IN THE EMPLOYMENT COURT
CHRISTCHURCH

CC 13/09
CRC 25/09

IN THE MATTER OF	an application for interim injunction
BETWEEN	PORT OTAGO LIMITED Plaintiff
AND	THE MARITIME UNION OF NEW ZEALAND INCORPORATED Defendant

Hearing: 7 October 2009 by telephone conference call
(Heard at Auckland)

Appearances: Peter Churchman and Lauren Beecroft, Counsel for Plaintiff
John Tizard and Anthea Connor, Counsel for Defendant

Judgment: 7 October 2009

Reasons: 7 October 2009

REASONS FOR INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

---

[1] These are the reasons for granting an urgent interlocutory injunction earlier this afternoon in the following terms:

> *Until further order of the Court the defendant and its members employed at Port Chalmers are prohibited from striking unlawfully and in particular by reducing the normal performance of their work by those members.*
>
> *The defendant has leave to apply on short notice to set aside or modify this interlocutory order.*
>
> *There will be a telephone conference call with a Judge on Friday 16 October 2009 at 9 am to consider the progress of the proceeding to a substantive hearing.*

> *The parties are directed to urgent mediation of their dispute about workforce restructuring and both parties are to make all reasonable endeavours to participate in mediation. A copy of this order is to be sent to Mr Mike Feeley of the Department of Labour's Mediation Service to enable urgent mediation to be arranged.*

[2] The plaintiff operates a container terminal and other port facilities at Port Chalmers. A number of its employees who operate straddle carriers, fork hoists, container cranes, and other plant necessary for the receipt, loading, unloading, and despatch of cargoes are members of the defendant union. There is a collective agreement governing the terms and conditions of employment of the Maritime Union of New Zealand Inc (MUNZ) members at the port which does not expire until next year.

[3] As a result of a number of factors including a reduction in container vessel calls at Port Chalmers and lower cargo volumes, the plaintiff is considering restructuring its workforce and declaring employees, potentially including members of MUNZ, redundant. Its plans have run into opposition from the defendant and there is evidence to suggest that the union has now determined not to co-operate in any exercise conducted by the port company that may affect adversely its members.

[4] Although the union denies being responsible itself, there is evidence that MUNZ members have recently adopted a co-ordinated strategy of "*go slow*" when working container ships at Port Chalmers. The inference is that this is a form of protest against the plaintiff's plans and done with the intention to bring economic pressure on the company to abandon or modify those plans.

[5] The plaintiff says, and there is evidence to support this, that slower than usual working practices by MUNZ members since 30 September have both delayed the turnaround times of container ships calling at Port Chalmers and have required additional expenditure on casual labour by the port company in an attempt to expedite turnaround times of such vessels. The additional labour costs incurred by the port company in respect of one recent container vessel call exceeded $11,700.

[6] The next Maersk container ship is due to call at Port Chalmers tomorrow to discharge and load cargo and the plaintiff is concerned, reasonably in my

assessment, that this will again be the subject of strike action by go slow with consequent monetary losses to the plaintiff and an increasing loss of the company's commercial reputation and potentially of further loss of business.

[7] There is a suggestion that the defendant and its members acknowledge working more slowly but say that this is for reasons of health and safety. The plaintiff says that while such considerations may, as in the case of severe inclement weather, slow down cargo processing times, these contingencies have not been present since 30 September and there have been no suggestions of risks to health and safety of employees before that time when work rates have been substantially and consistently higher.

[8] If there is a strike, this would be illegal because there is no current collective bargaining for a collective agreement and because any such strike would relate to a dispute between the parties or to personal grievances that individual potentially redundant workers may have: s86(1)(a), (c) and (d) of the Employment Relations Act 2000 ("the Act").

[9] I was satisfied that there are serious issues for trial between the parties and, in particular, that current working practices of members of the defendant amount to a reduction in the normal performance by them of their work: s81(1)(a)(i). Further, the plaintiff has an arguable case that this is due to a combination, agreement, common understanding or concerted action, whether express or implied, made or entered into by those employees: s81(1)(b).

[10] As to the balance of convenience, I considered that this favours the plaintiff. It may be said that its monetary losses, at least as have been ascertained so far, are relatively modest and perhaps within the ability of the union to repay. However, of potentially greater seriousness is the loss to the company of its commercial reputation in a competitive container port market and what I accept is the very real risk that continued slow working of container ships may result in an even greater loss of custom to Port Chalmers than even now exists. That would, of course, be counter-productive, not only for the company but also for the employees and the

union, not to mention the local community and commercial organisations that rely on imports and exports through the port.

[11] I deal finally with overall justice. I do not say that the effect of a significant number of potential redundancies of watersiders is to be overlooked or minimised. But if, as the plaintiff says, it is faced with the prospect of less work because of factors beyond its control but nevertheless wishes to engage with the union in consultation about how these should be dealt with, that is what must happen. Section 4(1A) of the Act obliges parties to employment relationships to conduct these in good faith and, in the sorts of circumstances presently facing the parties, to be active and constructive in maintaining productive employment relationships including by being responsive and communicative.

[12] Although understandably without any real opportunity to prepare the defendant's opposition to the application to which it did not consent, Mr Tizard questioned the practical utility of an order that requires in effect that employees work at a certain rate. How can that be detected and enforced, he asked. The short answer is that Parliament has for a long time, and over many iterations of employment legislation, defined reducing the normal performance of work by employees as one of the statutory constituents of a strike. The Court must try to make the statute work and I do not think it would be impossible to do so as in this case. If an injunction to this effect is breached, it is incumbent on the plaintiff to establish that by evidence. I imagine it would attempt to do so in the same way that it has established, at least to a prima facie level, the recent work go slows. There is no mathematically concise speed formula above which work must be performed. There is however evidence of average times over which specific tasks have been performed recently, and all other things being equal, it might naturally be expected that work to be performed normally will fall within those ranges.

[13] I did contemplate whether the plaintiff’s delay in seeking interlocutory relief from 30 September until today might count against it in the exercise of the Court’s discretion. I consider, however, that the company’s wait and see approach in an attempt to deal practically with the consequences of a go slow was justified and

should not count against it. For all these reasons, the overall justice of granting an interlocutory injunction also lay with the employer.

[14] This is the third interlocutory injunction application filed by the port company arising out of different elements of the same dispute. On the first two occasions, undertakings were given by the union or other arrangements made between counsel at the last minute that resulted in the applications for interlocutory relief being withdrawn. Brinksmanship in litigation is not a good way to conduct important employment relations. That is why I have both urged the parties to deal with the merits of their real dispute and directed that they do so with the assistance of a professional mediator.

[15] I reserve costs on this interlocutory application.

GL Colgan
Chief Judge

Reasons for Judgment signed at 4.10 pm on Wednesday 7 October 2009