IN THE EMPLOYMENT COURT
AUCKLAND

[2016] NZEmpC 112
EMPC 265/2015

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	RADIUS RESIDENTIAL CARE LIMITED Plaintiff
AND	THE NEW ZEALAND NURSES ORGANISATION INC First Defendant
AND	E TU INC (FORMERLY THE SERVICE & FOOD WORKERS UNION NGA RINGA TOTA INC) Second Defendant
AND	THE 64 EMPLOYEES LISTED IN SCHEDULE A TO THE STATEMENT OF CLAIM Third Defendants

Hearing:	10, 11 and 12 August 2016 (Heard at Auckland)
Appearances:	P Kiely and S Worthy, counsel for plaintiff J Lawrie and S Meikle, counsel for first defendant and for third defendants who are members of the first defendant P Cranney and A-M McInally, counsel for second defendant and for third defendants who are members of the second defendant
Judgment:	31 August 2016

JUDGMENT OF CHIEF JUDGE G L COLGAN

A The gatherings of union members of 26 and 27 March 2015 were not "union meetings" pursuant to s 26 of the Employment Relations Act 2000 or under cl 42 of the relevant collective agreement.

B **The first and second defendants misled and deceived the plaintiff and acted otherwise than in good faith in breach of s 4 of the Employment Relations Act 2000.**

C **The first and second defendants were parties to unlawful strikes by two or more of the third defendants on 26 and 27 March 2015.**

D **The first and second defendants are liable in damages (being wages paid to some of the third defendants who took part in unlawful strike action on 26 and/or 27 March 2015).**

E **The first and second defendants are not liable to penalties under s 4A of the Employment Relations Act 2000 in respect of their breaches of s 4 of the Employment Relations Act 2000.**

F **The plaintiff's claims to penalties against the four nominated third defendants are dismissed for want of sufficient proof of breaches by them of the Employment Relations Act 2000 and/or of the collective agreement.**

REASONS

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Background

[1] The question at the heart of this dispute is whether the actions of the defendants in what can best be described as gathering and picketing peacefully outside the plaintiff's head office and its rest homes in which union members were

employed, amounted to unlawful strikes (the plaintiff's case) or to authorised union meetings (the defendants' case). The case also addresses the good faith of the defendants' conduct in this regard.

[2] Radius Residential Care Limited (Radius) owns and operates a number of aged and disabled care facilities throughout New Zealand. This case focuses on events at facilities known as Baycare at Haruru Falls near Paihia, Rimu Park in Whangarei, Potter Home in Whangarei, Waipuna (formerly St Joan's Hospital) in Mount Wellington (Auckland), Arran Court in Te Atatu South, Auckland, and Taupaki Gables in Taupaki, west of Auckland. Staff at each of these facilities included members of each of the defendant Unions.

[3] At the relevant time Radius and the Unions were parties to a multi-union collective agreement which, although it had expired, was continued in force statutorily under s 53 of the Employment Relations Act 2000 (the Act). The occupational coverage of staff in those facilities included registered and enrolled nurses, healthcare assistants, cleaners, kitchen and laundry assistants, cooks, activities co-ordinators and diversional therapists. Employees' particular duties were set out in job descriptions and the collective agreement expressed an expectation that "… employees shall carry out their duties well, faithfully and diligently providing the employer the full benefit of the employee's experience and knowledge within their role" (cl 12). The collective agreement also provided, at cl 42, for stop-work meetings. Clause 42 will be set out subsequently in this judgment.

[4] Collective bargaining for a replacement collective agreement began in early August 2014. The parties in bargaining (the employer and the two Unions) settled first on a bargaining process agreement which included the following expectations and compliance with them:

> b) The parties shall engage constructively and participate fully and effectively during the course of bargaining.
>
> …
>
> f) The parties shall not deliberately attempt to provoke a breakdown in the bargaining.
>
> …
>
> i) The parties shall not do anything during the course of the bargaining to undermine the other party or their representatives. …

j) If one party forms a view that another party to the bargaining is acting in breach of the good faith bargaining code or ERA provisions then that party shall raise their concerns with the party they believe to be in breach, for the purpose of remedying any breach immediately.

[5] Terms of settlement of a new collective agreement were signed by the negotiators on the following day, 13 August 2014. The Unions agreed to recommend that their members accept the terms of the settlement that had been reached. This required a ratification process but before this could be undertaken, Cabinet (by the relevant Minister of the Crown) announced publicly an increase in funding for providers of permanent rest home beds such as Radius. It was thought by the Unions, the employees and others that funding increases could be applied to staff wages, so increasing them.

[6] The two Unions thereupon advised Radius that they would not now be recommending the terms of the settlement reached to their members and that they wished to continue bargaining. The agreements reached in bargaining were not ratified and bargaining resumed.

[7] Collective bargaining continued intermittently thereafter although, by the uncontradicted account presented in evidence by the plaintiff, this was more difficult than previously because of Radius's perceptions that the Unions had recanted on a deal reached earlier. Nevertheless, the parties were still in bargaining by early March 2015 when the following events occurred.

[8] On 11 and 12 March 2015 the Unions notified Radius that their members employed at the specified facilities would be attending union meetings pursuant to s 26 of the Act and cl 42 of the expired collective agreement. The notices specified the times and dates of the meetings in respect of the facilities. These meetings were intended to take place on 26 and 27 March 2015 and the notices claimed pay for union members who were rostered to work at the times of the intended meetings and who attended them, in accordance with s 26(5) of the Act. There was subsequently an agreed alteration to one of the times of a meeting affecting one facility. The notices did not specify where the union meetings would take place (they were not required to) and they did not, in my view, set out sufficiently the Unions' proposals

for coverage as required by s 26(3). That is not, however, an issue in the case. Radius made arrangements for the continued operations of its facilities in reliance upon its belief, based on past practice, that staff would be meeting on the facilities' sites in rooms provided by the employer.

[9] Beginning on the early afternoon of 26 March 2015, unionised employees who worked at the Baycare facility stood in lines on both sides of Puketona Road at Haruru, outside the facility. They protested publicly against what they said was Radius's refusal to pass on to them the increased government funding that had been announced recently, and otherwise about their terms and conditions of employment. Placards were held facing traffic on Puketona Road and support was sought by encouraging horn-tooting by motorists. This activity occurred between the notified hours of 1 pm and 3 pm.

[10] On the same day, some of the third defendants employed at the Waipuna, Taupaki Gables and Arran Court facilities were transported by bus or buses, organised by the Unions, to Radius's head office in Viaduct Harbour Avenue in central Auckland. These employees similarly protested publicly against Radius's refusal to pass on all or any part of the increased funding. They did so by standing in lines on the footpath on Fanshaw Street outside the building in which Radius is located. They held placards towards passing traffic. Those events, also, occurred between the notified times of 1 pm and 3 pm. Some at least of those employees were scheduled to be at work during that time.

[11] Similar events occurred on the following day, 27 March 2015, at the Rimu Park and Potter Home facilities between the specified hours. Union banners and balloons were used in addition to placards.

[12] In all cases it appears that many at least of those union members involved in these events would either have been otherwise on duty (and therefore in uniform), or were off duty in the sense that they were not rostered to work at those times.

[13] The plaintiff's case is that these activities did not constitute a "union meeting" under s 26 of the Act or cl 42 of the collective agreement. Radius says that

they amounted to a strike under s 81 of the Act and that such strike action was unlawful under s 86. Further, Radius says that the two Unions instigated, incited, counselled, procured, aided or abetted the third defendants in engaging in those actions, and so were parties to them.

[14] Although the plaintiff paid the staff who would otherwise have been on duty for those periods, it sought to reserve to itself the right to bring claims for declarations, penalties and other remedies against the defendants as it has now done.

[15] I should make clear at this point both that not all third defendants are now being pursued by the plaintiff for damages and that the cases of only four specified third defendants have been the subject of this hearing. None of those four specified third defendants is among those against whom the plaintiff has abandoned its claims for damages. It has, however, been agreed that none of the evidence given in respect of the four nominated third defendants at this hearing may be used in respect of the claims against the remaining third defendants should these go to trial subsequently.

