IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 54
ARC 13/12
ARC 17/12

IN THE MATTER OF	an application for declaration, proceedings removed from Employment Relations Authority
AND IN THE MATTER OF	applications for interim injunctions
BETWEEN	MARITIME UNION OF NEW ZEALAND INC Plaintiff
AND	PORTS OF AUCKLAND LIMITED Defendant

Hearing:	27 March 2012 (Heard at Auckland)
Counsel:	Mr Carruthers QC, Mr Cranney and Mr Mitchell, counsel for plaintiff Mr Haigh QC, Mr McIlraith and Ms Dunn, counsel for defendant
Judgment:	27 March 2012
Reasons:	29 March 2012

REASONS FOR ORAL INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS

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[1] These are my reasons for issuing interim injunctions on 27 March 2012 in the following terms:

(i) The defendant will take no further steps to advance or implement the proposal to make the plaintiff's members redundant.

(ii) The defendant will not dismiss the plaintiff's members.

(iii) The defendant will not employ or engage Drake New Zealand Ltd or Allied Workforce Ltd or any other person to perform the work of striking or locked-out employees in breach of s 97 of the Employment Relations Act 2000.

(iv) The defendant will instruct Drake New Zealand Ltd and Allied Workforce Ltd and any other contractor employed or engaged by the defendant to cease any form of advertising, training or recruitment or any form of preparation for those activities on behalf of the defendant or otherwise.

(v) The defendant will not make any statement to, or which could, encourage any union member to seek or accept employment with the contractors identified in (iv) above.

(vi) In the event that the defendant intends to employ or engage any other person to perform work covered by the collective agreement in dispute, it will give the plaintiff 48 hours' notice to enable the plaintiff to apply for relief.

[8] The defendant will not take any further steps in relation to applications for voluntary redundancy until 5pm on Friday 30 March 2012 or further order of the Court.

[2] The plaintiff union (MUNZ) has made two applications for interim injunctions against the defendant. The first in time was filed on 13 March 2012 and sought interlocutory injunctions, in broad terms, to prevent the defendant, Ports of Auckland Limited (POAL), from proceeding to contract out stevedoring and other work at the ports of Auckland (the contracting out injunctions). The contracting out injunctions were set down for hearing on 22 March. They were then adjourned on the basis of undertakings offered to the Court by the defendant, which were accepted by the plaintiff on 21 March, and are recorded in a minute of 22 March. It was agreed that the interlocutory application for the contracting out injunctions could be brought on at short notice by either party.

[3] The plaintiff union applied on 23 March to bring on the contracting out injunctions for hearing. This was on the grounds that the undertakings offered to the Court by the defendant and recorded in the minute of 22 March had been breached. The plaintiff sought more effective oversight by the Court of the defendant's conduct. The injunction application was therefore set down for hearing on Tuesday 27 March.

[4] At that hearing, the defendant consented to the plaintiff's application but the Court was required to be satisfied that it had the jurisdiction to issue the interim injunctions and that this was a proper case for the exercise of its discretion. Mr Carruthers, counsel for the plaintiff, provided his written submissions to the Court and the defendant. These contained references to a schedule of documents from the bundles of documents obtained on disclosure and filed in Court by the plaintiff. It was agreed that I should not have regard to those documents until the defendant had had the opportunity to respond to them, which it would do by midday on Thursday 29 March. As I shall indicate, I was satisfied from the balance of Mr Carruthers's submissions that this was a proper case for the issuance of the interim injunctions as consented to by the defendant.

[5] The second application for interlocutory injunctions was to restrain what were allegedly unlawful lockouts imposed by the defendant on 22 March (the lockout injunctions). That application was filed on 23 March and agreed to be heard at the same time as the contracting out injunctions. The second application was adjourned by consent until Friday 30 March 2012 on the basis of the defendant's offer to pay all permanent and P24 union employees (a category covered by the expired collective agreement) who were available for work, for the period from 3pm on Thursday 22 March when the strike notices were lifted, for their guaranteed shifts under the expired collective agreement, until 3pm on Friday 30 March 2012. To determine which union employees were available for work, those union members would need to present themselves at 3pm on Thursday 29 March 2012 at a place within one kilometre of the Port nominated by the defendant, and which was to be advised to the plaintiff by 9am on Wednesday 28 March.

