IN THE EMPLOYMENT COURT
AUCKLAND

[2010] NZEMPC 70
ARC 53/10

IN THE MATTER OF	an application for interim injunction
BETWEEN	ELECTRIX LIMITED Plaintiff
AND	NEW ZEALAND AMALGAMATED ENGINEERING, PRINTING AND MANUFACTURING UNION INC Defendant

Hearing: 31 May 2010
(Heard at Auckland)

Appearances: Rob Towner and Liz Coats, counsel for plaintiff
Anne-Marie McInally, counsel for defendant

Judgment: 31 May 2010

ORAL INTERIM JUDGMENT OF JUDGE B S TRAVIS

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[1] The plaintiff has applied for an injunction against the defendant union on the grounds that the strike action threatened in a notice issued by the union on behalf of its members would be unlawful under s 86 of the Employment Relations Act 2000. The plaintiff sought and obtained urgency for this hearing as the strike is to commence at 12.01am on Wednesday 2 June 2010.

[2] There is no issue between the parties that the threatened strike action will cause significant disruption to the plaintiff's business and will be contrary to the public interest. Employees of the plaintiff who are members of the defendant union are employed in an essential industry, namely the supply of electricity. It is also common ground that 14 days notice of strike action was required to be given and the proposed strike action was in support of the bargaining for a collective agreement.

The issue for determination by the Court is whether there is a serious case to answer that the strike notice that was given by the defendant on 18 May 2010 was defective and invalid and therefore the proposed strike action would be unlawful.

[3] There was no issue between the parties that in addition to establishing that there is a serious issue between the parties for determination at the substantive trial, the Court must then decide where the balance of convenience lies in the interim period, whether other remedies other than an injunction would be adequate, and where the overall justice of the case lies.

Factual background

[4] The plaintiff (Electrix) is contracted to provide Vector Limited with all field services such as maintenance, faults and services required to maintain the northern network electricity lines. Electrix's distribution division employees 182 personnel of whom approximately 77 are members of the defendant union. All of the distribution division employees are employed on individual employment agreements because no collective agreement has ever been in place between Electrix and any union in recent years. The majority of the distribution employees are trained as linesmen but the division also employs electricians, engineers, administrators and managers. Line work makes up the majority of the work carried out and includes work on specific projects at particular locations. The standard working hours for linesmen are 7.30am until 4pm. At 7am each morning one employee from each crew of three comes to the main office to pick up a truck and the equipment required for that day. The time worked between 7am and 7.30am is classed as overtime. Overtime work is time worked in excess of 40 hours per week in terms of the standard individual employment agreements.

[5] Some 30 distribution employees are engaged as fault men who work on a continuous roster between 6am and 10pm on weekdays and between 7am and 7pm on weekends. They work out of four depots across the northern network region so that Electrix has sufficient coverage within the region to ensure quick response time. Outside of the 12 hour shifts the fault men are on standby for other hours to deal with faults as they arise.

[6] Bargaining for a collective agreement has been ongoing since 22 December 2009 but the parties have failed to reach an agreement. A strike notice issued by the union on 13 May was withdrawn and the current strike notice issued on 18 May. It states, in part:

> This notice of strike action is given by the union on behalf of all employees of the employer who are members of the union and who are covered by the bargaining and whose names appear on the schedule marked "A" and annexed hereto ("the employees").

[7] The nature of the strike action was a continuous partial withdrawal of labour including a refusal to work overtime or carry out any scheduled work outside ordinary hours or any fault work and a refusal to respond to callouts unless there was an emergency involving consequent danger to life. The employer was given the power to decide whether such an emergency arose. Employees who responded to callouts in the event of an emergency would perform only such work as was necessary to remove the danger to life.

