IN THE EMPLOYMENT COURT
AUCKLAND

AC 27/08
ARC 44/08

IN THE MATTER OF	an application for an injunction
BETWEEN	SCA HYGIENE AUSTRALASIA LIMITED Plaintiff
AND	THE PULP AND PAPER INDUSTRY COUNCIL OF THE MANUFACTURING AND CONSTRUCTION WORKERS UNION INC First Defendant
AND	KEN WHEATLEY Second Defendant
AND	BRUCE NEAL Third Defendant

Hearing: 31 July 2008
1 August 2008
(Heard at Auckland)

Appearances: David France and Gemma Mayes, Counsel for Plaintiff
Kathryn Beck and Karen Jones, Counsel for First Defendant
No appearance for Second Defendant
No appearance for Third Defendant

Judgment: 28 August 2008

JUDGMENT OF JUDGE C M SHAW

Introduction

[1] Faced with threatened strike action by some of its employees, SCA Hygiene Australasia Limited ("the company") seeks a permanent injunction to restrain the defendant union ("the union") and those members from participating in that strike.

[2] The matter has proceeded under urgency. In the meantime, until the determination of these proceedings, the defendants have agreed not to go on strike and the company has agreed not to implement the restructuring to which the defendants objected.

[3] Two individual employees are named as second and third defendants by the company but by agreement they need not be involved in the proceedings unless and until the question of remedies arises. This hearing was confined to matters of liability.

[4] The parties also agreed that if the injunction is not granted that would end the proceedings save for costs.

[5] It is a feature of this case that the plaintiff does not allege that the threatened strike would be unlawful in terms of s86 of the Employment Relations Act 2000 ("the Act"). The principle issue is whether participation in the proposed strike relates to bargaining for a collective agreement and is therefore lawful in terms of s83.

The facts

[6] Since the company purchased the Kawerau Mill, a tissue production plant, in 2004 it has been striving to improve production and cost performance for the mill and to this end introduced a performance improvement process. Manning levels on Paper Machine 3 ("PM3"), one of the three paper machines at the mill, was identified as an area that needed improvement.

[7] On 15 March 2007 the company announced a restructuring proposal which included the reduction of manning numbers on PM3 from six plus one spare permanent employees per shift to three plus one spare.

[8] Following the consultation process set out in the collective agreement, the company and a union working party agreed to reduce the manning levels by two positions and to continue to monitor work-load issues with a view to reaching a decision about whether the PM3 positions should be reduced by one more.

[9] On 16 November 2007, the working party presented the company with a list of safety concerns arising from the proposed reduction of manning levels. The company moved to address some of those concerns but for operational and other reasons some have not yet been resolved.

[10] On 27 November 2007, no agreement having been reached, the company announced that it would be reducing manning levels on PM3 by one to three permanent employees and one spare. After a three month transition plan, restructuring was to be implemented on 25 February 2008.

[11] In the meantime, on 11 December the union gave notice of initiation of bargaining for a new collective agreement and on 17 January 2008 the parties signed a Bargaining Process Agreement.

[12] The union tabled its collective agreement bargaining claims at a meeting with the company on 7 February. These claims were in three parts. The Pulp and Paper claim included the following:

> *The manning on PM3 to be five per shift with a minimum working crew of four.*

[13] At the 7 February meeting, Harold Appleton, the secretary of the union, said that if the company continued to implement the restructure there would be consequences. He also suggested a separate meeting between the company and the PM3 group be held to see if the issue could be resolved prior to collective bargaining negotiations. This meeting was held on 12 February.

[14] By this time each side had a different but, I find, genuine understanding of the purpose of the meeting. Mr Appleton said he thought it was to discuss the union's claim for PM3 manning levels and to try and resolve it before the 25 February implementation date. Susan Gibbs, the company's Kawerau Mill Employment Relations' Manager, thought the meeting was to progress the implementation of the PM3 restructure. That misunderstanding has continued to the present time and largely informed the positions taken by the parties at the hearing of this injunction application.

[15] At the 12 February meeting Ms Gibbs tried to go over the history of consultation about the restructuring but Mr Appleton wanted to deal with the claim on the table and asked the company to seriously consider not implementing the changes on 25 February. He was asked if there was anything new to support the union's stance on the PM3 claim that would make the company rethink its position on implementation. He said, *"No"*. The union warned that industrial action was a possibility.