Factual background

[6] The factual background which I am about to set out is not, for the most part, in dispute and is based on the current pleadings. It should be noted, however, that although leave may be required to do so, as the substantive matter has been set down, either party may apply to amend its pleadings so the admissions on which I have relied for present purposes only, may not be those on which the substantive proceedings are heard.

[7] Three classic tests are to be applied to the question of whether an interlocutory injunction should issue. The first is whether the plaintiff has an arguable case. The second test is where the balance of convenience lies between the parties before the substantive matter can be heard and determined. Because the grant of interim relief is discretionary, the third test requires the Court to stand back from the detail of the first two tests and to ask where the overall justice of the case lies at the interlocutory stage.

[8] The plaintiff is a registered union. The defendant was established under the Port Companies Act 1988 and operates the port at Auckland. The defendant employs approximately 297 of the plaintiff's members (the union members), of whom approximately 235 are employed as stevedores. Others are engineers and tradespersons. The plaintiff and the defendant are engaged in collective bargaining to settle a new collective agreement to replace the collective agreement which expired on 30 September 2011. The expired agreement continues in force, pursuant to s 53 of the Employment Relations Act 2000 (the Act). The bargaining commenced on 6 September 2011.

[9] One of the issues discussed, but yet to be settled in the bargaining, is a proposal by the plaintiff that work covered by the new collective agreement not be contracted out during the term of the agreement. The expired collective agreement contains a clause which deals with contracting out but there is a dispute as to whether it has been properly complied with by the defendant.

[10] On 9 January 2012, it is alleged that the defendant issued a public press statement and advised the plaintiff that the defendant proposed the introduction of a contracting out model which might lead to the redundancy of the union members (the contracting out proposal). All subsequent dates refer to events in 2012.

[11] On 7 March, the defendant informed the plaintiff that it had decided to implement the contracting out proposal and stated that this would result in the termination of the union members' employment and their reengagement with new employers (the contractors) from whom proposals were being sought by the defendant. The defendant referred to a six week period of consultation prior to the

defendant issuing notices of termination. The defendant alleges that stevedores employed by it, including the union's members, have the opportunity to apply for employment with the selected contractors, that it has consulted with the union on these matters and alleges that the union has refused to engage on these issues. These matters are in dispute.

[12] On 9 March, it is alleged that the plaintiff received a media release from the defendant which stated that it had signed contracts with Drake New Zealand Limited (Drake) and Allied Workforce Limited (AWF) following its decision "to introduce competitive stevedoring at its Fergusson and Bledisloe Container Terminal operations" and that a further press release naming the third company that would be working with the defendant was expected shortly.

[13] The affidavits filed in support of the interim injunction stated that the union has received no information as to the terms of the contracts between the defendant and the selected contractors. The affidavits also deposed that the union understands that its members are going to be encouraged to make applications for positions with the new contractors. In support of those allegations, references were made to statements made by the chairman of the defendant, Richard Pearson, in the media in which he was alleged to have said that the union members needed to apply for jobs with the new contractors.

[14] Affidavits from three union members have deposed that they are permanent stevedores who have been employed by the defendant for up to 15 years, have economic commitments to their family and are torn between wanting a collective agreement between their union and the defendant and their concerns that they might have no option but to apply for employment with the contractors. The affidavit of Russell Mayn, the secretary/treasurer of the Auckland branch of the plaintiff union, has expressed the view that the union membership will be torn between the need to keep working even with contractors and their wish to be employed under a collective agreement and that since the announcement of 9 January, the collective bargaining has been undermined by the threat of the contracting out proposal. Mr Mayn also deposes that the active recruitment of stevedores for the contracting companies would allow such employees to be engaged to perform the work of striking workers

during the strikes which, at the time the affidavits were sworn, were currently in place and were to continue. The strike notices were withdrawn on 22 March.

