IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2022] NZEmpC 33
EMPC 62/2022

IN THE MATTER OF	an application for a declaration pursuant to s 83(b) of the Employment Relations Act 2000
AND IN THE MATTER	of an application for an interim injunction
BETWEEN	CAPITAL AND COAST DISTRICT HEALTH BOARD Plaintiff
AND	THE 19 DISTRICT HEALTH BOARDS IN NEW ZEALAND (LISTED IN THE SCHEDULE TO THIS JUDGMENT) Second to Twentieth Plaintiffs
AND	PUBLIC SERVICE ASSOCIATION, TE PŪKENGA HERE TIKANGA MAHI Defendant

Hearing:	3 March 2022 (heard via Virtual Meeting Room)
Appearances:	S Hornsby-Geluk and M Vant, counsel for plaintiffs P Cranney and C Mayston, counsel for defendant
Judgment:	4 March 2022

REASONS FOR JUDGMENT OF JUDGE B A CORKILL
(Application for interim injunction)

Introduction

[1] These are the reasons for the judgment issued yesterday.[1] An urgent application was brought for an interim injunction restraining a strike which had been notified to commence at 6.00 am today; and in respect of an anticipated strike for which it was understood a notice would be given for 18 March 2022.

[2] The plaintiffs, which are 20 District Health Boards (DHBs), asserted that the notices issued by the Public Service Association, Te Pūkenga Here Tikanga Mahi (the PSA), related to an illegal strike. This is because the requirements of s 83(b) of the Employment Relations Act 2000 (the ER Act) would not be met since the proposed strikes do not relate to bargaining for a collective agreement but to bargaining for a pay equity claim.

[3] The defendant strongly opposed the application. It said the strike and proposed strike, if they were to proceed, would be legal, and that the application for relief should be dismissed.

Background

The parties

[4] The parties are engaged in bargaining for two multi-employer collective agreements (MECAs). One is between the Auckland District Health Board, Counties Manukau District Health Board, and the Waitemata District Health Board on the one hand, and the PSA on the other. The other will be between the remaining 17 DHBs, and the PSA.

[5] Such MECAs would follow previous MECAs that commenced on 7 December 2018, and had an expiry date of 31 October 2020, continued by virtue of s 53 of the ER Act, as extended by the Epidemic Preparedness (Employment Relations Act 2000 – Collective Bargaining) Immediate Modification Order 2020.

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1 *Capital and Coast District Health Board v Public Service Association, Te Pūkenga Here Tikanga Mahi* [2022] NZEmpC 32.

[6] The MECAs cover the Allied Health, Public Health, Technical and Scientific workforces, which provide a range of therapy, diagnostic, public health, technical and other forms of support to patients and clients.

[7] The plaintiffs employ approximately 15,700 staff, falling in with the broad coverage of the MECAs, who provide services to the general public through their hospitals and associated facilities.

[8] The PSA represents approximately 10,000 of the total Allied, Scientific and Technical staff who are employed by the DHBs.

Pay equity claim

[9] On 26 July 2018, the PSA raised two pay equity claims for the Allied, Scientific and Technical employees of the DHBs.

[10] In December 2019, the parties entered into a bargaining process agreement, setting out a process to address the pay equity claims.

[11] On 6 November 2020, the Equal Pay Amendment Act 2020 came into force, amending the Equal Pay Act 1972 (the EP Act).

[12] The parties to the pay equity claim are still working through the assessment process in order to establish whether the Allied, Scientific and Technical workforce has been, or is, undervalued.

Collective bargaining for MECAs

[13] Bargaining was initiated by the PSA in respect of each of the MECAs by notices issued on 1 September 2020.

[14] After a broad framework for engagement in the bargaining had been agreed, a bargaining process agreement was entered into in November 2020.

[15] Then bargaining took place over multiple dates from November 2020 to August 2021.

[16] On 28 October 2021, the DHBs made an offer of settlement to the PSA.

