IN THE EMPLOYMENT COURT
AUCKLAND

AC 12/09
ARC 48/07

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER OF	an application for orders
BETWEEN	SERVICE AND FOOD WORKERS UNION NGA RINGA TOTA INC First Plaintiff
AND	STEPHEN DEAN ABURN & ORS Second Plaintiffs
AND	SPOTLESS SERVICES (NZ) LIMITED Defendant

Hearing: 11 March 2009
(Heard at Auckland)

Appearances: Peter Cranney & Tim Oldfield, Counsel for Plaintiffs
Shan Wilson & Katherine Burson, Counsel for Defendant

Judgment: 1 April 2009

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] The union and the individual plaintiff employees ask that certain issues be heard and decided as preliminary questions in these proceedings that have been referred back to this Court by the Court of Appeal. Spotless also asks that decision of any remedies to employees that the Court may determine to be payable by it, be severed from the hearing on liability.

[2] It may be timely to reiterate the essential background. The union brought proceedings alleging that refusals to provide work for its members were not lawful

lockouts as Spotless Services (NZ) Limited ("Spotless") sought to justify them. After refusing interlocutory injunctive relief, in judgments in July 2007 I found for the union that the refusal by Spotless to provide work to the union's members was not justified in law as being lawful lockouts under the Employment Relations Act 2000 ("the Act").

[3] The union and affected employees subsequently brought proceedings to recover wages they claimed Spotless ought to have paid them in these circumstances. I found largely against the claimants because for most but not all of the time during which they were held out of work, I concluded they would probably have been on strike and therefore not entitled to wages. In addition, I then concluded that there was a separate ground of illegality on the part of Spotless, even if it had imposed lockouts as defined in the legislation. This ground related to subsequent inconsistent notices affecting the validity of the essential notices of lockout that Spotless had been required to give. I refer to this as "the subsequent notice" issue in the case.

[4] All parties appealed and all were successful in a judgment issued by the Court of Appeal on 22 December 2008. The Court of Appeal directed this Court to re-hear and reconsider the question of the lawfulness of what it concluded were lockouts imposed by Spotless. The Court of Appeal also directed this Court to re-hear and re-determine, independently of its first conclusion, the question of the effect, if any, of the subsequent arguably inconsistent notices posted by Spotless relating to the lockout. Finally, and because of the outcomes of Spotless's appeal, the Court of Appeal directed that the claims for wages must be re-heard and re-determined in light of guidance provided by it on these questions at the request of the parties.

[5] The union has now abandoned formally its proceedings against Spotless in ARC 39/07. These were the original claims to prohibit by injunction the purported lockouts of union members in mid-2007. There are now fresh and refined pleadings that identify the issues except to the extent that Spotless's statement of defence to the amended statement of claim dated 11 March 2009 failed to plead, or at least plead sufficiently, its affirmative defence that the lockouts were justified statutorily by reason of hospital patient health. As I note at the conclusion of the judgment,

Spotless was given a limited time to rectify that omission without opposition by the union.

[6] Against this background, the union now wants a separate and preliminary hearing by this Court on two questions. The first is the effect in law of the notices posted after notice of intention to lock out affecting that intended lockout. The second question is whether arrears of wages are recoverable regardless of the likelihood or otherwise of strike action having taken place in the absence of unlawful conduct by Spotless.

[7] This proposal for separate preliminary questions is opposed by Spotless.

[8] Mr Cranney's arguments in support of severing issues for preliminary trial included the following.

[9] As to the question whether subsequent notices issued by Spotless rendered the lockouts unlawful, Mr Cranney submitted that although this is partly a question of fact, it is largely one of law and will require the Court principally to interpret the content of subsequent notices and apply settled law. Counsel submitted that if the lawfulness of the lockout is determined in favour of the plaintiffs on this issue, there will be no need to address the defendant's case of illegality of the lockouts based on s84 of the Act.

[10] On the question whether arrears of wages are payable in the event of lockouts being determined to be unlawful, counsel submitted that these questions are ones entirely of law under the Wages Protection Act 1983 and the relevant employment agreements. Mr Cranney submitted that this second issue is capable of resolution without any evidence.