[16] Mr Appleton explained to the Court that there was nothing new because in the course of the consultations about restructuring the union members had discussed the whole thing at length. In that context he had nothing new to add, however, he was not refusing to talk about the claims. The union's position was that, as the PM3 claim was now part of the collective bargaining, it could be addressed by negotiating on that claim. He anticipated discussing the claim in a wider sense than just an issue about demanning a machine and considering options which may not have come up in the consultation process about the specific issue of manning. On the other hand Douglas Longdill, the company's human resources manager, said that as there was nothing new from the union they couldn't take the negotiations further. The company could see no reason not to implement the changes.

[17] Following that meeting, the union held an all-up meeting to discuss the claims with its members. The workers supported the taking of strike action but limited it to the PM3 machine in order to minimise disruption to the whole mill. As well, the parties continued to meet over the issue and attended mediation on 7 May 2008 but reached no agreement.

[18] On 12 June the company announced to the PM3 employees that it would proceed with the implementation of the PM3 restructuring on 30 June.

[19] The union and the company met again on 20 June when the company gave its progress report on all of the claims on the table. On the PM3 claim it said that it would continue with the implementation and wanted to discuss workload allocations arising from it.

[20] In her covering letter to that report Ms Gibbs wrote:

> *If, following the outcome of [the union's] meeting with [its] members, we are at an impasse in the bargaining, we remind you of the following clause in our Bargaining Process Agreement.*
>
> ***Inability to Agree***
>
> *If there is any dispute over the conduct of the bargaining or the parties have reached an impasse in the bargaining, the parties will discuss options for resolving their differences including whether mediation could assist prior to resorting to other forms of action.*

[21] Another all-up union meeting was held and the company was advised by the union that the PM3 would stop if it implemented the restructure. Following this the injunction proceedings were commenced.

[22] Mr Appleton said that the union has never and is not contesting the company's ability to implement the restructuring decision nor the process it adopted. However, now that it is a claim in collective bargaining the union believes its members have the right to take whatever lawful action they see necessary to support their claim. Because the company was seen to be ignoring the claim as a bargaining issue by implementing the restructure the union members decided to take action.

[23] For its part, the company saw the threat to take action as simply an attempt to stop the implementation of the restructure.

Discussion

[24] The company accepts that the proposed strike would not be in breach of any of the s86 provisions. It is therefore not unlawful and the first part of the lawfulness test in s83 is fulfilled. However, Mr France submitted on behalf of the company that the participation of the union and the workers in the proposed strike would not relate to collective bargaining and therefore is not a lawful strike under s83 of the Act. Whether the second part of the test can be met is largely factual; does the strike relate to bargaining for a collective agreement. Both counsel addressed the application of the words "*relates to*" in s83(b).

[25] For the union Ms Beck submitted that the words should be interpreted differently from the same words in s86 because the test of dominant purpose or

motive for the strike which has been commonly applied to the words in s86 is only relevant when the Court is assessing whether a strike may be unlawful under s86. She argued that an assessment of the dominant purpose in every circumstance would unnaturally extend the wording of the Act and there is nothing in the Act to suggest such a reading. Mr France argued that the words being the same in each section, should bear the same meaning.

[26] The objects of the statutory scheme for strikes and lockouts in Part 8 of the Act include:

> *(a) to recognise that the requirement that a union and an employer must deal with each other in good faith does not preclude certain strikes and lockouts being lawful (as defined in the Part); and*
>
> *(b) to define lawful and unlawful strikes and lockouts;*

[27] Section 83 of the act materially provides:

> *Participation in a strike or lockout is lawful if the strike or lockout -*
>
> *(a) is not unlawful under section 86; and*
>
> *(b) relates to bargaining -*
>
> *(i) for a collective agreement that will bind each of the employees concerned;...*

[28] Section 86 materially provides that participation in a strike or lockout is unlawful if the strike or lockout:

> *(a) occurs while a collective agreement binding the employees participating in the strike or affected by the lockout is in force, unless subsection (2) applies; or*
>
> *(b) occurs during bargaining for a proposed collective agreement that will bind the employees participating in the strike or affected by the lockout, unless –*
>
> *...*
>
> *(c) relates to a personal grievance; or*
>
> *(d) relates to a dispute; or*
>
> *(da) relates to a bargaining fee clause or proposed bargaining fee clause under Part 6B; or*
>
> *(e) relates to any matter dealt with in Part 3; or*

[29] A strike must therefore be both not unlawful and relate to bargaining for a collective agreement.

