IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 197
ARC 3/12

IN THE MATTER OF	injunction
BETWEEN	MARITIME UNION OF NEW ZEALAND Plaintiff
AND	PORTS OF AUCKLAND LIMITED Defendant

ARC 5/12

AND IN THE MATTER OF proceedings removed

BETWEEN	MARITIME UNION OF NEW ZEALAND Plaintiff
AND	PORTS OF AUCKLAND LIMITED Defendant

Hearing:	20 November 2012 (Heard at Auckland)
Counsel:	Simon Mitchell, counsel for plaintiff Richard McIlraith, counsel for defendant
Judgment:	20 November 2012
Reasons:	23 November 2012

REASONS FOR ORAL JUDGMENT OF JUDGE B S TRAVIS

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[1] At the conclusion of the chambers hearing, I advised the parties that I declined leave to the plaintiff to amend its statement of claim and granted the adjournment sought by the defendant. These are the reasons for those decisions.

Leave to amend

[2] On 31 October 2012 the plaintiff (MUNZ) applied for leave to file a second amended statement of claim. The proposed statement of claim included a claim based on the alleged actions of the defendant in October 2012, in entering into a collective agreement with another union, PortPro Incorporated (PortPro) to cover stevedoring work.

[3] Paragraph 12 of the proposed statement of claim alleged that PortPro had been recently established with members employed only by the defendant and that at no time did the defendant consult with the plaintiff as to its bargaining with PortPro or the impact of entering into a collective agreement with PortPro on the plaintiff.

[4] It is alleged that the action of the defendant in bargaining with PortPro and concluding a collective agreement, and failing to consult with the plaintiff, was a breach of the defendant's obligation of good faith to the plaintiff.

[5] The proposed statement of claim also introduced a new paragraph 22 which stated:

> The actions of the defendant in failing to act in good faith were:
>
> a. Deliberate, serious and sustained;
>
> b. Intended to undermine bargaining for a collective agreement;
>
> c. Intended to undermine a collective agreement.

[6] Mr Mitchell for the plaintiff advised that it was intended that this amended pleading was to apply to all of the actions of the defendant which had been pleaded in the plaintiff's previous statement of claim and which remained unchanged.

[7] In addition, a penalty "for the action of the defendant in breaching its obligations of good faith to the plaintiff, pursuant to s 4A of the Act" was introduced. Mr Mitchell indicated that that would apply only to the allegations regarding PortPro because the previous causes of action had not sought a penalty and there had already

been disclosure of documents. Where there are claims for a penalty, there are limitations on the ability to obtain disclosure.

[8] Mr Mitchell submitted that the claim in relation to PortPro was not broad and that, in effect, the plaintiff was submitting there was an obligation on the defendant to advise that the bargaining was happening, to consult with the plaintiff and not to enter into a collective agreement without such consultation having occurred. He observed that the claim could not have been made at the time the proceedings were filed, because PortPro was not established at that time.

[9] Mr Mitchell submitted that the effect of the combined proceedings to date was to address the obligations of the defendant in relation to its treatment of non-union employees and to changing terms and conditions of those employees during a period of bargaining for a collective agreement with members of the plaintiff. He submitted that the PortPro issue was closely related to the claims already before the Court.

[10] Whilst I could see the force of that contention and the advantage of hearing all causes of action relating to allegations of undermining and breaches of good faith during the current collective bargaining together, my major concern was that the matters alleged to have arisen in October 2012 were not matters that were previously before the Employment Relations Authority (the Authority) and the Employment Court had no originating jurisdiction to deal with them.

[11] Part of the present proceedings came directly before the Court partly as a result of an injunction application to prevent an alleged breach of s 97 of the Employment Relations Act 2000 during the course of bargaining. This alleged the use of non-union labour to carry out the work of members of the union engaged in the collective bargaining who were locked out by the defendant.

[12] Those proceedings were effectively consolidated with proceedings removed by the Authority to the Court on 17 January 2012. Those proceedings alleged a breach of the duty of good faith by the defendant invoking the redundancy provisions in the collective agreement whilst there was collective bargaining going

on between the parties. Those matters are still before the Court and were due for hearing in a three day fixture commencing on Monday 3 December 2012, which I adjourned on the defendant's application for reasons which I shall give.

[13] Mr McIlraith for the defendant submitted that the issues arising from the alleged negotiations with PortPro should be resolved by way of a separate action which needed to be commenced first in the Authority. He contended that the defendant would be required to file significant additional evidence which would not otherwise be part of the current proceedings. He also foreshadowed that should the plaintiff's application for leave to amend be granted, the defendant anticipated that further interlocutory steps may be required, including an application for further and better particulars. He therefore submitted that the leave to amend the statement of claim should be declined.

[14] Counsel's researches were unable to provide any authorities which have considered a situation like the present where a matter has been removed under s 178 of the Act from the Authority to the Court and a new cause of action has arisen relating to the matter but which was not previously before the Authority. I consider, however, that the authorities recently summarised in the judgment of Judge Inglis in *Newick v Working In Ltd*[1] on challenges under s 179 of the Act do provide authoritative guidance.

[15] The same word, "matter", appears in both sections. After referring to all the authorities on the scope of the Court's jurisdiction on de novo challenges[2], Judge Inglis stated:

> [26] Additional causes of action, not advanced in the Authority, can be pursued on a *de novo* challenge, provided the "twin statutory requirements" (of having been questions before the Authority (s 179) and having been brought within time (ss 114 and 142) are met and the claim is within the overall jurisdiction of the Court. There is, accordingly, no objection to re-couching a legal claim, provided the matter itself was before the Authority.