Pleadings

[16] Because of several changes to the scope of the plaintiff's claims leading up to and during the hearing, it is important that these, as they now stand, be summarised by reference to the plaintiff's statement of claim.

[17] The plaintiff's first cause of action under s 4A of the Act follows a heading "Penalties" for breaches of s 4 of the Act claimed against the first and second defendants. Claims which encompassed the third defendants have now been abandoned in respect of the four nominated third defendants and may or may not be abandoned in respect of the other third defendants whose individual cases have not been heard and determined at this hearing.

[18] Next under this first cause of action for "Penalties", the plaintiff seeks declarations by the Court of breach of s 4 (good faith) against the first, second and the four nominated third defendants.

[19] Penultimately under this first cause of action, the plaintiff seeks penalties against (now) the first and second defendants and that any penalties awarded be made payable to the plaintiff pursuant to s 136(2) of the Act.

[20] The plaintiff's second cause of action is set out under the heading "Unlawful Strike Action". The first relief claimed is a declaration that the first, second and the four nominated third defendants participated in unlawful strike action on 26 and/or 27 March 2015.

[21] Second, the plaintiff seeks a declaration that the four nominated third defendants did not attend a "union meeting" on those days.

[22] Finally in the second cause of action, the plaintiff seeks damages against the first, second and four nominated third defendants for losses caused by their unlawful strike action, being compensation for wages paid to employees for periods when they were on strike unlawfully.

[23] The plaintiff's third cause of action is for damages for breach of cl 42 of the relevant collective agreement for wages paid to the third defendants.

[24] Further under this cause of action, the plaintiff seeks penalties against the first and second defendants under s 134(1) of the Act.

[25] Penultimately, the plaintiff seeks penalties under s 134(1) of the Act against the four nominated third defendants for breach of cl 42 and for being parties to the breaches of cl 42 by the first and second defendants.

[26] Finally in this regard, the plaintiff seeks an order that all penalties be payable to Radius pursuant to s 136(2) of the Act.

Summary of issues

[27] These may be listed in logical order of decision as follows:

1. What is a "union meeting" under s 26 of the Act and cl 42 of the relevant collective agreement?

2. Were the relevant events which occurred on 26 and 27 March 2015 "union meetings" as defined?

3. Did the defendants act in good faith towards the plaintiff in relation to these events?

4. Were the defendants' actions unlawful strikes?

5. What is the burden of proof on the plaintiff in these proceedings in which penalties are sought?

6. Should damages and/or penalties be awarded against the defendants?

Interpretation of "union meeting" - the statute and the collective agreement

[28] I deal first with the relevant statutory provisions relating to union meetings contained in s 26 of the Act. Section 26 is located in Part 4 of the Act which is headed "Recognition and operation of unions". Under s 12, relevant objects of Part 4 include:

> (a) to recognise the role of unions in promoting their members' collective employment interests; and
>
> …
>
> (d) to provide representatives of registered unions with reasonable access to workplaces for purposes related to employment and union business.

[29] Section 26 follows immediately a number of sections dealing with, and under the heading, "*Access to workplaces*" by union officials. There is a similar subheading ("*Union meetings*") immediately before s 26 which is as follows:

> **26 Union meetings**
> (1) An employer must allow every union member employed by the employer to attend—
> (a) at least 1 union meeting (of a maximum of 2 hours' duration) in the calendar year 2000; and
> (b) at least 2 union meetings (each of a maximum of 2 hours' duration) in each calendar year after the calendar year 2000.
> (2) The union must give the employer at least 14 days' notice of the date and time of any union meeting to which subsection (1) applies.
> (3) The union must make such arrangements with the employer as may be necessary to ensure that the employer's business is maintained during any union meeting to which subsection (1) applies, including, where appropriate, an arrangement for sufficient union members to remain available during the meeting to enable the employer's operations to continue.
> (4) Work must resume as soon as practicable after the meeting, but the employer is not obliged to pay any union member for a period longer than 2 hours in respect of any meeting.
> (5) An employer must allow a union member employed by the employer to attend a union meeting under subsection (1) on ordinary pay to the extent that the employee would otherwise be working for the employer during the meeting.
> (6) For the purposes of subsection (5), the union must—
> (a) supply to the employer a list of members who attended the union meeting; and
> (b) advise the employer of the duration of the meeting.
> (7) Every employer who fails to allow a union member to attend a union meeting in accordance with this section is liable to a penalty imposed by the Authority.

[30] The section itself provides no assistance on questions such as where a union meeting takes place, with whom relevant employees may meet, the subject matter of the meeting or the like.

[31] The context of s 26 and some of its provisions gives guidance to the interpretation of what is a "union meeting". For example, subs (6) requires a union to supply to the relevant employer a list of its members who attended the union meeting, and to advise the employer of the duration of the meeting. This contemplates that an employer will not have this information by reason of its absence and the absence of any representative of the employer from such a meeting. That is consistent with the usually private or closed nature of such meetings, among the purposes of which is to discuss matters affecting the employer about which the

union or employees may not wish the employer to know, at least at that time. This, in turn, tends to indicate that a union meeting will be held at a place and in other relevant circumstances which exclude observation of, or listening into, the meeting.

[32] In practice, and speaking generally, some union meetings take place on the employer's premises: for example, in a cafeteria or other suitable and potentially private area. As already noted, the usual expectation is that the union meeting will be conducted in privacy. On other occasions the circumstances will require a neutral external venue such as a public hall or the like in which there are similar expectations of privacy and confidentiality. I am not aware of any past allegations in practice in which those expectations have not been respected and met by employers.

[33] The evidence in this case is that there were rooms in each of the care facilities (residents' dining rooms or, in at least one case, a "quiet room") in which union meetings could take place and have been held in the past. These rooms are able to be made private for that purpose. The advantage, at least to Radius and the residents of the facilities, in having union meetings on the premises means that staff are available immediately if needed in an emergency. For example, if there is a fire alarm, residents will require assistance in evacuating the premises before the Fire Service or other emergency services can attend to assist with this task. For this reason alone it is important either that such meetings are conducted on the premises or, if they are not to be, that the union holding the meeting makes arrangements for such eventualities as required under s 26(3).

[34] Next is cl 42 of the collective agreement which also allowed for what it described as "Stop work meetings". This clause is as follows:

> The Employer will allow every union member to attend paid union meetings to a maximum of 4 hours duration in each calendar year.
>
> The union will give the Employer at least 14 days' notice of the date and time of any meeting to which this sub clause applies.
>
> The union will make such arrangements with the Employer as may be necessary to ensure that the employers business is maintained during any union meeting under this clause. Work will resume as soon as possible after any meeting, but the Employer will not be obliged to pay any Employee for a period of greater than two hours in respect of any meeting.

> Only union members who attended the meeting will be entitled to pay. The union will supply the Employer with a list of members who attended the meeting.

[35] This effectively repeats the statutory provision although with different times for such meetings. The same phrase at issue "union meetings" is identical and, consistently with the history of the legislation that I examine subsequently, means that the same interpretation of "union meeting" should be applied to the same phrases.

[36] Clearly, the relevant statutory provisions (s 26 and its predecessors) pre-date the current collective agreement and perhaps also any predecessor collective agreements between these parties. The history of the predecessors of current s 26 may provide some clues to the nature of what Parliament intended to be "union meetings" for both statutory and collective agreement interpretation purposes.

[37] I start with the meaning of this phrase in s 26 of the Act already set out. Research reveals that the first relevant statutory reference to union meetings appeared in s 57 of the Labour Relations Act 1987. The substance of s 57, which has been reiterated largely unchanged in the current s 26 dating from 1990 was, however, not a feature in the Employment Contracts Act 1991 which was in force from 1991 to 2000.