[17] The PSA stated on 28 October 2021 that it would recommend the offer be rejected by its members, since, it said, there had been a lack of movement by the DHBs on the PSA's pay equity claims. The PSA then advised the DHBs on 13 December 2021 that its members had rejected the offer.

[18] The parties attended mediation on 2 February 2022, when the PSA put forward seven claims, a number of which it is asserted related to the PSA's pay equity claim. I will outline these later.

[19] In response, the DHBs indicated during the mediation that those parts of the PSA's claims that did not relate to pay equity were generally acceptable, but it would not agree to the elements which related to pay equity.

[20] On 17 February 2022, the PSA issued notices of strike action to the DHBs, notifying them of a 24-hour full withdrawal of labour to commence at 6.00 am on 4 March 2022, and to finish at 6.00 am on 5 March 2022. It is common ground that the notices relate to essential services. A further notice was anticipated for 18 – 19 March 2022, which the DHBs said would likely be issued on 4 March 2022.

[21] Soon after, the DHBs initiated facilitation with the Employment Relations Authority. Following a conference call with the Authority on 28 February 2022, the Authority scheduled urgent facilitation on 7 and 8 March 2022. Soon after the conference call, the PSA confirmed that it would proceed with planned strike action on 4 March 2022.

[22] The DHBs then issued the current application.

Overview of parties' cases

[23] For the plaintiffs, Mx Hornsby-Geluk submitted in summary:

(a) It is strongly arguable that any strike would be unlawful because it would be motivated by, and would relate to, an equal pay claim, and not to

bargaining for a MECA. The two processes are separate, and an equal pay claim cannot therefore give rise to a right to strike.

(b) The balance of convenience favours the plaintiffs, because of the significant harm that could arise were the strikes to proceed. For instance, the impact on other health professionals and on members of the public who need hospital care and allied health services at a time when those services are stretched, vulnerable, and at a crisis point.

(c) Overall justice favours the grant of relief in light of all the circumstances, including the fact that urgent facilitation is scheduled for early next week.

[24] Mr Cranney, counsel for the defendant, submitted in summary:

(a) The PSA was entitled to raise the possibility of settlement of its equal pay claim in the context of bargaining for MECAs. The PSA raised monetary claims, some of which related to its equal pay claim, which it was perfectly entitled to do in the context of the bargaining between the parties. It is clear from s 54 of the ER Act that the parties are at liberty to agree on anything in bargaining. The points raised as to equal pay simply related to aspects of the equal pay claim for which there was no specific reference to in the EP Act; it does not refer to interim payments, lump sums in advance of settlement, or back pay. Accordingly, the only question was whether the strikes related to the bargaining. Issues were raised in bargaining, only some of which touched on equal pay. The statutory test under s 83 was plainly met. The plaintiffs' claim to the contrary was not arguable, or even if it was, only weakly so.

(b) The defendant has taken the steps it is required to take in order to comply fully with the life preserving obligations imposed by the ER Act. Agreement has been reached with the DHBs on those issues. All problems that have been raised by the DHBs had been addressed and went well beyond the prescribed requirements for life preserving

arrangements. The PSA remain willing to address any additional reasonable matters that the DHBs may wish to raise. The DHBs had delayed filing the proceedings until only two days before this strike action, despite having 14 days' notice of the first strike. The position adopted by the DHBs as to pay equity issues conflicts directly with agreements already made with other very large health-sector workforces. The relevant workforce had been at the forefront of New Zealand's efforts to deal with the COVID-19 emergency, and have the right to freely associate in accordance with the law. Their collective bargaining was of particular importance, particularly in the context of the pandemic. Damages would not be an adequate remedy.

(c) Overall justice heavily favoured the PSA. It relied on the various matters raised with regard to the balance of convenience, and on the weak and untenable nature of the DHBs' case.