[11] Mr Cranney estimated that a hearing of about 2 days' duration will be required to consider evidence and submissions on this subsequent notice question. If all liability questions are in issue at the one hearing, counsel for the plaintiffs estimates that a hearing of about 5 times that duration, that is 2 weeks, will be required.

[12] Clearly, the strength of the plaintiffs' assertion of nullification of the lockout notices by the publication of subsequent inconsistent notices, to the extent that it can be gauged at this stage, is an important element in determining whether to sever that issue for preliminary decision. Mr Cranney submitted that the contents of the notices speak for themselves and that there is longstanding and clear Court of Appeal authority that the publication during the notice period of inconsistent advice of a strike or lockout by the party giving notice of it will nullify the essential notice and therefore render the strike or lockout unlawful.

[13] Ms Wilson for Spotless argued that the circumstances of this case are distinguishable both in law and on fact so that it cannot be said, at least with any certainty, that such notices as were put up by Spotless around hospitals during the period of notice of the lockout had the effect contended for by the union.

[14] More generally, Mr Cranney made the following points in support of what he submitted would be a more just and expeditious programme for the litigation by identifying particular issues and dealing with them as preliminaries. First, counsel submitted that the parties have now been in the Employment Court for 5 days and in the Court of Appeal for 1½ days with the matter still not being resolved. Very significant legal costs have been incurred. Mr Cranney invited me to conclude that it will be unreasonable to organise the litigation in a manner that will incur further costs and resources to address very substantial factual and legal issues unnecessarily. Counsel submitted that there is no material disadvantage to Spotless by the making of these directions.

[15] In opposing severance of issues for preliminary trial, Ms Wilson submitted that it is likely that any decision on a preliminary issue will be the subject of an application for leave to appeal to the Court of Appeal. Irrespective of the outcome of such an application for leave to appeal, counsel submitted that such a process is likely to delay finality of the litigation, at least in the Employment Court.

[16] I do not consider, however, that predictions of appeals before trial based on considerations such as the importance of the issues to the parties and the track record of the litigation (as Ms Wilson advanced), should influence the Court greatly, if at

all. If questions of liability are consolidated, as Spotless says they should be, in one hearing, the same likelihood of appeals should logically apply and therefore delay finality of the litigation. I do not regard as significant, or certainly determinative, the likelihood of such appeals and whether the remainder of the proceedings should be stayed until the disposal of such appeals. It cannot be said with sufficient certainty that the Court of Appeal might not delay consideration of an appeal or even of an application for leave to appeal while justiciable issues in the Employment Court remain outstanding. Such considerations are really only speculative at this stage.

[17] Next, on the question of the subsequent notices, Spotless says that its case will be that such notices were not placed on notice boards in all of its hospital sites around New Zealand. Rather, its case will be that some managers put up notices or handed them to staff in some locations but not in others. It will be Spotless's case that where notices were not displayed or handed out, they cannot have caused confusion or invalidated the formal lockout notices previously issued. So, it follows in the defendant's submission, that even if the Court determines this as a preliminary question, a further hearing will be required to address s84 justification for the lockouts in respect of those sites where notices were not placed on notice boards or given to staff.

[18] That ground of opposition impresses me as more soundly based. If, as Spotless says it will in evidence, the company establishes that subsequent notices affecting the lockout were not displayed universally, I do not think it can be said with sufficient certainty that the legal effect of the whole lockout was nullified thereby. The case may turn on what employees in different locations understood the nature of the proposed lockout to be. If that is so, the question will depend not only upon the contents and location of subsequent notices posted but also, potentially, upon any advice to affected employees by the union as a result of these subsequent notices being posted.

[19] So I do not consider that the necessary factual basis can be established as easily as the plaintiffs contended.

[20] Whether the plaintiffs' second proposed preliminary question should be so argued depends upon a sufficient certainty that this first question can truly be determined as a preliminary one. Because I am not persuaded that the first question can be so categorised, it follows that the second question that depends upon a finding of unlawful lockout cannot be determined as a preliminary.

[21] Although I acknowledge the delay in setting down a longer fixture and the increased cost to the plaintiffs of doing so, the preliminary attractions of saving some time and cost may prove illusory. Further, if, Spotless having opposed the plaintiffs' proposed curtailing of the proceedings, the company fails on these arguments, it will be at risk of an order for substantial costs against it in the long run. This may include reimbursement of the costs incurred by the union in calling the evidence of relevant witnesses in numerous parts of the country.

