IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 59
ARC 3/12, ARC 5/12, ARC 13/12, ARC 17/12, ARC 72/12, ARC 85/12 and ARC 22/13

IN THE MATTER OF	an injunction
AND IN THE MATTER OF	challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	proceedings removed
AND IN THE MATTER OF	declaration of strike, lockout or picket
AND IN THE MATTER OF	an application to vary interim orders and to mediate
BETWEEN	MARITIME UNION OF NEW ZEALAND INC Plaintiff
AND	PORTS OF AUCKLAND LIMITED Defendant

Hearing: Following a chambers hearing on 12 April 2013
(Heard at Auckland)

Counsel: Simon Mitchell, counsel for plaintiff
Richard McIlraith, counsel for defendant

Judgment: 12 April 2013

INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS

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[1] According to a timetable agreed by the parties, and confirmed by a minute of this Court issued on 18 March 2013, a fixture to dispose of several outstanding interlocutory matters between them was set down for Thursday, 18 April 2013.

[2] In accordance with an agreed modification to that timetable the defendant today filed a notice of opposition and affidavits in opposition which contain extensive material which the plaintiff now seeks the opportunity to reply to and, as a consequence, an adjournment of the interlocutory hearing.

[3] Another ground for the adjournment was that the plaintiff has had removed another set of proceedings to the Court today,[1] from the Employment Relations Authority[2] (the Authority), which will need to be addressed in the interlocutory hearing. The fourth cause of action in the plaintiff's proposed statement of claim in those proceedings is an allegation that the defendant has contracted out engineering work (the engineering work) which has undermined the bargaining going on between the parties and is a breach of s 32(d)(iii) of the Employment Relations Act 2000 (the Act). It is also alleged that it is in breach of an interlocutory injunction granted by the Court on 27 March 2012. This is a matter which has not previously been the subject of mediation. It is also going to be called upon by the plaintiff in support of its application to amend the wording of the injunction granted on 27 March 2012, to further restrict the defendant's activities while bargaining is proceeding.

[4] The adjournment was strenuously opposed by Mr McIlraith on behalf of the defendant. He correctly observed that the agreed timetable did not contemplate a reply to the defendant's affidavits and notice of opposition. In reliance upon the affidavits filed today, Mr McIlraith addressed the inconvenience and difficulties the defendant was now encountering as a result of the terms of the 27 March 2012[3] injunction, let alone the amendment now being sought by the plaintiff. It was also unclear at this stage precisely what amendment to that injunction the plaintiff was finally going to seek, especially in relation to the alleged contracting out of the engineering work. Whilst accepting that mediation had not yet occurred in relation to the engineering work, Mr McIlraith submitted that any mediation should not be allowed to prevent the Court determining the interlocutory matters and in particular the defendant's applications to discharge the injunction issued on 27 and 30 March 2012.[4]

[5] Whilst I have considerable sympathy for the defendant's position as outlined effectively by Mr McIlraith, the difficulty with these complex proceedings is that they have been something of a moveable feast since the plaintiff's original applications to the Court, more than 12 months ago. There have been a number of

[1] ARC 22/13.
[2] [2013] NZERA Auckland 123.
[3] [2012] NZEmpC 52.
[4] [2012] NZEmpC 55.

new allegations based on recent events which the plaintiff relies upon to justify not only the retention of the original 27 March 2012 injunction but, in its contention, would also allow for more stringent injunctive relief.

[6] The present interlocutory matters have now centred on what amounts to applications for new interim injunctions and the defendant's application to discharge the two injunctions granted on 27 and 30 March 2012 respectively which may have considerable impact on the defendant's commercial activities and may also interfere with the facilitation process the parties are engaged in for the purposes of endeavouring to conclude a new collective agreement.

[7] It also appears that the plaintiff's allegations concerning the engineering work could create considerable practical problems for the parties which even a concluded collective agreement might not resolve.

[8] In terms of s 188(2) of the Act, where any matter comes before the Court for decision, the Court must first consider whether an attempt has been made to resolve the matter by the use of mediation and must direct that mediation, or further mediation (as the case may require), may be used before the Court hears the matter.

[9] Mr Mitchell submitted that in terms of s 188(2)(b), this was a case where the use of mediation could contribute constructively to resolving the matter, would be in the public interest and, in view of the ongoing matters between the parties, would also not undermine the urgent or interim nature of the proceedings.

[10] Mr Mitchell's argument persuaded me that this was a proper case for the Court to direct mediation in relation to the engineering work removed to the Court today under ARC 22/13, even if this had the effect of requiring a brief adjournment of the interlocutory proceedings.

[11] I also accept, over Mr McIlraith's opposition, that this was an appropriate case for the plaintiff to have the opportunity to reply to the defendant's affidavits and, in light of the new allegations, to reframe the terms of the injunctive relief it

was now seeking. Similarly the defendant ought to have the opportunity to respond to the plaintiff's affidavits and reframed injunction application.

[12] With considerable reluctance therefore, I grant the adjournment application, but on the basis that this should not be for more than a period of two weeks. Tentative dates were offered to counsel who have now to obtain instructions from their clients and find out the availability of the senior counsel who are instructed in this case. The Court will use its best endeavours to accommodate the hearing of the adjourned proceedings at the earliest mutually convenient time.

[13] The parties are to advise the Court on an agreed timetable and if no such agreement can be reached, there will be a chambers hearing at 10am on Thursday 18 April 2013 to impose a timetable for a new hearing date for the interlocutory application.

[14] In the meantime the parties are directed to mediate the outstanding engineering work dispute and any other disputed matters that can be accommodated to assist in the practical operations of the Ports of Auckland. If it would assist the parties the Court could also make available a Judge to sit on a Judicial Settlement Conference with that mediator.

[15] There has been no opposition to the defendant's application to set aside the orders made on 30 March 2012. I am satisfied that those orders are no longer viable and therefore they are now formally set aside.

[16] Leave is reserved for the parties to apply for further directions.

[17] Costs are reserved.

B S Travis
Judge

Judgment signed at 3 pm on 12 April 2013