Applicable principles

[25] There is no dispute that the Court has the appropriate jurisdiction to deal with this matter.[2]

[26] The applicable principles are also uncontroversial. First, the Court must be satisfied whether there is an arguable case as to the merits of the claim. In a case such as the present, where the interim application will effectively dispose of the defendant's substantive right to strike on the basis of notices already issued, or about to be issued, something more than a barely arguable case is required. Thus, in *Tasman Pulp & Paper Co Ltd v NZ (with exceptions) Shipwrights Etc Union*, the full Court observed that where the proposed action is incapable of being deferred without effectively being cancelled so that the grant of the interim relief effectively becomes a summary judgment, the relative strengths and weaknesses of the parties' cases are more relevant to the overall justice of the case.[3]

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2 Employment Relations Act 2000, ss 99, 100, 187(1)(h) and 187(1)(i).

3 *Tasman Pulp & Paper Co Ltd v NZ (with exceptions) Shipwrights Etc Union* [1991] 1 ERNZ 886 (LC) at 898.

[27] Having dealt with the threshold issue, the Court must then consider where the balance of convenience lies. This is an important consideration that may well determine the grant of an interim injunction.[4] It includes consideration as to whether damages would be an adequate remedy to either party if the injunction were to have been wrongly granted or refused.[5]

[28] The strengths and weaknesses of the parties' arguments, in a case such as the present, which amounts to being an application for summary judgment, are also relevant at this stage. In *NWL Ltd v Woods*, Lord Diplock said:[6]

> Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, *the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial, is a factor to be brought into the balance by the Judge in weighing the risks that injustice may result from deciding the application one way or the other.*

[29] That is, arguability becomes more important in a case such as the present, although that factor is not necessarily dispositive.

[30] Finally, it is necessary to stand back and make an assessment of the overall justice of the position following analysis of the first two issues.[7]

Arguable case

[31] The principal question is whether, in terms of s 83 of the ER Act, the strikes relate to bargaining.

[32] Section 83 relevantly provides:

> **83 Lawful strikes and lockouts related to collective bargaining**
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> Participation in a strike or lockout is lawful if the strike or lockout—
>
> (a) is not unlawful under section 86; and
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> (b) relates to bargaining—

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4 *Eng Mee Yong v Letchumanan* [1980] AC 311 (PC) at 337.
5 *Mitre 10 (New Zealand) Ltd v Benchmark Building Supplies Ltd* [2003] 3 NZLR 186 (HC) at [79].
6 *NWL Ltd v Woods* [1979] 1 WLR 1294, 1306 (emphasis added).
7 *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90, [2013] 13 TCLR 531 at [12]–[13].

(i) for a collective agreement that will bind each of the employees concerned; or

(ii) with regard to an aspect of a collective agreement in respect of which the right to strike or lock out, as the case may be, is available under a declaration made by the court under section 192(2)(c).

[33] In *Spotless Services (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc,* the Court of Appeal held that a strike or lockout will be lawful if the dominant motive is one that is within ss 83 and 84 of the ER Act.[8]

[34] In *Unite Union Inc v Sky City Auckland Ltd*, Judge Travis noted that there had been some controversy as to the relevant test, but this Court is now bound by the finding made by the Court of Appeal in *Spotless*. Accordingly, the question is whether the union's dominant motive in bringing the strikes is to further collective bargaining.[9]

[35] It is necessary to elaborate on those aspects of the history of events that pertain to this issue.

[36] On 28 October 2021, the DHBs made an offer of settlement to the PSA which reflected the outcomes of the parties' bargaining engagements to that point. In it, the DHBs addressed claims made by the PSA in respect of their pay equity claim, stating:

> We are not able to agree to the undertaking sought by the PSA in respect of the Allied claim. The Pay Equity process is currently underway. This is the forum in which to discuss matters of resourcing and timelines, noting that it is a multi-union process so other unions would have legitimate interests in these matters.