[22] On balance, I am not persuaded that the issues identified by the plaintiffs will be so clear-cut evidentially that it is prudent to determine them as preliminary questions wholly or even partially of law. For these reasons, I dismiss the plaintiffs' application.

[23] The events with which this case is concerned occurred in mid-2007, now more than 18 months ago. The proceedings were determined in this Court first in July and subsequently in November 2007. The judgment of the Court of Appeal was delivered in late 2008. I anticipate that even if all matters remitted by the Court of Appeal are heard together, adequate time for the hearing of evidence and submissions will extend that delay to more than 2 years after the events. It is true that finality might be advanced if a preliminary hearing determines matters in the union's and the employees' favour. However, the case is not clear-cut for either side and there is a good chance that a second and even later hearing will be required to finalise these matters.

[24] This is not an issue of delay for its own sake although litigation delay is undesirable. These parties continue to be in employment relationships that I noted more than a year ago needed to be improved including by the putting behind them of this litigation. Further collective bargaining in mid-2009 between these parties runs

the risk of similar aggravation of their relationship as occurred in mid-2007. At best, they should have the opportunity to know about the lawfulness of their past bargaining strategies so that they may act lawfully in the impending bargaining. Whilst the parties cannot be compelled to abandon or settle their litigation, the Court can and should bring it to a prompt and just conclusion. To hear all issues of liability at once is, on balance, more consistent with this objective than to sever causes of action for preliminary consideration.

The defendant's severance application

[25] Sensibly, the union did not oppose this severance of particulars of remedies although both parties asked the Court in determining liability, if any, to provide sufficient guidance on applicable legal principles to enable the parties themselves to calculate entitlements. That is a logical course that the Court will follow in determining, first, the parties' rights and liabilities in law as distinct from the monetary awards that the plaintiffs claim.

[26] I agree that decisions on questions of amounts of wage arrears that may be due to individual employees if Spotless is liable to them, can most justly be heard after a preliminary determination of liability. There are many hundreds of employees, many of whose circumstances depend upon the hospitals at which they worked and other variables. Details of any individual entitlements are also complicated by the intermittent nature of the lockouts. Those complications are aggravated by the different shifts on which employees worked or would have worked.

[27] So although each of the employees' individual circumstances will not be unique, there will be a very large number of differences to be taken into account by the Court. If it comes to this, the exercise in determining the precise amounts due to the individual employees may be very time consuming and pedantic. By contrast, determining the defendant's liability, if any, will be a pan-employee exercise and relatively brief although not simple.

Directions for future conduct of the case

[28] For reasons set out above, this case should be set down for trial as soon as reasonably and justly possible. Sufficient time is currently available in August 2009. With all issues of liability to be considered at the one hearing but excluding consideration of individual wage loss claims and compensation for them, my best estimate is that up to 5 days may be required. That estimate will be able to be revised when the parties know the number of witnesses, modes of giving evidence, the extent of disputed facts, and the like. A callover to address these questions should be arranged within the next month.

[29] Both parties are willing, at least in principle, to explore the possibility of informal resolution of this dispute at a judicial settlement conference. A day with a further subsequent day in reserve if necessary can be set aside for such a conference to be chaired by a Judge in mid-June. If that option is taken up a judicial settlement conference will be able to take place substantially earlier than the probable trial date.

[30] I record that I have invited counsel for the parties to address frankly whether another Judge than I should chair a judicial settlement conference and/or be the trial Judge and I would appreciate counsel's submissions on this issue at the callover.

[31] The defendant has now filed and served an amended statement of defence to the amended statement of claim which will re-introduce the affirmative defence that the lockouts were justified statutorily by reason of hospital patient health considerations. That should be responded to by the plaintiffs within the next 14 days.

[32] I record, also, that the plaintiffs will commence immediately the intended process of document disclosure by giving notice under the Employment Court Regulations 2000 to the defendant and, if Spotless also seeks disclosure against the union or the employees, that its counsel will do likewise.

[33] I reserve costs on these applications, noting that the unusually extensive arguments presented by both sides occupied half a hearing day.

[34] Leave is reserved for any party to apply for further orders or directions on reasonable notice.

GL Colgan
Chief Judge

Judgment signed at 3.30 pm on Wednesday 1 April 2009