[8] On Monday 10 May 2010 at 7am Mr Gallagher, a union organiser, held a meeting of members of the union at Electrix's premises at Albany. He arranged for two separate text messages to go to each of the union members advising of the time and venue of the meeting. The meeting was attended by 42 union members who then took a secret ballot on whether they were willing to take strike action. They were issued blank slips of paper on which they were asked to record either "Yes" if they supported the proposal to take strike action or "No" if they did not support it. All 42 members present voted and were unanimously in favour of taking strike action.

[9] An issue raised on behalf of Electrix is that the union's strike notice did not comply with the union's rules. Clause 21 of the union rules stated:

> **21 SECRET BALLOT ON QUESTION OF STRIKE**
>
> No strike shall take place unless the question has been submitted to a secret ballot of those members who would become parties to the strike if it proceeded.

[10] A further union meeting was conducted on 27 May at Electrix depot at Albany at 7am. Fifty five members attended that meeting and unanimously rejected Electrix's proposal for settlement. A further secret ballot was conducted, according to Mr Gallagher's evidence, to gauge the current level of support for, or opposition to the proposed strike action to commence on 2 June and continuing thereafter. Members were asked to vote "Yes" if they supported the strike action and "No" if they did not. All 55 present voted and the result was unanimously in favour of the strike action proceeding.

[11] There is an issue as to whether some of the members of the union whose names are included on the strike notice were not present at the meeting of 10 May and may not support the strike action. Notices of intention to resign from the union of three members who are Electrix employees has been acknowledged as having been received by the union but not in writing s required by the union's rules.

[12] William Newson, the assistant national secretary of the union, has deposed that the steps taken to call the meeting of 10 May were adequate and reasonable and the use of mass text messaging was appropriate. Previously the union would have to have relied upon word of mouth to let people know when a union meeting was being arranged in an industry like the present where people are not working at a common location. He gave evidence that even when the union has managed to let everyone know in advance of a union meeting there is rarely 100 percent turnout. This is often due to work demands that require people to stay on the job at the meeting time or where they have so far to travel that it is impracticable for them to attend and then still be available for work at a designated place afterwards. Mr Newson, like Mr Gallagher, has deposed that they have discerned no strong feeling of opposition to the proposed strike. Mr Newson's evidence was that the union's rules have been complied with. He relied also on rule 37.7 which calls for a common sense approach to interpreting the union's rules. He gave evidence that at a practical level it would be impossible to issue strike notices if all affected individuals were required to participate in the secret ballot. The union takes the view that a simple majority of those present and voting carries the motion and will bind even those who did not attend.

[13] Ranjit Manak in the distribution division manager for Electrix has deposed that, having heard that a number of employees who are union members do not agree with the strike action, some of whom may have resigned from the union, it therefore remains unclear how many of the 77 employees named in schedule A to the notice will actually go on strike. This he deposes has prevented Electrix from setting rosters and making contingency and cover plans from 2 June. He also deposes that the second uncertainty is working out which employees Electrix can, with any certainty, roster to work during the strike period. This is because he says a number of the union members named in schedule A have said they will not participate in the union strike and should be rostered on as normal. He is, however, concerned that the same employees could be peer pressured by the other union members to participate in the strike and therefore may not show up at the last minute for callout. This could put Electrix in a very difficult position of having to find employees to cover shifts and provide the services required under the Vector contract.

[14] Mr Manak deposed that the threatened strike action will cause considerable disruption to the effective operations of the business of Electrix's distribution division and will prevent it being able to fulfil the terms and conditions of the Vector contract. This could have serious financial consequences for Electrix. Further, Electrix is required to pay "charter claims" to customers for any outages which last for more than a certain amount of time. Finally he deposes to the effect that the strike, involving employees responsible for maintaining power lines and restoring power after outages, will have on the public. He deposes that this may have serious consequences for public safety and health because it may cause traffic or street lights being out for periods, lengthy outages to schools, disruption to residents, problems with the infrastructure including sewer stations and have a deleterious effect on businesses. There is little doubt that the members of the union on whose behalf the strike notice has been issued are vital for the maintenance of power supplies in the areas affected.