[37] The equal pay claims brought by the PSA had been consolidated with a claim brought by the Association of Professional and Executive Employees Inc (APEX). The APEX claim involved several other unions. In short, multiple union parties are now involved in the equal pay claim, and it was these parties to whom the DHBs had referred.

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8 *Spotless Services (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2008] ERNZ 609 (CA) at [39].

9 *Unite Union Inc v SkyCity Auckland Ltd* [2011] NZEmpC 12, [2011] ERNZ 1 at [34]–[46]. Contrast *SCA Hygiene Australia Ltd v Pulp and Paper Industry Council of the Manufacturing and Construction Workers Union Inc* [2008] ERNZ 301 (EmpC) at [37]–[39].

[38] On 28 October 2021, PSA advised that "as there is no movement regarding our pay equity claims we will be going out with a recommendation to reject [the offer]". On 13 December 2021, the PSA confirmed that its members had accordingly rejected the offer.

[39] On 2 February 2022, the parties attended mediated bargaining, at which the PSA tabled a settlement proposal which included a number of "outstanding issues". They have been described in the evidence of the parties in this way:

(i) A request for a salary increase of $5,800 which matched that provided to nurses/midwives who had received $4,000 of that increase as a "pay equity adjustment".

(ii) A request for a lump sum payment of $7,600 of which $1,600 related to the delay in bargaining being settled, and $6,000 was described by the PSA as a parity payment, this matching the lump sum payment provided to nurses who had received $6,000 as a pay equity lump sum.

(iii) An agreement that a settlement agreement would be concluded in relation to pay equity by no later than 31 December 2022, and that a penalty of $1,000 would be paid by the plaintiffs to each employee, were this deadline not to be met.

(iv) An agreement that the effective date of that pay equity settlement would be 1 January 2022.

(v) An obligation to appropriately resource the pay equity claim to ensure completion in a timely manner.

(vi) Agreement that the workforce has sufficiently experienced workers available to meet service requirements.

(vii) Agreement to establish a workforce group to work together to progress issues of significance to the workforce.

(viii) The provision of a significant recruitment campaign to ensure safe staffing.

(ix) The conducting of an independent review to audit staffing levels.

[40] At mediation, the DHBs indicated they did not see the parts of the claim that were unrelated to pay equity as being a major stumbling block. However, they advised that they could not agree to the elements of the PSA's claim that did relate to pay equity.

[41] On 3 February 2022, the PSA sent a communication to its members in which it referred to the offer that had been made by the DHBs on 28 October 2021, and stated:

> Throughout the ratification process, PSA members strongly communicated that the offer:
>
> - Was inequitable compared to other offers made to other health-sector workers, which included provisions such as pay equity implementation dates and down payments on pay equity.
>
> ...

[42] This was a reference to agreements entered into when a MECA was finalised for nurses and midwives, signed by the DHBs and the New Zealand Nurses Organisation in September 2021; and to an earlier settlement relating to the Mental Health and Public Health Nursing MECA, signed by the DHBs and the PSA on 26 August 2021. I will return the terms of these settlements later.

[43] On 17 February 2022, the PSA issued notices of strike action for 4 – 5 March 2022.

[44] The DHBs submit that it is plain from this chronology that the impasse in bargaining between the parties fundamentally related to the DHBs' unwillingness to agree to the claims made which related to pay equity. They say that, assessing the chronology from October 2021 to February 2022, the primary motivation of the upcoming strikes was to advance the pay equity claims.

[45] Mx Hornsby-Geluk went on to analyse the provisions relating to the bringing of an equal pay claim under the EP Act. She focused on s 13ZN of that Act which provides:

> **13ZN Relationship between pay equity claims and collective bargaining**
>
> (1) The entry into a collective agreement in accordance with collective bargaining provisions of the Employment Relations Act 2000 by an employer and a union does not settle or extinguish an unsettled pay equity claim to which the employer is a party.
>
> (2) The existence of an unsettled pay equity claim between an employer and an employee, or of an uncompleted review of a pay equity claim settlement, is not a genuine reason for failing to conclude collective bargaining between that employer and a union representing the

> employer's employees for the purposes of s 33 of the Employment Relations Act 2000.