[38] Hansard records that in introducing the Labour Relations Bill 1987 (No 93-2) the Minister of Labour stated that what was to become s 57 "tightens up procedure for union meetings" but noted that it should have little effect on stop-work meetings as most awards then provided for better provisions.[1]

[39] In *Labour Law in New Zealand*, the author refers to "union meetings".[2] This description of the purpose of such meetings suggests an expectation of participatory dialogue. It says:

> It was considered necessary for the effective operation of unions that provision should be made enabling unions to hold meetings during working

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1 (12 May 1987) 480 NZPD 8927.

2 John Hughes *Labour Law in New Zealand* (Lawbook Company, Sydney, 1991) at [6.560].

> hours where those members who attended continued to be paid. It was felt that such meetings, commonly referred to as "stop-work meetings" would attract more participation from members than meetings held outside working hours. They would defeat the criticism that a small body of committed persons within a union's membership could – by their dedicated attendance at meetings called outside working hours – commit the union to, say, militant policies perhaps not favoured by the majority of the union's membership.

[40] These observations were apparently based on the report of the Department of Labour to the Labour Select Committee considering the Labour Relations Bill, dated 27 April 1986.

[41] Section 57 of the Labour Relations Act appears to have been dealt with in case law first in 1990 in *New Zealand Nurses Union v Presbyterian Support Services East Coast (Duart Hospital).*[3] The question in that case concerned whether an employer was required to pay employees to attend a stop-work meeting when, at the time of the meeting, those employees would not normally have been on duty. There is, however, no reference in that judgment (or indeed in any of the cases) to the purpose of the meeting. It is possible to infer from the judgment of the Labour Court in *Northern Clerical and Legal Employees IUOW v Registrar of Unions*[4] that the purpose of what were then s 57 meetings was to discuss and vote on questions of union office elections.

[42] The next case to be referred to arose under what is now s 26 of the Act. That was *Greenlea Premier Meats Ltd v New Zealand Meat & Related Trades Union Inc.*[5] This involved an application for an interlocutory injunction to restrain a union from conducting two stop-work meetings where it was alleged that s 26(3) had been breached. The Court identified the apparent contradiction between the statutory requirement for employers to allow union members to attend meetings during working hours and, at the same time, obliging the Union to ensure that the employer's business could be carried on as usual. The Court held that the Union's failure to make such arrangements caused the meetings to amount to an unlawful strike. This was expressed as follows:

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3 *New Zealand Nurses Union v Presbyterian Support Services East Coast (Duart Hospital)* (1990) 3 NZELC 97,334.

4 *Northern Clerical and Legal Employees IUOW v Registrar of Unions* [1990] NZILR 78 at 14.

5 *Greenlea Premier Meats Ltd v New Zealand Meat & Related Trades Union Inc* [2006] ERNZ 312.

> [24] I accept that it is arguable for the plaintiff that the holding of meetings purportedly under s 26, but which breach its conditions, would amount to a discontinuing of employment (wholly or partially), the breaking of the employees' employment agreements, or the reducing by the employees of their normal outputs under s 81(1)(a)(i), (iii) and (v) due to a combination, agreement, common understanding or concerted action, whether express or implied, made or entered into by the employees.

[43] *Greenlea* does not really assist in deciding the question of the meaning of the phrase, but does assist in determining the consequence of non-compliance with s 26. My research discloses no other cases decided in New Zealand about what was intended to be the nature of a "union meeting".

[44] *The Laws of New Zealand* directs the reader to English law on this topic.[6] Halsbury's Laws of England states:[7]

> **Time off for trade union activities.** An employer must permit an employee of his who is a member of an independent trade union recognised by the employer in respect of that description of employee to take time off during his working hours for the purpose of taking part in any activities of the union, and any activities in relation to which the employee is acting as a representative of the union.

[45] Halsbury refers to *Luce v Bexley London Borough Council*, where a teacher was refused time off by the teacher's employer for the purpose of lobbying Parliament.[8] The Employment Appeal Tribunal upheld the Industrial Tribunal's declaration that her "time off" was "intended to convey only political or ideological objections to legislation" and held it was not within the statutory right to time off for union activities.[9] Although the United Kingdom statute does not refer to "meetings" specifically but, rather, to "activities of the union", the footnote to the foregoing passage records:

> This right does not extend to activities which themselves consist of industrial action, whether or not in contemplation or furtherance of a trade dispute … There must be a genuine link between the activity in question and the employment relationship between the employer, the employee and the trade union.

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6 *The Laws of New Zealand* Employment (online ed) at [111]: "For English law see *40 Halsbury's Laws of England* (5th ed, 2009) paras 846-1027".

7 *Halsbury's Laws of England* (5th ed, 2009) vol 40 Trade Unions at [1015].

8 *Luce v Bexley London Borough Council* [1990] ICR 591.

9 At 598.

[46] The relevant Code of Practice in the United Kingdom at the time issued by ACAS[10] entitled "Time off for trade union duties and activities" gives examples of "trade union activities" as including:[11]

> - attending workplace meetings to discuss and note on the outcome of negotiations with the employer. Where relevant, and with the employer's agreement, this can include attending such workplace meets at the employer's neighbouring locations.
> - meeting full time officers to discuss issues relevant to the workplace
> - voting in union elections.

[47] Now, the UK Employment Protection Code of Practice (Time Off) Order governs trade union activities in that jurisdiction and has legal effect.[12] The stated purpose of the entitlement to "time off" is focused on "effective communication" and in particular:[13]

> To operate effectively and democratically, trade unions need the active participation of members. It can also be very much in employers' interests that such participation is assured and help is given to promote effective communication between union representatives and members in the workplace.

[48] Section 39 of the UK Code of Practice states: "There is no right to time off for trade union activities which themselves consist of industrial action."

[49] The phrases "union meeting" and "stop-work meeting" are often used interchangeably and are in cl 42 of the collective agreement. The New Zealand Oxford Dictionary defines a "stop-work meeting" as "A meeting of employees held in company time to consider strike action or the progress of an industrial dispute."[14] This appears to imply that such a meeting involves discussion about issues (including prospective strike action) but does not extend to strike action in itself although this may be the subject of the discussion.

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10 The UK Conciliation and Arbitration Service but which has educational as well as mediatory and arbitration functions.

11 Code of Practice: Time off for trade union duties and activities, 3 ACAS January 2010 at [37].

12 The Employment Protection Code of Practice (Time Off) Order (S/I 2003/1191) 2003.

13 Code of Practice at Section 3.

14 T Deverson and G Kennedy (eds) *The New Zealand Oxford Dictionary* (Oxford University Press, Victoria, 2005).

[50] Hughes's *Labour Law in New Zealand* addresses union rules and what they must include.[15] The requirements for the structure and conduct of meetings suggest that a "meeting" is more than a "gathering". The text summarises the law and adds:[16]

> The quorum for such a meeting, its powers and the method of voting must also be specified. Voting is usually by hand. Common matters covered by union rules in this respect are the frequency of such meetings, provision for an annual meeting, rights of admission … and the form of the meeting (for example, standing orders). Subject to what the rule-book may say, the general law of meetings is applicable to union meetings.

Relevant evidence about the nature of the "meetings"

[51] Evidence, including eye witness accounts and from photographs and videos taken, supports the plaintiff's case that these events of 26 and 27 March 2015 did not constitute union meetings. This evidence included variously that:

- Participants brought with them or collected pre-prepared placards, and displayed them to the public, bearing words that were critical of Radius.

- Employees and union officials stood in lines outside the Radius facilities and its office premises, in many cases beyond normal oral communication distance, or at least otherwise than by shouting (of which there was much, although for public consumption and sometimes in rhyming slogans).

- The participants encouraged passing drivers to sound their vehicles' horns as a show of support and this was achieved.

- The participants held signs protesting about Radius's pay rates.

- The participants carried professionally made banners (some of which bore the acronyms "NZNO" and "SFWU"), placards and balloons.

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15 Hughes *Labour Law in New Zealand*, above n 2 at [6.135].