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[1] [2012] NZEmpC 156.
[2] *Sibly v Christchurch City Council* [2002] 1 ERNZ 476; *Abernethy v Dynea NZ Ltd (No 1)* [2007] ERNZ 271; *Bourne v Real Journeys Ltd* [2011] NZEmpC 120; *Patel v Pegasus Stations Ltd* [2011] NZEmpC 129 at [23] and *Clark v Board of Trustees of Dargaville High School (No 2)* AC3A/09, 20 April 2009.

[16] I find that the allegation of a breach of good faith arising out of the events in October 2012 is not part of those matters removed to the Court on 17 January 2012 nor part of the originating jurisdiction of the Court to deal with s 97 of the Act during a lockout.

[17] Because of the particular statutory limitations, I consider that the authorities cited by Mr Mitchell such as *Kirton v Prospecdev Holdings Ltd*[3] and *Elders Pastoral Ltd v Marr*[4] do not assist the plaintiff. They deal with amendments of pleadings where the Court has original jurisdiction. The Employment Court's jurisdiction in this area arises only by removal or challenge.

[18] For these reasons I declined to grant the plaintiff leave to amend the proceedings.

Application for adjournment

[19] On 13 November 2012 the defendant applied to the Court to adjourn the fixture set down to commence on 3 December 2012 for three days. The grounds on which the adjournment was sought were, first, that Mr Farmer QC, representing the defendant was no longer available for the hearing due to his involvement in a High Court trial, details of which were provided in an accompanying memorandum. The second ground was that the scope of the evidence filed by the witnesses for the plaintiff was much wider than anticipated, and the evidence in response from the defendant was therefore likely to be more extensive. In the view of the defendant the matter was therefore likely to take more than the three days set aside for it and that it would be undesirable for it to be part-heard.

[20] Mr Mitchell strenuously opposed the adjournment expressing the plaintiff's confidence that the three day time estimate would be sufficient. Mr Mitchell also advised that there was a likelihood that the plaintiff would apply in the Authority for relief against the circumstances arising out of the PortPro negotiations and would immediately apply to have those proceedings removed to the Court and for leave to

[3] (1990) 2 PRNZ 412.
[4] (1987) 2 PRNZ 383 (CA).

amend the present pleadings. Mr Mitchell contended that that would not greatly increase the length of the hearing.

[21] Having heard counsel, I agree with Mr McIlraith that even putting the PortPro matter to one side, which is the current situation because leave to amend has been declined, the matters currently before the Court will require extensive evidence on the part of the defendant to adequately rebut the plaintiff's allegations. Mr McIlraith advised that the evidence at present, which has yet to be filed, runs to approximately 70 pages and may even be extended. I consider that in these circumstances there is a risk that the current proceedings including submissions will not be completed within the originally allocated three days.

[22] If the plaintiff proceeds as indicated by Mr Mitchell and the plaintiff is successful in removing to the Court any proceedings relating to allegations of breaches of the duty of good faith arising out of the defendant's involvement with PortPro and leave to amend is granted, I consider that the matter may take more than five days.

[23] Mr Mitchell submitted that the plaintiff, whilst accepting the small disadvantage to the defendant of senior counsel not being available, contended there is plenty of time for the defendant to choose alternative counsel. He noted the difficulties of setting the matter down previously were due to the commitments of senior counsel. Mr Mitchell observed that the bargaining at the Port is continuing for a collective agreement and that the facilitation process is nearing its conclusion.

[24] Mr Mitchell submitted that it was important for the plaintiff and the defendant at this critical point in the collective bargaining that the serious breaches of good faith obligations alleged by the plaintiff are determined in a prompt manner and there has already been considerable delay because of the unavailability of senior counsel. He observed that if this matter had been determined on the first date offered by the Court, this could well have occurred prior to the PortPro collective agreement being negotiated, which the plaintiff contends has impacted upon its bargaining position. He therefore submitted that it was unfair to allow an adjournment at this

time with the defendant being able to instruct alternative counsel. He submitted that it was not in the interests of justice to delay the matter further.

[25] Mr McIlraith submitted that at the time this matter was set down for hearing both parties indicated that they would be engaging senior counsel. Mr Carruthers QC has been retained by the plaintiff and Mr Farmer by the defendant. Mr McIlraith observed that the hearing was scheduled once the availability of senior counsel had been ascertained. He observed that Mr Farmer had been engaged by the defendant in relation to this proceeding for some time, and that the defendant wishes to retain his services. He submitted that Mr Farmer's unavailability was unavoidable. He also advised that due to some other difficulties his own continued involvement may not be available at the time of the fixture. Mr McIlraith accepted that while it was in the interests of both parties that these matters are dealt with promptly, they were first filed in January 2012, and have not been progressed with urgency. He observed that the interim orders initially sought by the plaintiff were addressed by the provision of undertakings by the defendant which still remain in force. He submitted that an adjournment of this matter to a suitable date early next year would not be unduly prejudicial to the parties.

[26] I observed that the defendant, through the untimely demise of Mr Haigh QC, was deprived of its senior counsel earlier in the year and has since had to instruct other senior counsel. The presence of senior counsel on both sides was an indication of the importance with which the parties regarded these proceedings. To deprive the defendant of its counsel of its choice and require it to instruct new counsel so close to the fixture would, I consider, be unduly disadvantageous to the defendant and not in the interests of justice.

[27] I am fortified in that decision by the willingness of the defendant to accommodate the next earliest available fixture.

[28] After advising the parties that I granted the adjournment for the reasons given above, they met with the Registrar and agreed on a date of hearing. The fixture is

therefore adjourned to commence on Thursday 7 February and to continue until Wednesday 13 February 2013.

B S Travis
Judge

Judgment signed at 11.15am on 23 November 2012