[46] It was argued that the section makes it plain the two processes are separate. Moreover, while collective bargaining and a pay equity process can run in parallel, there is no ability to strike in support of a pay equity claim. That was because the EP Act does not provide for a right to strike in respect of a pay equity process, and s 83 of the ER Act is expressly restricted to bargaining for a collective agreement.

[47] In summary, the DHBs submit that bargaining for a collective agreement under the ER Act is a separate and different process than bargaining for a pay equity settlement under the EP Act.

[48] Mx Hornsby-Geluk submitted that the two processes deal with different issues. Bargaining under the ER Act is designed to settle terms and conditions of employment. Bargaining for an EP Act settlement is designed to address historic undervaluation of a claimant workforce, according to the criteria of that Act; that includes interim payments with regard to an equal pay claim.

[49] I agree that the EP Act establishes an elaborate and discrete process for dealing with equal pay claims. This is apparent from s 13ZN. The processes of that Act are underpinned by significant good faith obligations. The process includes a stand-alone regime for enforcement. For example, an employer party must use its best endeavours to settle the pay equity claim in an "orderly, timely, and efficient manner".[10] Penalties for non-compliance may be sought, including against "every person" who is involved in the failure to comply.[11]

[50] Although the right to strike can be a crucial, and very significant right, it is one bestowed by statute in certain circumstances. Parliament did not see fit to refer to the right to strike in the provisions of the EP Act.

[51] Mr Cranney emphasised that the claims raised by the PSA at mediation referred to some equal pay issues, but also to other issues. Thus, the first claim in part dealt

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10 Equal Pay Act 1972, s 13C(2)(d).
11 Equal Pay Act 1972, s 18.

with a non-equal pay issue, being a salary increase of $5,800. Moreover, the first three claims were simply for sums of money, which it was appropriate to seek in the context of bargaining for a MECA. The last four claims related to workforce issues and had nothing to do with equal pay matters.

[52] However, against that is the evidence of Mr Aaron Crawford, Lead Advocate for the collective bargaining between the DHBs and the PSA, who stated that the union had been told the non-pay equity components were not "stumbling blocks" to settlement. This evidence is not disputed by evidence given for the PSA by its National Sector Lead for the DHB sector, Mr Ashok Shankar.

[53] Mr Cranney submitted that the claim had arisen in bargaining for the MECA and that the bargaining had dealt with many matters, some of which did relate to pay equity, which was hardly surprising. "Bargaining" under the ER Act was broadly defined, and in the end the parties could include in the collective agreement any matter which was mutually agreed.[12] However, s 54(3)(b) states that a collective agreement must not contain anything which is inconsistent with the ER Act. Arguably, inconsistency could arise if an equal pay issue was resolved via a collective agreement without regard to the processes of the EP Act, even a "down-payment" as sought by the PSA.

[54] In assessing motivation, it is necessary to focus on the realities. The sequence of exchanges which I have summarised arguably establish that the impasse between the parties primarily relates to equal pay issues.

[55] The affected members of the PSA are plainly aggrieved that their equal pay claim has not advanced significantly since its inception in 2018. They want an interim payment that might do something to recognise what they perceive is the significant under-valuation of their work whilst the somewhat complex processes of the EP Act move forward. They also feel aggrieved that a pay equity settlement has been reached with other health workers, apparently when bargaining for a MECA. They also seek parity with those other employees.

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[12] Employment Relations Act 2000, s 54(2).

[56] This context does suggest that the driver for the offer made at mediation related to their long outstanding equal pay claim, which they sought to associate with bargaining for the collective agreement.