16 At [6.135].

- There were descriptions of the sounds generated by the events including "a big racket" and "yahooing", more consistent with a picket or protest gathering than a "meeting" as I interpret that word in the statute and the collective agreement.

- Some comments, verbal and sign written, appear to have been personalised against Radius's Chief Executive Officer and his earnings.

- Photographs and video footage of some of these events confirm its nature and disprove that it was a "meeting" as that word will be defined.

- The events and activities were arranged and organised by union organisers.

[52] Mr Cranney sought, by reference to a photograph of the activities outside one of the care facilities, to persuade the Court that there had indeed been a "meeting" of the staff with a union official as contemplated by s 26 of the Act or cl 42 of the collective agreement. This still photograph, a brief snapshot of people, shows several Radius employees sitting on grass in the shade of trees, some holding placards that are critical of Radius. Facing those persons is someone said to have been a union official, wearing a yellow fluorescent vest. Mr Cranney sought to persuade witnesses that this illustrated that a meeting was being held. I agree, however, with Mr Kiely that this is probably a photograph of an event at another place and taken on an earlier occasion. It was posted on a Facebook page that advertised, in advance, the events of 26 and 27 March and so was not a depiction of events that had happened on those days.

A "union meeting" - decision on definition

[53] Although what happened in the events the subject of this case has been described both by witnesses and counsel (and not infrequently) as "picketing" and "protesting", the Court's task is to determine whether what occurred was a "union

meeting" as the framers of both the legislation and the collective agreement intended it to be interpreted and applied.

[54] I conclude, from all of the sources previously assembled, that a "union meeting" was intended to mean a gathering of union members and union officials for the common purpose of giving and receiving advice, holding discussions, settling strategic resolutions and giving instructions to negotiators in bargaining and similar associated interactions.

[55] Applying that definition, what I am satisfied was organised by the first and second defendants and participated in by the third defendants on the occasions the subject of this proceeding, were not "union meetings" as intended by the use of those words in the Act and in the collective agreement.

[56] Although it is unnecessary to label what occurred, picketing and public protest appear to be the closest employment analogies, but what is more important is that they were not union meetings as was intended to be covered in s 26 of the Act or cl 42 of the collective agreement.

Unlawful strikes?

[57] There is no real dispute that if the activities the subject of this case amounted to strikes as defined in the legislation, such must have been unlawful as being in breach of the universal notice requirements under the Act which had come into effect earlier that month. In these circumstances, it is unnecessary to analyse those aspects of lawfulness. However, whether the impugned activities amounted to a strike as defined, is disputed and does require analysis and decision.

[58] I am satisfied that the events the subject of this proceeding amounted to strikes as defined by s 81 of the Act. They were the acts of:

> (a) … a number of employees who [were] in the employment of the same employer …
>
> (i) in discontinuing that employment … partially, or in reducing the normal performance of it; or
>
> …
>
> (ii) in breaking their employment agreements; …

…

(b) … due to a combination, agreement, common understanding, or concerted action, whether express or, as the case requires, implied, made or entered into by the employees.

[59] I am satisfied, also, that this strike action by some of the third defendants was organised, aided and abetted by the first and second defendant Unions. There is ample evidence in the correspondence, discussions between union officials and representatives with Radius managerial staff, and from the oral and photographic/video depictions of what occurred, which clearly indicate that the strikes were organised and supported by the two Unions. They were parties to strikes by some employees. They were therefore, by the application of s 81(3), parties to an unlawful strike or unlawful strikes.

Burdens of proof in claims for penalties

[60] In all cases the plaintiff seeks damages against all defendants whose cases were presented. In all but a few cases, the plaintiff also seeks penalties against all such defendants. The four third defendants whose cases are for trial and decision now, are all employees against whom the plaintiff seeks both damages and penalties. Radius has abandoned its claims for penalties against some third defendants.

[61] In these circumstances, and although the onus of proof remains on the plaintiff in both causes of action (that is, damages and penalties), there are arguably different burdens of proof. For damages, the Court must be satisfied of breaches simply on the balance of probabilities, the traditional civil standard, including that the third defendants either participated in strike action during a period when they would otherwise have been performing work, or that they were parties to the strike action of other employees. In all cases, the plaintiff must establish the unlawfulness of those strikes and that it has, by reason of them, suffered economic loss. The claims for damages against the Unions must also be proven by the plaintiff on the balance of probabilities.

[62] To obtain a penalty against each of those third defendants (and the Unions) for the same conduct however, there is a respectable argument that the plaintiff must establish the constituents of the breach by each of them to a standard higher than

simply on the balance of probabilities. That is because, in addition to suing the same defendants for its economic losses, the plaintiff seeks to have them penalised by the imposition of a monetary payment akin to a fine for the breach of the statute and/or of the collective agreement. As it is permitted by the statute, the plaintiff seeks to put the third defendants in double jeopardy of both having to pay damages to it and having to pay a penalty to it for the same breach. In this case I have decided that the payment of any penalty would be to the Crown and not to any other person pursuant to s 136(2). This is not a case where, if a breach is established and compensatory damages are paid, the Court should exercise its discretion to award the whole or any part of a penalty to another person, in this case Radius.

[63] This question of burden of proof is one on which there is possibly the greatest divergence of judicial opinion, at least in the Employment Court. There is even one instance of the same Judge reaching opposite conclusions in different cases, albeit separated by several years. The relevant provisions of the Act dealing with penalties do not give any indication of either the onus or burden of proof in such cases although I think it is clear that the onus rests with the applicant for a penalty in all cases. The plaintiff did not contend otherwise in this case.

[64] There is now, intriguingly, a statutory requirement in pecuniary penalties cases under the new Part 9A of the Act, that these be decided apparently on a simple balance of probabilities standard.[17] While this requirement cannot apply retrospectively to previously decided cases and under other sections of the Act, the potential consequences of a Part 9A pecuniary penalty are significantly more draconian than those of a penalty covered by ss 134-135 of the Act as this case is. It might be counter-intuitive if the former now requires a lower standard of proof than the latter.

[65] What the Court must decide, therefore, is what the burden of proof was when the acts or omissions the subject of this litigation occurred between 11 and 27 March 2015. To do so, it is necessary to examine previous cases in which this issue has arisen and, in particular, relevant authoritative decisions of the Court of Appeal.

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[17] See Employment Relations Act 2000, s 142S.

[66] There is authority, particularly in cases decided before the enactment of the current statute, that the burden of proof was to a 'beyond reasonable doubt' standard. Such cases included old ones like *Inspector of Awards v Dearsly's Ltd*[18] and more recent ones including *Otago Clerical Workers IUOW v McLeod Bros Ltd.*[19] There were also cases from that era which held that penalty provisions should be construed strictly,[20] and that in penalty proceedings, documents should be construed narrowly.[21]

[67] Mr Cranney for the defendants relied significantly on an early judgment of this Court in support of his proposition that the standard of proof required to be established by the plaintiff of the breaches for penalty purposes is the criminal standard of beyond reasonable doubt.[22] *Southern Pacific Hotel* concerned access by union officials to a workplace and, in a claim for penalties, the standard of proof of breach.

[68] The conclusions of Goddard CJ on this question are set out succinctly at page 533 of the report:

> … I am satisfied beyond reasonable doubt that breaches of s 14 have taken place. This is the standard of proof that it is customary for this Court to require before it agrees to impose a penalty, and while the appropriateness of this standard, borrowed from the criminal law, to what are essentially civil proceedings has been questioned by individual Judges of this Court, it has so far not been departed from, nor was I asked to do so in this case. I am persuaded to the high standard I have mentioned that breaches have occurred …

[69] Perhaps because it appears to have been agreed that the criminal standard was applicable, the Chief Judge did not set out the unwavering line of cases to which he referred. As I have already noted, the position generally on standards of proof in civil cases has been much more closely examined by the courts in New Zealand and different, or at least more nuanced, tests have been applied. On this issue I would conclude that the *Southern Pacific Hotel* case is no longer good law when it asserts

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18 *Inspector of Awards v Dearsly's Ltd* [1944] GLR 12.
19 *Otago Clerical Workers IUOW v McLeod Bros Ltd* [1988] NZILR 1308 (LC).
20 *Northern Drivers Union IUOW v Walling Ltd* [1971] BA 921.
21 *Wellington etc Clerical etc IUOW v Northern United Building Society* [1981] ACJ 447.
22 *Service Workers Union of Aotearoa Inc v Southern Pacific Hotel Corp (NZ) Ltd* [1993] 2 ERNZ 513.

that the criminal standard of proof beyond reasonable doubt is applicable to all penalty cases under the Act.