[15] On 21 March, the agreement referred to above (at [2]) was reached between the parties which allowed the application for the lockout injunctions to be adjourned sine die to be brought on at short notice, if sought by either party. It also allowed for the substantive hearing, set down to commence on 26 March for five days, to be adjourned sine die on the same basis. This agreement was reached on the basis of the undertakings given by the defendant in the following terms:

> The defendant makes the following undertakings for a period of one month from Thursday 22 March 2012 and thereafter by agreement or further order of the Court:
>
> (i) The defendant will take no further steps to implement the proposal to make the plaintiff's members redundant.
>
> (ii) The defendant will not dismiss the plaintiff's members.
>
> (iii) The defendant will not employ or engage Drake Personnel Limited or Allied Workforce Limited, or any other person to perform the work of striking employees in breach of s 97 of the Employment Relations Act 2000 and will take steps to instruct Drake Personnel Limited, Allied Workforce Limited and any other potential contractor not to undertake any recruitment or training related to the contracting out of work at Ports of Auckland.
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> (iv) In the event that the defendant intends to employ or engage any other person to perform work covered by the collective agreement in dispute, it will give the plaintiff 48 hours' notice to enable the plaintiff to apply for relief.

[16] The plaintiff's affidavits set out statements allegedly made by Mr Pearson on 22 March in radio and television interviews to the effect that there had been "no U-turn. You could call it a route deviation if you have to". He also allegedly stated on television on 22 March that the defendant was:

> … encouraging our staff that's on strike still to come and apply for jobs with the contractors. So there's no change there. The board, we've made no change in our view, of the benefits of contracting and it's the right decision for the Port.

[17] Other examples are given, including an interview allegedly given at 7.16am on 22 March on Newstalk ZB Auckland during the Mike Hosking Breakfast programme, in answer to a question as to whether there had been a U-turn, Mr Pearson stated:

> … we are encouraging our staff that are actually still on strike, if they want to apply for jobs at the Port, come and apply, there's no change to that process at all.

[18] The plaintiff also provided an affidavit which detailed enquiries allegedly made of Drake and AWF which suggested that the staff of those companies, responding to enquiries on 21 and 22 March, were unaware of any instruction from the defendant to cease recruitment of staff for work at the defendant's premises. I note that Mr Haigh, counsel for the defendant, gave an undertaking in open Court on 27 March confirming that the defendant had instructed both Drake and AWF to cease any form of advertising, training or recruitment or any form of preparation for those activities on behalf of the defendant, as it had undertaken so to do. I unhesitatingly accepted Mr Haigh's undertaking, as did Mr Carruthers.

[19] At around midday on 22 March, the members of the union voted to end their strike currently in place, which was to end on 23 March, and voted to end the two week strike that would have commenced on 23 March and have concluded on 6 April 2012. The union immediately wrote to the defendant advising it that the strikes ended immediately and that it was the union's expectation "that members will be rostered from second shift today commencing at 3pm."

[20] Mr Mayn deposes that the union members had an expectation that some members would be able to return to work at the commencement of the second shift at 3pm on 22 March. He also deposes that since that time, members of the union have not been allowed to return to work and that the defendant invited the plaintiff to attend a meeting to discuss the issue on 23 March. He also deposes that at around midday on 22 March, the defendant served a lockout notice on the plaintiff advising of a complete and continuous discontinuance of employment from 12.01 am on 6 April until its demands were complied with.

[21] The issues relating to the lockout notice and the defendant's alleged refusal to allow the union employees to return to work on 22 March will be dealt with in the hearing on 30 March.

Arguable case

[22] Counsel for the defendant has advised the Court that, whilst the defendant does not accept that it has breached any of the undertakings recorded in the Court minute of 22 March, it nevertheless consented to the orders sought by the plaintiff in the contracting out injunctions.

[23] The plaintiff has indicated that it intended to amend its application, in relation to the contracting out injunction, to seek a further order that the defendant not progress any voluntary redundancies. This is based on a letter allegedly sent to members of the union on 23 March by Mr Gibson (Chief Executive of POAL), which refers to the handling of enquiries from employees seeking voluntary severance. Without objection, the plaintiff has been granted leave to amend its contracting out injunctions application to include reference to the allegations about voluntary severance and this matter will be dealt with on 30 March. In the meantime the situation will be covered by the last interim injunction set out in [1] above.