Serious question

[15] Mr Towner submitted that this case is about whether some employees named in the strike notice had an intention to strike when the notice was issued; whether the

union had authority to issue the strike notice specifically on behalf of named employees who were not at the meeting of 10 May and whether there is a lack of the necessary clarity about which of the 77 employees are intending to strike. He cited *Fire Service Commission v Duncan*,[1] a decision of the full Court where the union had given a strike notice before it had held a secret ballot on the question of the strike or stoppage in accordance with its rules. The full Court granted an injunction and in giving the reasons for that decision stated:

> Section 69 emphasises the intention of the individual employee. Although the notice may be given on behalf of the employee it is the employee's intention which is all important. The intention of the executive of the employee's union even when it is composed, as here, of fellow employees and its secretary, is not relevant.

[16] It was accepted by counsel that although there has been a slight change in the wording of s 90 of the Employment Relations Act 2000 when compared with s 69 of the Employment Contracts Act 1991, the two sections are on all fours in relation to the required intention of the individual employee. Section 90(1) provides that no employee in an essential service may strike unless the strike is lawful and the employee has "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." Under subsection 4 that notice must be signed by a representative of the employee's union on the employee's behalf.

[17] Mr Towner also relied upon the approach of the Employment Court in *Southland Area Health Board v NZ Resident Doctors Association*[2]. The Court held that the rules empowered the union there to lawfully issue a strike notice when authorised by its affected members. The Court held that the union had the authority, in fact, to give the strike notices on behalf of its members, as a result of a meeting it held and subsequent informal contacts with the remainder of the members who had not attended the meeting. The Court found that the strike notices therefore were of binding legal effect and satisfied the requirements of the Employment Contracts Act because the union had sufficiently established the authority to issue the strike notices. Mr Towner submitted this case supported the proposition that a vote in

[1] (1994) 4 NZELC 98,276.
[2] [1992] 3 ERNZ 511.

favour of strike action by some members of a union did not automatically bind other members of the union who were not present at the meeting, and that it is a factual issue whether the employees who did not participate in the vote have an individual intention to strike. In the *Southland Area Health Board* case the Court could infer the intention on the part of all union members to strike because of the way in which they were each approached.

[18] Mr Towner submitted that if in the present case the facts had been different, for example had there only been a minimal attendance at the 10 May meeting of say ten members and six had voted for and four against strike action, and the union was aware of opposition to the strike action, a valid notice covering all of the members could not have been issued. In this case 42 members attended the meeting and voted unanimously in favour of strike action, but that left 35 members unaccounted for. He pointed to the evidence of Mr Manak that at least six and possibly more members of the union had not attended the meeting and did not support the strike action.

[19] Mr Towner's submissions were based on the proposition that members who had attended a meeting and had voted against the resolution to strike which was then passed by a majority at that meeting, would still be bound. Those members who did not attend the meeting would, however, not be bound and no notice could be issued on their behalf unless it was ascertained that they had the necessary intention to strike before the notice was issued.

[20] Mr Towner submitted that the statutory requirements for strike notices must be strictly complied with, and this requires clarity and certainty citing *Secretary for Justice v NZPSA*.[3] He submitted that the notice must speak for itself, citing *New Zealand Fire Service Commission v Ivamy*.[4]

[21] Mr Towner accepted that it was difficult to reconcile the proposition that union members who attended a meeting and voted against a strike ballot would be bound, if it was passed by a majority, with the contention that those who did not attend the meeting would not be bound, and that if they did not intend to strike, they

[3] [1990] 2 NZLR 36.
[4] [1996] 1 ERNZ 85 at 102-4.

could not have a valid notice issued on their behalf. He referred to Rule 7.7 of the union's rules in the present case which states:

> Every member shall be bound by the Rules and the policy of the Union and by lawful decisions of the Union or part of the Union which apply to the member.

[22] Mr Towner contended that this rule could be construed to mean those members who participated in the lawful decision being passed at a meeting would be bound but those who did not attend would not be part of the union's decision which applied to that member.