[70] However, a different view (albeit that of the same Judge who decided the *Southern Pacific Hotel* case) of the burden of proof emerged in and following the judgment of the Employment Court in *Xu v McIntosh*:[23]

> … In all instances, that is to say in both the personal grievance and the penalty action, the standard of proof required to be attained to discharge the relevant burden of proof is the standard applying in all civil cases: proof on a balance of probabilities. In criminal cases, the higher standard of proof beyond reasonable doubt is required but that has no application in this Court except when it is exercising express criminal jurisdiction or is contemplating imprisonment for disobedience to an injunction or a compliance order. …

[71] Although in relation to the decision of personal grievances and not of penalty claims, the judgment of the Court of Appeal in *Honda NZ Ltd v NZ Boilermakers etc Union*[24] required a more nuanced test where allegations of very serious misconduct in employment formed the basis of dismissal but which allegations were denied. *Honda* was a personal grievance case in which the employee's conduct said to constitute serious misconduct justifying summary dismissal was the allegedly dishonest removal of the employer's property from the employer's premises. Accepting that the burden of establishing the case before an arbitral body in such cases was to a balance of probabilities standard, the Court of Appeal in *Honda* adopted its own words in what was then a recent judgment, *Budget Rent a Car Ltd v Auckland Regional Authority* where Somers J said that:[25]

> … although this is a civil case to which the civil standard of persuasion applies the very gravity of what is alleged makes the probability of its-occurrence more remote or unlikely and hence the more difficult to establish. The difference between the civil and criminal standards diminishes with the seriousness, and in this case the criminality, of the issue. …

[72] The Court of Appeal in *Honda* also referred to the United Kingdom judgment of Scarman LJ in *Khawaja v Secretary of State for the Home Department* where this observation was made: "The flexibility of the civil standard of proof suffices to ensure that the court will require the high degree of probability which is appropriate

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23 *Xu v McIntosh* [2004] 2 ERNZ 448 at [29].

24 *Honda NZ Ltd v NZ Boilermakers etc Union* [1991] 1 NZLR 392, (1990) ERNZ Sel Cas 855 (CA).

25 *Budget Rent a Car Ltd v Auckland Regional Authority* [1985] 2 NZLR 414, 425.

to what is at stake."[26] That passage relied, in turn, on the earlier judgment of Dickson J in the High Court of Australia in *Wright v Wright*: "The nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue."[27]

[73] Although acknowledging that *Honda* dealt with the standard of proof of an alleged misconduct leading to dismissal for the purpose of deciding a personal grievance, the more sweeping statement of that standard in *Xu*, aligning personal grievances with penalties, may require a re-examination of whether the burden propounded by the Court of Appeal also applies to penalties. If *Xu* is right, it may appear counter-intuitive to require a lower burden of proof in actions for penalties than in personal grievances. For these reasons, I also conclude that *Xu* is now also of dubious validity.

[74] As the authors of Brooker's Employment Law point out in their commentary at ER135.06,[28] new legislation in effect since earlier this year (but not strictly applicable to this case) requires expressly that the civil standard of proof (balance of probabilities) is to apply to proceedings for pecuniary penalties.[29] As the text notes: "This of itself strongly suggests that the criminal standard of proof referred to above is no longer applicable in s 135 proceedings." I agree. That, however, begs the question whether some nuanced balance of probabilities standard or burden may be applicable to penalty proceedings although it may be seen as undesirable that different standards should apply to s 135 proceedings as are required to be applied to pecuniary penalty proceedings under the recent amendments. Whether Parliament intended that recent statement to apply both retrospectively, and in respect of penalty actions other than the new ones, is not clear. Almost certainly, however, retrospectivity cannot have been intended because of the presumption in statutory interpretation that this is not applicable unless provided for expressly.[30]

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26 *Khawaja v Secretary of State for the Home Department* [1983] 1 All ER 765 at 784.
27 *Wright v Wright* (1948) 77 CLR 191 at 210.
28 *Employment Law* (online looseleaf ed, Brookers) at ER135.06.
29 Employment Relations Act 2000, s 142S (inserted by s 19 of the Employment Relations Amendment Act 2016).
30 Interpretation Act 1999, s 7 and, by analogy, New Zealand Bill of Rights Act 1990, s 26.

[75] In a different context, but pertinently for decision of this issue in employment law, the Supreme Court examined burdens of proof in *Z v Dental Complaints Assessment Committee*.[31] In an opinion which concurred in part with the majority and dissented in part, Elias CJ wrote:[32]

> … Except where a different standard is required by statute, New Zealand law recognises only two standards of proof. The standard that the trier of fact be sure of the facts in issue is applied in criminal cases, but is also used in some non-criminal cases. If the trier of fact is left with a reasonable doubt that cannot be excluded, the standard is not reached. In civil cases, and in most other non-criminal proceedings unless a different standard is prescribed or applied, the trier of fact must be satisfied on the balance of probabilities. In that case, he must be convinced by the evidence that the fact in issue is more likely than not.

[76] I note that the sections of the Act affecting penalties do not stipulate any test as a precondition to penalising for a breach, even the general test of being "satisfied" that there has been a breach. It is not insignificant, in my view, that the Chief Justice did not confine the criminal standard only to criminal cases. Her Honour also used the countervailing phrase "in most other non-criminal proceedings unless a different standard is prescribed or applied" in relation to the balance of probabilities standard. Nor do I understand that the Chief Justice's categorisation of cases would require that even those minority of cases to which her Honour referred above, must fall absolutely into the civil or the criminal standard.

[77] This, in turn, allows for adopting an approach of requiring a higher than a mere balance of probabilities standard (for example in the case of civil penalties) but still falling short of the criminal standard of beyond reasonable doubt. That is indeed what I read the majority judgments in *Z* to allow, so that the opinions of the minority and the majority in *Z* on this question may be closer than at first glance.

[78] In support of her contention of the existence of only two standards of proof, the Chief Justice relied on the judgment of the High Court of Australia in *Rejfek v McElroy* where this was said:[33]

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31 *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1.
32 At [26].
33 *Rejfek v McElroy* (1965) 112 CLR 517, at 521-522.

> No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge.

[79] The Chief Justice in *Z* continued:[34]

> Whatever the standard used (whether beyond reasonable doubt or on the balance of probabilities) the trier of fact must take account of inherent improbabilities in deciding what evidence is sufficient to satisfy him to the appropriate standard. … It is often said that more grave allegations are less likely to be true and require more in the way of evidence before the trier of fact will be satisfied.[35] I have some doubts as to the extent to which experience bears out the proposition, but in any event it is clear that its application turns on human experience and the particular context … Statements such as these have however caused confusion when applied, not to the inherent probabilities which any decision-maker necessarily weighs, but to the standard of proof. The confusion has led to judicial statements which suggest that the standard of proof is itself "flexible", an unfortunate and inaccurate notion. Nor do I think matters are improved by the suggestion that it is not the *standard* but its *application* that is "flexible". "Flexibility" is a term I think best avoided in the context of proof, despite its impressive pedigree. Proof is made out whenever a decision-maker is carried beyond indecision to the point of acceptance either that a fact is more probable than not (if the standard is on the balance of probabilities) or that he has no reasonable doubt about it (if the standard is proof beyond reasonable doubt). (Footnotes omitted)

[80] At [34] the Chief Justice in *Z* wrote:

> On that basis, in proceedings which are not civil claims between private litigants, it is necessary to consider what standard of proof is appropriate, even if for some purposes the proceedings may be treated as civil. The standard of proof to be applied in professional disciplinary proceedings in New Zealand has not been the subject of extensive appellate consideration. …

[81] After examining some leading medical discipline cases, the Chief Justice referred to the judgment of Blanchard J in *Cullen v Medical Council of New Zealand* that:[36]

> … where there is a serious charge of professional misconduct, you have got to be sure. The degree of certainty or sureness in your mind is higher according to the seriousness of the charge, and I would venture to suggest it is not simply a case of finding a fact to be more probable than not, you have

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34 *Z*, above n 31, at [28].