[57] Their concerns are entirely understandable. I agree that it is a matter of regret that their equal pay claim is even now only in its early stages, as is acknowledged by Mr Crawford in his evidence.

[58] However, in light of the context, I find it is arguable that the dominant motivation for bringing the strikes relates to bargaining for the equal pay claim under the EP Act rather than bargaining for a collective agreement under the ER Act.

[59] One significant difficulty which arises from the PSA's approach is that it is only one of several union parties to the equal pay claims. The DHBs owe statutory duties of good faith to all the parties involved in that claim.[13] There is a potential for the pay equity claim process to be undermined were the DHBs to deal with one union party only, outside of the statutory equal pay process, even with regard to interim issues, including a down payment.

[60] Mr Cranney submitted that the effect of the DHB's argument is that unions in circumstances such as the PSA finds itself could never risk raising equal pay issues when bargaining for a collective agreement in case it compromised the right to strike. In the end, the assessment requires a factual assessment as to whether the dominant motive for initiating a strike relates to the collective agreement or not. That is an issue of fact which falls for consideration on a case-by-case basis.

[61] I do not think it can be argued that the EP Act does not provide any provision for interim payments, lump sums in advance of settlement, or backpay as was submitted. There are provisions as to "payment for past work", for instance, under s 13ZL, where existing employees may be offered the benefit of a settlement which includes remuneration for such work. Under s 13ZZD, the Authority has the jurisdiction to issue a determination as to past work. It is well arguable that such topics do fall for consideration under the EP Act.

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[13] Equal Pay Act 1972, s 13C.

[62] It is also argued for the PSA that what is now being sought for the Allied and other workers is no different from what has already been agreed with other health workers in the settlements reached last year.

[63] As to this, the DHBs say that when settlements were entered into on each occasion, the parties were careful to ensure that the outcome of bargaining for a collective agreement was documented separately to the outcome of the bargaining for equal pay. This reinforced the separate processes.

[64] Secondly, circumstances of those health workers were arguably different to the circumstances of the Allied and other workers, so that the assessment that was undertaken for the earlier equal pay settlement cannot simply be applied to a different workforce so as to provide pay parity.

[65] What may have occurred on another occasion is not necessarily relevant to the question this Court must resolve, which relates to the motivation for the proposed strikes. What the Court is required to consider are the circumstances giving rise to the issuing of the notices in this particular case.

[66] Accordingly, I was satisfied that the DHBs' claim that the strikes would be illegal given the requirements of s 83 of the ER Act is indeed arguable on the particular facts which the Court was required to consider. This finding was recorded in the interlocutory judgment.[14]

Balance of convenience

[67] Mx Hornsby-Geluk submitted that if the strikes were to go ahead and found to be unlawful, there would be the potential for serious and irreversible harm to DHB staff, patients and their families and communities. In summary, this conclusion was evident because:

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[14] *Capital and Coast District Health Board v Public Service Association, Te Pūkenga Here Tikanga Mahi,* above n 1, at [6].

(a) The impact of strike action would be widespread across all DHBs, and the hospital and community-based services, including newly established COVID-19 community hubs.

(b) The timing of the strike action was set for a Friday. This meant that the services usually provided by striking employees would cease for a three-day period, and the reduced hospital cover over that time would increase the risk of adverse outcomes for patients. This would be particularly concerning since the striking employees would be responsible for early supported discharge and complex discharge planning, which reduces overall inpatient services to accommodate weekend acute admissions.

(c) There would be a risk to other health professionals who are not striking, and who are required to operate in an environment without their necessary diagnostic and operational support.

(d) Additional hours are already worked by non-striking employees of the DHBs, who do not have the capacity to cover the extra work required as a result of the strike action, without risk to their health and safety.

(e) Private providers could not meet the demand that patients would require as a result of the strike action, because they do not have the required capacity to provide the support.