[24] I find that there is a seriously arguable case that the actions of the defendant in allegedly threatening to and then deciding to contract out the work on which the union employees were engaged under the expired collective agreement whilst collective bargaining was on foot for a new collective agreement was likely to undermine and arguably has undermined the bargaining. It will also, arguably, undermine the bargaining in the future. It is therefore seriously arguable that those actions have breached s 32(1)(d)(iii) of the Act. This section provides that the duty of good faith in s 4 of the Act requires a union and an employer bargaining for a collective agreement to do a number of things. These include the requirement in subsection (d)(iii) that the union and the employer:

> must not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining.

[25] It is contended by the plaintiff that the proposal and the decision to contract out have caused a fear of dismissals among union members and has created pressure on their families and thereby undermined the bargaining for the new collective. There is evidence in the affidavits before the Court which makes this arguable.

[26] Mr Carruthers's submissions noted that the issue of mass dismissals of the workforce during bargaining has been addressed only briefly in the s 32(1)(d)(iii) context and was left open by Chief Judge Colgan in *Eastern Bay Independent Industrial Workers Union 1995 Inc v Norske Skog Tasman Ltd.*[1] It was not raised in *New Zealand Amalgamated Engineering Printing & Manufacturing Union Inc v Carter Holt Harvey Ltd*[2] and he submitted that the restructuring in that case was allowed to continue in parallel with bargaining because contracting out was, unlike the present case, not an issue in the bargaining.

[27] Mr Carruthers submitted that, even under the Employment Contracts Act 1991, mass dismissals for bargaining purposes had been found to be unlawful in *McCulloch v New Zealand Fire Service Commission*[3] and *New Zealand Seafarers' Union Inc v Silver Fern Shipping Ltd (No 2).*[4]

[28] Next, it has been contended that the dismissal proposals constituted an unlawful lockout. I consider that this is less seriously arguable because there appears to be a lack of the demands which are required to bring the defendant's alleged actions within the definition of "lock out" in s 82(1)(b)(ii) of the Act.

[29] It is also contended that the dismissal proposals are contrary to the obligation imposed by s 4(1A)(b) of the Act which requires the defendant to be active and constructive in maintaining a productive employment relationship with the union members of the plaintiff. It is contended that the decision to initiate mass dismissals of the entire bargaining unit was contrary to that duty. There is also an allegation that the defendant has failed to provide information concerning the contracting out proposals in breach of s 4(1A) before any decision was made.

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[1] [2010] NZEmpC 165 at [11].
[2] [2002] 1 ERNZ 597.
[3] [1998] 3 ERNZ 378.
[4] [1998] 3 ERNZ 786.

[30] Finally, there is an issue that by progressing the dismissal proposal and engaging the contractors, their employees will be performing the work of striking employees in breach of s 97 of the Act. That will be equally arguable, even though the strike has ceased, if the dismissal proposals are pursued while the threatened lockouts apply. I find that all these issues are arguable and they will be dealt with in the substantive hearing commencing on 16 May.

[31] As to the balance of convenience, if the dismissal proposals were allowed to proceed before the issues can be substantively resolved, this arguably would have irretrievable consequences for those dismissed employees. The injunctions sought apply until the substantive hearing and may delay the defendant exercising its contractual rights (which are also in issue). However, to permit the exercise of those rights, which are in dispute in the interim because of statutory requirements, could cause irreversible damage to the plaintiff's members. I note, in this regard, that the substantive issues would have been addressed in the week commencing 26 March but for the undertakings which arguably have been breached. The Court could have provided an earlier fixture in the week commencing 23 April, but counsel for the defendant advised that the defendant was not available. The date finally allocated was suitable for the parties. In all the circumstances, I was satisfied that the balance of convenience favoured the granting of the injunctive relief sought, in the form to which the defendant consented.

[32] Standing back from the detail, I was also persuaded that the overall justice of the case required that the defendant be prevented from exercising its dismissal proposals until its right to be able to do so, in light of the statutory requirements, is dealt with by the substantive hearing.

B S Travis
Judge

Judgment signed at 11.00am on 29 March 2012