[30] Most cases where strikes or lockouts have been challenged have concerned the first part of this test. In those the Court has analysed whether on the facts, the strike was unlawful in terms of s86 or its predecessors in earlier legislation.

[31] In *Hancock & Co Limited v Wellington Hotel etc IUOW*[1] employees at a work place characterised by disruption and disharmony went on strike. One employee left his employment at that time but the union had not invoked the personal grievance procedure. The employer sought a compliance order on the grounds that the strike was related to a dispute of rights or the termination of the employee and was therefore unlawful under the Labour Relations Act. Chief Judge Horn found[2] that the strike was neither due to the employee's departure nor to a dispute of rights but rather to the disruptive situation at the workplace.

[32] In *NZ Labourers etc IUOW v Fletcher Challenge Limited*[3] the full Court reviewed previous decisions and initially took a similar approach to that of Chief Judge Horn in the *Hancock* case[4]. It asked what, on the facts, was the real nature of the strike action, what was the real cause of the strike and what was the substance of the matter. However, the Court added to the test by importing the notion of mixed motives and dominant purpose from the law of torts and as applied in Australia under that country's Trade Practices Act. Since the *Fletcher* case, the test of "*dominant purpose*" has been applied in a number of interim injunction decisions, most of which have focussed on s86 or its predecessors.

[33] However, in *Norske Skog Tasman Limited v Pulp and Paper Industry Council of Manufacturing and Construction Workers Union*[5], a decision given under great urgency, the Court considered the submission that in addition to the allegation that the strike was unlawful under s86 there was an arguable case that the strike did not relate to bargaining under s83. The Court was referred to a number of cases which dealt with the phrase, but it is apparent these were not s83 (b) cases. For

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[1] [1987] NZILR 613
[2] At p617
[3] (1989) ERNZ Sel Cas 424; [1989] 3 NZILR 129
[4] At p201
[5] AC 42/04, 31 July 2004

example, the decision in *Air New Zealand Limited v Flight Attendants and Related Services (NZ) Association Inc*[6] which was relied on did not refer to s83.

[34] In *Norske Skog* Judge Colgan referred to the "*predominant or dominant motive of a party*" and found that there was an arguable case for the plaintiff that the dominant motive or predominant motive of the union and its members was to inflict economic harm even though in some respects the strike action also related to continuing bargaining.

[35] Most recently the dominant motive test has been applied by the full Court in relation to s86 in *Southern Local Government Union etc v Christchurch City Council*[7] to decide if a lockout related to collective bargaining or a dispute about existing terms and conditions of employment.

[36] However, on at least one other occasion the court has not relied on the dominant motive approach. In *New Zealand Public Service Association Inc v Designpower NZ Limited*[8] Judge Colgan stated:

> *The distillation of the several pages devoted to the definition in the Fletcher case, I think, causes the phrase "relates" to mean "significantly referable to". The task of the Court is to examine whether there is a real relationship between the two items or event.*

[37] I am of the view that the dominant purpose test has added a gloss to the meaning of the words of sections 83 and 86 which goes beyond the plain meaning of the text of those sections and does not serve the purpose of the enactment[9].

[38] The purpose of Part 8 of the Act in relation to the legality of participation in strikes is discernable from ss83 to 86. Apart from the grounds of safety or health in s84, the lawfulness is dependant upon the extent to which the action relates to bargaining for a collective agreement. It is not lawful while the collective agreement is in force (except in very limited circumstances) and can only occur once bargaining

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[6] [2002] 2 ERNZ 770
[7] [2007] ERNZ 739
[8] [1992] 1 ERNZ 669
[9] s5(1) Interpretation Act 1999

is well underway. Strike or lockout action is a tool only to be used in respect of bargaining.

[39] The Act requires the Court to decide whether the strike or lockout action relates to collective bargaining or to one of the matters listed in s86. Where there are two matters to which the action may relate I conclude that the approaches taken in *Hancock* and in the *NZ PSA* case amount to a workable test that reflects the words of the statute. To establish whether the industrial action relates to collective bargaining, the question is whether there is a real causal relationship between the action and the bargaining. Rather than applying an abstract test which does not appear in the sections, essentially the decision is a matter of fact about what is the motivation for the action.

[40] If this test is applied, I accept Mr France's submission that there should be no distinction between the meaning "*relates to*" in ss83 and 86. The use of the same words in each section is a strong indication that they should be interpreted the same and this is consistent with the purpose of the sections.