35 Here the Chief Justice relied on authorities including *Budget Rent A Car Ltd v Auckland Regional Authority* [1985] 2 NZLR 414 (CA).

36 *Cullen v Medical Council of New Zealand* HC Auckland, HC 68-95 20 March 1996 at 3.

> got to be sure in your own mind, satisfied that the evidence establishes the facts.

[82] The Chief Justice noted also that in *Guy v Medical Council of New Zealand*[37] Tipping J, addressing the appropriate standard of proof, held that this should be "the civil standard, but with the degree of probability consistent with the gravity of the allegation."[38] Tipping J expressed it thus in *Guy*:

> A sliding scale of probability is as good a balancing of these competing interests as can be devised. It also has the advantage of at least conceptual clarity combined with flexibility. A conclusion suggesting that if the conduct alleged is sufficiently bad the criminal standard should apply would lead to endless arguments about what the standards should be. It can hardly differ depending upon the perceived gravity of what is alleged.

[83] The Chief Justice in *Z* admitted to what she described as "some problems with this approach".[39] Her Honour continued:

> If it is difficult to decide when an allegation amounts to a serious crime requiring application of the criminal standard, it is equally or perhaps even more difficult to assess when an allegation is grave enough to require a higher "degree of probability" and then to what extent the degree of probability should be raised. Nor does it seem that a "sliding scale of probability" has the advantage of "conceptual clarity combined with flexibility". … It also seems to fall into the category of cases described by Lord Hoffmann in *Re B* where there appears to be confusion between inherent probabilities and the standard of proof.

[84] Turning to authorities on the question other than in a medical disciplinary setting, the Chief Justice in *Z* referred to a (Hong Kong) Police Disciplinary Tribunal case where the gravamen of the complaint against a police officer amounted to criminal conduct.[40] The Hong Kong Court of Appeal was unanimous that the criminal standard was to be applied to the evidence in support of the charge of misconduct:[41]

> The standard of proof must be commensurate with the gravity of the charge. Here, the tribunal seems to have required the prosecution to prove the case on a mere "balance of probabilities" which in my judgment is plainly unacceptable.

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37 *Guy v Medical Council of New Zealand* [1995] NZAR 67 (HC).
38 At 80.
39 *Z*, above n 31, at [37].
40 *Tse Lo Hong v Attorney-General* [1995] 3 HKC 428.
41 At 440.

[85] The Chief Justice in *Z* concluded her comprehensive analysis of standards of proof in professional disciplinary cases at [55] as follows:

> In conclusion, the standard of proof depends upon what is required for reasons of fairness. The standard of proof beyond reasonable doubt protects against error in decision-making. It promotes consistency. … Where serious disciplinary charges are brought under statutory process in circumstances where substantial penalties may be imposed and damage to reputation and livelihood is inevitable if adverse findings are made, fairness requires application of a higher standard of proof than one on the balance of probabilities. The application of such standard is supported by authority and is consistent with the functions and scheme of the Dental Act.

[86] In the same judgment, and reflecting the view of the majority of the Court, McGrath J discussed what might be called the "flexible approach" of the application of the civil standard in England and concluded:[42]

> … There is accordingly a single civil standard, the balance of probabilities, which is applied flexibly according to the seriousness of matters to be proved and the consequences of proving them. We are satisfied that the rule is long established, sound in principle, and that in general it should continue to apply to civil proceedings in New Zealand.

[87] The majority in *Z* noted that the relevant legislative disciplinary proceedings required the Tribunal to be "satisfied" that a practitioner was guilty of detrimental acts or omissions, or of professional misconduct.[43] At [96] McGrath J for the majority wrote:

> Being "satisfied" in this context simply means that the Tribunal has made up its mind that is the case. The term "satisfied" does not require that the Tribunal should reach its judgment having been satisfied that the underlying facts have been proved to any particular standard. Nor does the Act or any applicable procedural rule stipulate a standard of proof which the Tribunal must apply. That question must accordingly be decided on general principles having regard to the statutory context.

[88] The majority relied on the classic passage in *Briginshaw v Briginshaw*:[44]

> The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of

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42 *Z*, above n 31, at [112].
43 Dental Act 1988, s 54.
44 *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-362.

> certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.

[89] The majority in *Z* noted that "the balance of probabilities test in civil cases [is] flexible in its application in that jurisdiction".[45] Using, as an example, an application by a local authority for a care order based upon an allegation of rape by the respondent of other children in the family, Lord Nicolls in *Re H (Minors) (Sexual Abuse: Standard of Proof)* concluded:[46]

> The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had non-consensual oral sex with his under age stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.
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> Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.

[90] In *Z* McGrath J for the majority of the Court of Appeal wrote:[47]

> In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in

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45 *Z*, above n 31, at [100].
46 *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 at 586.
47 *Z*, above n 31, at [102].

> certain types of civil case. Balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet this standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.

[91] Turning to the English approach in a line of cases arguably more akin to the one currently before me for penalties, McGrath J for the majority of the Court of Appeal in *Z* wrote: [48]

> English decisions have departed from a flexibly applied civil standard approach in certain types of civil proceeding in which the Court has required, largely as a matter of policy, direct application of the criminal standard. An example is *McCann* ...[49]

[92] Noting that the House of Lords subsequently distanced itself from this approach in *Re B*,[50] *McCann* concerned applications for what are known as antisocial behaviour orders in the United Kingdom which prohibit those subject to them from entering certain areas in which they have been causing trouble. Breach of the orders can lead to criminal sanctions. The House of Lords said that as civil proceedings, the standard of proof of the necessary constituents of the claim should be on the balance of probabilities. However, for the purposes of making the task of Magistrates deciding these cases "more straightforward", the evidence required for making antisocial orders should be established to the criminal standard.

[93] Concluding this topic, McGrath J wrote in *Z*:[51]

> … the rule that a flexible approach is taken to applying the civil standard of proof where there are grave allegations in civil proceedings remains generally applicable in England. There is accordingly a single civil standard, the balance of probabilities, which is applied flexibly according to the seriousness of matters to be proved and the consequences of proving them. We are satisfied that the rule is long established, sound in principle, and that in general it should continue to apply to civil proceedings in New Zealand.

[94] It is notable that McGrath J included, as the rationale for the flexible standard, not simply the seriousness of matters to be proved, but "the consequences

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48 At [108].
49 *R (McCann) v Manchester Crown Court* [2003] 1 AC 787.
50 *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] 3 WLR 1 (HL).
51 *Z*, above n 31, at [112].

of proving them". The consequences in the case of penalties in employment law in New Zealand include that, in addition to compensatory orders and costs, a person against whom a statutory penalty is sought is liable to pay an additional monetary penalty in the nature of a fine and, unless discretionary circumstances exist, to pay that to the Crown rather than to the victim of a breach.

[95] Because it was advanced in argument, I will address, although only briefly, reference to what Judge Inglis described as "a sliding scale of proof depending on the seriousness of the allegations" in *Ritchies Transport Holdings Ltd v Merennage*.[52] As the Judge noted, and I respectfully agree, the "sliding scale" does not describe the standard of proof to which an employer must be satisfied of misconduct by an employee but, rather, the curial standard when an issue of justification for disadvantage or dismissal is before the Authority or the Court. In this sense, therefore, there is authority for a sliding scale standard of proof in employment cases.[53] In my assessment, that applies not only to personal grievances but equally to penalty proceedings, especially where these are brought in addition to claims for compensatory remedies for the same breach.