[23] Ms McInally took issue with Mr Towner's submission that only those persons attending the meeting at which the secret ballot took place would be bound. She observed that as a matter of practicality in the example given of six out of ten voting for a strike which would affect 77 members, that the union would be unlikely to proceed with strike action until it had called another meeting with larger representation to support the proposed action. However, technically, she submitted the other 67 could be bound.

[24] In the present case there was evidence that strike action had been discussed as early as April and that two notices were given of the union meeting of 10 May to all the affected members. Ms McInally contended that as a matter of democratic process the majority decision would prevail and pointed to Mr Towner's concession that it would bind those who attended a meeting but had voted against the proposal to strike. It was her contention that the similar democratic principles would also apply to those who had not attended the meeting. To require the union to canvass those persons would be to breach the express rule that any ballot for strike action should be conducted in secret. It would also place an intolerable burden on the union.

[25] I prefer and accept the defendant union's submissions to that of the plaintiff. I cannot see the distinction between a resolution binding all those present at the meeting, even if they had no present intention of striking, and yet not binding those who for whatever reason did not attend the meeting. This would disadvantage union

members who wanted to speak against and vote against a resolution to strike because if they attended the meeting they would then be bound by the outcome. It would advantage those members who preferred to be on the sidelines and not attend the meeting. That would not encourage the democratic process.

[26] Ms McInally referred to rule 37.7 which provides that at all times the union's rules should be interpreted and applied without undue technicality and in a commonsense and practical manner which best advances the objects of the union. This is consistent with the way the Court has interpreted union rules, see *McCain Foods (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc*.[5]

[27] In my view a common sense interpretation of rule 37.7 means that when there has been a secret ballot held of those members who would become party to the strike if it proceeded, a resolution to strike would be a lawful decision of that part of the union which applies to the member, whether or not that member attended the relevant meeting.

[28] As long as the employee remains a member of the union and is bound by the rules then that member must be taken to have authorised the union applying the passed resolution to give notice of an intention to strike on his or her behalf. If that member no longer wishes to strike then he or she has the option of resigning from the union and then not being bound by the strike notice.

[29] For these reasons I find that there is no serious issue to be tried as to whether the strike notice was validly issued.

[30] I do not consider there is a serious issue to be tried on whether the valid notice has become uncertain because of communications from individual members of the union who wish to strike. The notice given has sufficient clarity and certainty to enable the rosters to be properly constructed, notwithstanding the indications which may have been given by certain members. If there had been communications from the union which created an uncertainty, then the strike notice may not have been able to have been relied upon.

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[5] [2008] ERNZ 260.

[31] For all these reasons I find it barely arguable that there is an issue to be tried, let alone a serious issue. Although this is expressed as being an interim injunction it will be final because there will be no opportunity to hold a substantive hearing prior to the time when the strike notice takes effect. The plaintiff in these circumstances would have needed to have shown a seriously arguable issue before the other considerations relevant to interim relief needed to be considered.

Balance of convenience and overall justice

[32] Had there been a serious issue to be tried then I accept Mr Towner's submission that the balance of convenience would have favoured the grant of relief if the strike notice was arguably in breach of the statutory requirements, see *Auckland Electric Power Board v NZ Electrical etc IUOW*.[6] There are serious risks attendant on the strike proceeding because the plaintiff may have insufficient non-union employees to be able to maintain the essential service it provides. I note, however, that the strike notices do not prevent the involvement of union members where human life is at risk. Balanced against this are the interests of third parties who are likely to be adversely affected by the proposed strike action.

[33] However, looking at the overall justice of the case and the respective strength of the arguments in support of whether there was a serious question to be tried, I am not persuaded that in all the present circumstances an interim injunction should issue. The application is therefore declined.

[34] Costs are reserved.

B S Travis
Judge

Oral judgment delivered at 2.55pm on 31 May 2010

[6] [1992] 1 ERNZ 623 at 630.