[41] I conclude that for participation in a strike to be lawful under s83, the Court has to find as a matter of fact that it relates to collective bargaining in the sense that collective bargaining must be the cause of the strike or be specifically related to the strike action.

Decision

[42] Mr France argued that the proposed strike relates to the restructuring as its real nature is a direct and immediate reaction against the plaintiff's implementation of its decision to reduce manning numbers on PM3 rather than to any impasse in bargaining. He referred to the union representatives' reference to consequences if the restructure were to be implemented at the first meeting to discuss the collective agreement claim on 7 February and the first mention of strike action only 5 days later on 12 February. Any safety issues had been, or were being, addressed by the company and there was nothing else to discuss in the bargaining process.

[43] He submitted that the proposed strike is entirely dependant on the plaintiff actually implementing its restructure rather than on the outcome of bargaining negotiations between the parties. The defendants have not had recourse to the parties' Bargaining Process Agreement and have done nothing more than submit a claim and failed to engage in bargaining after that. The fact of implementation will not alter the ability of the defendants' to continue to bargain over the manning claim.

[44] It is the company's view that the inclusion of PM3 manning levels as a bargaining claim is directly and predominantly related to retaliation against the plaintiff's decision to restructure. The intention is to coerce the plaintiff to revisit its confirmed decision as opposed to genuine collective bargaining and furtherance of a new collective agreement. Mr France submitted that the process of bargaining under the Act requires more than merely putting forward a claim and then failing to engage in the bargaining. The union's actions were tactical, the lodging of the claim was a statement of position and the union was not interested in bargaining over it. In spite of that submission, Mr France was careful to acknowledge that the company had not pleaded a lack of good faith and made it clear that it was not advancing any such allegation. It is apparent that both parties are anxious to preserve as far as possible their continuing employment relationship. Such an approach is both understandable and in accord with the objects of Part 8 of the Act that acting in good faith does not preclude certain strikes being lawful.

[45] I find that the tabling of a claim about the manning of the PM3 machine was a tactic by the union but a genuine one. The union, through Mr Appleton, acknowledged that its members could not lawfully strike over the restructuring. By making the manning levels the subject of a claim the union had the opportunity to revisit that issue on a different footing. The claim having been tabled, the union and company could address it in the context of other negotiable claims, use it as a bargaining tool, and, if necessary, reach a compromise solution.

[46] The claim was part of the collective bargaining between the parties from the time it was tabled on 7 February. The company acknowledged this in its response to the claims on 20 June.

[47] The statements of 7 February about consequences if implementation took place were made, I find, because by then the claim was seen by the union and indeed was related to collective bargaining. As such, lawful industrial action was a possibility.

[48] The company understandably believed that the threat of strike action had the effect of putting pressure on it not to implement the restructuring and to this extent I accept that the company saw it as being a response to the decision to restructure. However, I find that the proposed strike action which was to be limited to the PM3 manning issue was in response to the company's decision to implement the restructuring on 25 February in spite of the claim which was yet to be bargained for.

[49] The parties met regularly after the claim was tabled to discuss the implementation and the consequences of that. The union went to its members three times between 18 February and 25 June for instructions as to what action should be taken, and the parties went to mediation on 7 May.

[50] Although there was no meeting of the parties' minds on the issue, I find that they were in the process of bargaining throughout this time. The union wanted the company to consider not implementing the changes to manning on PM3, the company wanted to proceed but was open to further new argument which was not forthcoming. Without one side or the other giving way, there was no getting through this impasse.

[51] It was not suggested in argument that the legitimacy or otherwise of strike action is measured by the diligence of the bargaining process which preceded it. Pursuant to s83 if the strike is not unlawful under s86 and it relates to collective bargaining then it is lawful.

[52] I am satisfied that, although the union plainly disagreed with the decision to restructure, the proposed strike was directly related to the collective bargaining for the PM3 manning claim. The union wished to delay the implementation of the restructuring while it furthered the claim on the table.

[53] There was some disagreement between counsel as to whether the claim would have been compromised if the implementation took place before bargaining was concluded. It is not necessary to decide this but the fact that it is a contentious point between the parties is another indication that the ongoing collective bargaining is still an issue between the parties.

[54] For these reasons, I conclude that the proposed strike which is the subject of these proceedings by members of the first defendant employed on the PM3 machine at the plaintiff's Kawerau Mill is related to collective bargaining and would be lawful. The plaintiff's application for permanent injunction is refused.

[55] Costs are reserved.

C M SHAW
JUDGE

Judgment signed at 9 am on Thursday 28 August 2008