[96] The judgment of the Supreme Court favours the more nuanced approach to be taken to personal grievance proceedings after the *Honda* case in the Court of Appeal, and now in cases where civil penalties are sought as here. This approach militates against the adoption of a strict and fixed balance of probabilities test as set, for example, in *Xu*.

[97] In their commentary at ER 142ZB.01 the authors of Brooker's Employment Law opine that what they describe as "the *Honda* rule" must be applied not only for the benefit of employees in personal grievance cases but that a "similar flexible approach might be applied to serious matters such as penalties and banning orders". The *Honda* rule is encapsulated in the judgment of the Labour Court in the *Honda* case on appeal:[54]

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52 *Ritchies Transport Holdings Ltd v Merennage* [2015] NZEmpC 198.
53 *Honda*, above n 24.
54 At 394.

> It is well settled that the standard of proof which the employer must attain is the civil standard of balance of probabilities rather than the criminal standard of beyond reasonable doubt; however, where a serious charge is the basis of the justification for dismissal, then the evidence in support of it must be as convincing in its nature as the charge is grave.

[98] Attempting to synthesise these cases, I conclude that where a person faces an application for a statutory penalty in addition to a claim for damages arising out of the same breach, the civil standard of proof (balance of probabilities) is to be approached by applying a higher than simple requirement of probability over improbability. To support a claim for penalties in these circumstances, the Court will require convincing evidence of the probability of a defendant's breach of a statutory provision, or one of an employment agreement, before it can be satisfied, on the balance of probabilities, that such a breach has been proven for penalty purposes.

[99] In these circumstances, I consider that the uncertainty of this aspect of employment law in New Zealand is resolved by the approach of the majority of the Court of Appeal in *Z*. This, in turn, means, in my conclusion, that different standards of proof, potentially of the same events or conduct, may be required where both civil damages for breach, and penalties for the same breach, are sought, as here, in the same proceeding.

[100] It follows, therefore, that although I may find certain events proved on an ordinary balance of probabilities test for the purpose of establishing whether a breach compensable by damages has occurred, the same evidence in support of the contention of the same breach but for penalty purposes, may not be made out. As will be seen, that is indeed the case in respect of some of the defendants in this proceeding.

A defence to the damages claims

[101] Mr Cranney, on behalf of all defendants, submitted that the plaintiff can have suffered no losses attributable to the actions of the defendants (even if these were unlawful) and so disentitling it to any damages.

[102] The third defendants were entitled to take part in two paid union or stop-work meetings per calendar year for a maximum duration of two hours on each occasion.

Because, in the relevant calendar year, there was no stop-work meeting other than what the defendants say constituted these events, then, counsel submitted, the third defendants were entitled to offset against the plaintiff's losses, the wages they would have been paid had they held a second stop-work meeting. I do not accept that inventive submission for the following reasons.

[103] The statutory entitlement to paid time off for union meetings, reiterated and enhanced slightly by the entitlements under the collective agreement, are to paid time off from ordinary working duties for such meetings. If an employee attends outside his or her working hours, then there is no entitlement to pay for that period. But the entitlement is to paid time off to attend a meeting, not to pay for the periods during which such time off might have been taken. The fact that there was not a second stop-work meeting during the calendar year for which employees might have been paid, does not entitle those employees to claim pay for the untaken 'meeting' leave. It follows that a notion of a pay credit, as advanced by Mr Cranney, cannot be used to offset the plaintiff's losses in this case.

[104] An analogy is with paid sick leave. Employees who are sick, or otherwise qualify for sick pay, may be paid for the time off taken by them when unable to work by that condition and recovering from it. But an employee who does not take sick leave is not entitled to claim, at the end of the year, a monetary equivalent of the value of the paid sick leave not taken. The position is likewise with respect to paid union meetings.

[105] Whilst this arrangement may perhaps have provided the basis of a settlement of the litigation, as indeed the plaintiff proposed, it does not afford the defendants a defence to the claims for damages for the plaintiff's losses, being the amounts paid to those employees who would otherwise have been working but whose productive time was lost to the employer.

Decision of strike issue

[106] The plaintiffs are entitled to the declarations that they seek in respect of each of the first and second defendants, that they were parties to unlawful strike action by

those employees who were rostered to work but did not do so. There is evidence that some employees fell into this category at each "meeting" location, but none as to who, in particular, did and did not do so.

[107] The first and second defendants are jointly and severally liable to the plaintiff in damages for its financial losses incurred by reason of their being parties to that unlawful strike action, including for the repayment of earnings paid to employees who participated in that strike action at a time when those employees would otherwise have been rostered to work. The evidence establishes that these sums are very modest: the maximum at issue at the hearing was less than $35 per employee although this may increase theoretically once the other third defendants' cases are decided.

[108] It is necessary, also, to decide the penalty claims against the four nominated third defendants whose cases have been heard.

[109] In the absence of any evidence to the contrary or of any challenge to the plaintiff's evidence, I conclude that although the third defendant Janet Franklin, a union delegate from the Radius Rimu Park facility, participated in the activity outside that facility, there is no evidence, or insufficient probative evidence, that she would otherwise have been at work at that time, so that she cannot be said to have been on strike. There is nothing unlawful in participating in picket or protest action addressed against an employer if an employee was, at the same time, not required to be at work. In view of the evidence that the protests consisted of both otherwise on-duty employees and off-duty employees, the plaintiff has failed to establish an essential ingredient of its case against Ms Franklin.

[110] Nor is there any evidence as to her being a party to unlawful strike action by others. The fact that Ms Franklin was a union delegate alone does not establish the necessary degree of instigating, inciting, counselling, procuring, aiding or abetting any other employee to engage in unlawful strike action.

[111] Turning next to the third defendant Elizabeth Packer, who was employed at the Baycare facility, there is indirect evidence that she was scheduled to work at the

time of the picketing or protest activity. That is because Ms Packer, the union delegate at the Baycare facility, subsequently provided its facility manager, Pamela Hughes, with a "Meeting Attendance Form" which listed the participants in what was claimed to have been a union meeting and Ms Packer was subsequently paid for that time. If she had not been scheduled to work, she would not have been able to claim pay for the period and Radius would not have paid her. There is sufficient evidence (although only on a bare balance of probabilities standard) that Ms Packer was thereby on strike and unlawfully. She is liable to Radius for the wages paid to her for that period.

[112] However, this evidence does not meet the test for a penalty set out above. That claim against Ms Packer fails.

[113] In respect of the third defendant Polly Bell, who was employed at Radius's Potter Home, the only (indirect) evidence is that of the facility manager, Miranda Beazley, that after the picketing/protest outside the Potter Home, a union representative, Jeanette Golder, provided a list of staff who had attended the claimed "union meeting". Although there is evidence about a conversation between Ms Beazley and Ms Bell about the accuracy of Ms Bell's placard, there is no or insufficient evidence that she was scheduled to be at work at the time of the picketing/protest, so that the claim of participation by her in an unlawful strike fails.

[114] The "Meeting Attendance Form", provided by Ms Golder to Ms Beazley in respect of the events or meetings at Potter Home, appears to show the names and other details of attendees in different handwriting in each case. So, too, are the notations alongside each name including the employee's job title, workplace, and whether each was "on duty". The tick in the latter box against Ms Bell's name indicates, through her Union, her acknowledgement that she made a claim for pay for the period of the "meeting" on the basis that she would have been on duty at that time. In this sense, therefore, I conclude that there is evidence, to a balance of probabilities standard, of Ms Bell's participation in an unlawful strike for which she may be liable to the plaintiff in damages (any pay that she received for the period that she was scheduled to be at work but was at the protest). However, in the matter

of penalties, there is insufficient evidence to meet that enhanced test of this same breach for that purpose.

