or continues is likely to affect the public interest substantially." Although, understandably, this ground is relied on by the union to

[3] [2009] ERNZ 134.

support a reference to bargaining facilitation, it would be difficult for the union to now argue otherwise in relation to the same circumstances under s 90.

[15] For these reasons I concluded that the notice requirements of s 90 of the Act applied to these parties. There is really no question that notice in terms of s 90 has not been given. The first defendant, and perhaps even the plaintiff in other circumstances in the past, have assumed that s 90 did not apply to them. That is, however, not a safe assumption as emerges not infrequently in cases such as this when the legal position is tested and examined.

[16] I am satisfied that there is an arguable case for the plaintiff that there is current and intended strike action in an essential service but without s 90 having been complied with so that such strike action is and would be unlawful.

[17] In such cases, it is difficult to assert other than that the balance of convenience favours the plaintiff as does the overall justice of the case. Although the strike action is lawful as being in support of collective bargaining and recourse to it should not be prohibited lightly, even for a relatively short period until proper notice can be given, an employer affected adversely by unlawful strike action is entitled to a recognition in law of that position.

[18] It is open to the union to now give s 90 notice of strike action to avoid the difficulties in law of the current situation.

[19] If this interlocutory judgment does not dispose of the issue of the lawfulness of the current and proposed strike action, leave is reserved for any party to apply to set the proceeding down for a substantive fixture. I encourage the Employment Relations Authority to consider and determine promptly the application for facilitated bargaining so that all parties can know where they stand as soon as possible.

GL Colgan
Chief Judge

Judgment signed at 5 pm on Thursday 8 April 2010