[115] Finally is the case of Donna Mather in respect of picketing/protesting at the plaintiff's Auckland offices. Ms Mather worked at Radius's Taupaki Gables facility. The evidence in relation to Ms Mather is very similar to that of Ms Bell. On 8 April 2015 Amy Hansen, a representative of the (then) Service & Food Workers Union Inc emailed Laurel Winwood, Radius's Facilities Manager at the Taupaki Gables facility in West Auckland. In this email Ms Hansen advised that "[t]hose who attended that were on shift (either morning or afternoon) that day from the SFWU …" included "Donna". Although, on its own, that might not establish sufficiently Ms Mather's liability, Ms Winwood's evidence is of identifying Ms Mather in a videotape clip linked to a journalist's article in a publication known as "New Zealand Doctor". This evidence, together with the reference to the claim for wages on behalf of "Donna" is sufficient, in the absence of any challenge or evidence to the contrary, to establish (on the balance of probabilities) that Ms Mather participated in the strike action and, because she was otherwise rostered to work, did so unlawfully. Ms Mather is likewise liable to Radius for the wages paid to her for that period.

[116] Although there is some photographic evidence that Ms Mather participated in the picketing/protest activity outside Radius's head office at Viaduct Harbour, there is no sufficiently persuasive evidence that she was scheduled to be working at that time so that her actions would have supported a finding to the enhanced balance of probability standard for a penalty for breach. In these circumstances, the claims against Ms Mather as third defendant are allowed in respect of damages for breach (wages paid) but are dismissed for penalty purposes.

Breach of s 4 (good faith)?

[117] The plaintiff is also entitled to a declaration that, in regard to communications with Radius prior to the unlawful strike action, the Unions misled the plaintiff in breach of s 4 of the Act. That is, they conducted themselves in bad faith, contrary to the statutory expectations of good faith conduct in collective bargaining and generally in the parties' employment relationship.

[118] In the absence of evidence for the defendants to contradict the strong inferences from the communications (written and oral) between Radius and union representatives, I conclude that the first and second defendants set out to try to obtain their members' entitlements to lawful paid stop-work meetings by holding un-notified strikes but for which they sought payment (on behalf of those employees who would have been at work). In doing so, the Unions misled and deceived the plaintiff about their true intentions. There can have been no real doubt that the picketing and protest action outside Radius premises would not have constituted a union or stop-work meeting as those terms have historically, and are commonly, interpreted. It is unknown whether the Unions took legal advice about these plans before executing them. Given the weakness of the arguments that their counsel were obliged to advance in this case, however, it seems inherently improbable that a confident assertion of the lawfulness of this strategy could ever have been given.

Penalties for breach of s 4A?

[119] The plaintiff's allegations of bad faith are now directed primarily at the Unions. I have determined that they breached their good faith obligations under s 4 of the Act. I must therefore, and will, deal with the claims for penalties under s 4A against the first and second defendants.

[120] Parliament has set a high bar for the imposition of a penalty under s 4A for breaches of duties of good faith. The plaintiff must establish that these breaches were, cumulatively, deliberate, serious and sustained.[55] Alternatively, the plaintiff must establish that the failure to comply with the duty of good faith was intended to undermine (in this case) bargaining for a collective agreement or an individual agreement or the parties' relationship.[56] The third and alternative ground for a penalty under s 4A(c) is not applicable to this case.

[121] Although the plaintiff has a good argument that the Unions' failure to comply with the duty of good faith was both deliberate and (although weaker) even perhaps serious, the claim nevertheless fails the third leg of that cumulative characterisation,

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55 Employment Relations Act 2000, s 4A(a).
56 Section 4A(b).

that it was "sustained". The notices issued by the Unions, and the other conduct, which were misleading and deceptive, related to a closely linked series of actions which were to occur over two days affecting several of Radius's facilities. They were not, nor could they really have been, sustained thereafter. That was because, realistically, they could only have occurred once before the proverbial cat was out of the bag. Although, somewhat surprisingly, Radius did pay a number of the employees for being engaged in what they almost immediately recognised was strike action, any subsequent misleading necessary to make the breach of good faith "sustained" would have been regarded, correctly, as strike action and not paid for. I assume that is why these "meetings" only occurred on those days. There would, in addition, have had to have been notice given by the Unions for that strike action to be lawful.

[122] In these circumstances, the defendants' breaches were not "sustained". I doubt also whether they could have been termed "serious" as the statute also requires them to be for penalty purposes, but it is unnecessary to decide this test definitively. They were, at least, an unwise strategy that only succeeded by misleading and deceptive conduct.

[123] Nor do I conclude that the first and second defendants' failures to comply with the duty of good faith were intended to undermine the bargaining for a collective agreement or the parties' relationship. Simply because one party to an employment relationship has failed to meet the standards required of it by s 4 does not mean that it has done so intending to undermine bargaining for a collective agreement (if that is going on at the same time) or to undermine the parties' relationship. Sometimes, as here, an ill-advised strategy can annoy or embarrass or make things difficult for the other party but nevertheless fall short of undermining. These failures to act in good faith were, as well as ill-advised, opportunistic and publicity-seeking rather than intended to be damaging to bargaining or the parties' relationship. That conclusion is reinforced by two factors. First is the measured and non-confrontational way in which Radius dealt with these events immediately upon becoming aware of their occurrence. Second is the acknowledgement of their wrongfulness by the Unions' open offers to settle the litigation by, in effect, conceding as much, and proposing not to do so again.

[124] These are all factors which, together, lead me to a conclusion that this is not an appropriate case for penalties under s 4A.

Remedies

[125] Apart from the declarations that I make against the Unions in respect of bad faith conduct and being a party to an unlawful strike, I do not propose to decide further remedies at this time. That is for the following reasons.

[126] The parties are currently in collective bargaining for a collective agreement. The events of this case, irrespective of their legality or illegality, have inevitably strained good employment relations between the Union and the employer and, I have no doubt, with those individual employees sued by their employer. There is bridge building to be undertaken on both sides, not only in relation to attempting to conclude a further collective agreement, but generally.

[127] All parties will be acutely aware themselves, but it is worthwhile the Court re-stating, that their business and working activities support those in aged or disability care to whom all have a commitment of service and who may be the indirect victims of ongoing poor employment relations in the sector.

[128] It is no light thing to conclude and declare a party to important and ongoing employment relationships to have acted in bad faith towards another party in that relationship and the defendant Unions will now bear the stigma of that declaration. In these circumstances, it is unnecessary to mark the Court's denunciation of that conduct by imposing additional sanctions on the Unions. Improved relationships, including elements of trust and confidence, are what is now required.

[129] Radius is entitled to question the long-term wisdom of the strategy used by the defendant Unions in this case. Radius may justifiably ask itself and the Unions whether future notifications for paid stop-work meetings will be genuine in view of this one-off exercise which, upon sober and realistic assessment, was doomed to fail, at least in a legal sense. It is not unrealistic for Radius to seek an enhanced degree of assurance from the Unions if there are to be, and as permitted by the legislation,

future stop-work meetings for the proper purpose of those events. That need for heightened trust by Radius may extend to other dealings with the Unions as Radius's Jane Smart spoke of in evidence.

[130] In these circumstances, I will reserve questions of monetary remedies and penalties and questions of liability in respect of the other 60 or so employees whose cases have not been heard. I direct the parties to mediation or further mediation in an attempt to settle and put this matter behind them in their mutual interests, and the interests of those for whom they care, for the future.

[131] Costs are likewise reserved.

[132] A reasonable, but not unlimited, period for achieving these aims for settlement of the remaining issues in the litigation should be allowed. Any application to revive the proceedings, or any part of them, should not be made before 1 November 2016 unless in extraordinary or unforeseen circumstances, in which case an application on notice will be entertained.

GL Colgan
Chief Judge

Judgment delivered at 4 pm on 31 August 2016