(f) A further issue was that general service delivery, contingency planning, and production planning within the DHB's sector are under significant pressure from the responsibilities that have already been assigned to many of the same DHB officers for managing the planning and implementation of changes associated with COVID-19 or the management of COVID-19 preparedness and Omicron business continuity planning.

(g) Over the next days and weeks, based on the number of hospital admissions, particularly in Auckland and Waikato regions, and the daily

> increases in staff absenteeism, the plaintiffs are expecting hospital care to become increasingly restricted only to those with high complex needs. Strike action would exacerbate these issues and limit the ability of some DHBs to provide care for even those patients, putting them at significant risk of harm.

[68] Mx Hornsby-Geluk went on to refer to the additional stressors associated with preparing for a potential reduction in the general health workforce, as a result of the community spread of Omicron, which places a further burden on the DHBs' workforce, but specifically those who would also be managing strike impact. Reference was made to the dramatic escalation in absenteeism since 25 February 2022.

[69] Staff absenteeism would potentially compromise the ability of the DHBs to treat and discharge patients during a strike, when there would likely be an escalating need to admit patients; on the indirect impact of the outbreak on aged-related care facilities which the DHBs would not be well placed to support; on the ability to maintain COVID-19 hubs around New Zealand as part of the hospital admission avoidance strategy; and on the potential to compromise DHBs' oncology services, which are reliant on certain categories of Allied health and technical staff.

[70] Mr Cranney submitted that the PSA had carefully discharged its responsibilities to agree life preserving services under sch 1B of the ER Act, and indeed had gone further. There is insufficient evidence before the Court to allow it to conclude how much further the PSA may have gone, but the primary evidence of adverse consequences, as just summarised, was not the subject of rebuttal evidence. Accordingly, I accept it.

[71] I did not think these arrangements went far enough. That is not to minimise the steps taken by the PSA to discharge their legal obligations, but the Court must recognise that the strikes would be taking place in highly unusual circumstances when the health sector is already under very significant stress.

[72] The existence of a pandemic means that stretched health services would face even further pressure, which would likely impact not only on other DHB employees, where there are already high rates of absenteeism, but also on many hospital patients, where the rates of admission are increasing dramatically each day due to the Omicron outbreak. The public interest in health services being as effective as possible in the current circumstances is a strong factor which points to the grant of relief.

[73] Mr Cranney referred the Court to a briefing given to the Minister of Workplace Relations and Safety in March 2020, which referred to a question as to whether or not restrictions on industrial action by workers or employers in essential industries should be the subject of legislative amendment, a step which was not taken at the time. Whilst the pre-existing provisions relating to the legality of strikes have remained in place, including for workers in essential industries, that does not preclude the Court from having to assess the very challenging circumstances as they now are.

[74] I am required to consider the issue as to adequacy of damages. In circumstances such as the present, that particular consideration cannot be a dispositive factor.

[75] Mr Cranney raised other issues, including the fact the application was filed very late. I agree with him that it was most regrettable the application was left to the last minute, as it meant that it had to be resolved very urgently. The PSA was placed under considerable pressure. That said, given the foreseeable impact of a significant nationwide strike involving essential services during a pandemic, it is perhaps unsurprising the application was brought when it appears prior attempts to avoid it were not fruitful. In the end, this factor is well outweighed by the public interest factors I have reviewed.

[76] Mr Cranney also said that not all documents that should have been placed before the Court by the DHBs were. I have considered these factors, but I do not find them to be significant in the assessment of the balance of convenience.

[77] Finally, I consider the case for the DHBs has sufficient merit as to confirm, together with the above factors, that the balance of convenience must weigh in its favour. I so found in the interlocutory judgment.

Overall justice

[78] As noted earlier, the Authority has scheduled facilitation to commence next Monday. That suggests that there will be an effective and prompt mechanism for the parties to discuss the issues which have created the present impasse.

[79] Standing back and weighing all factors, I was satisfied that an order of interim injunction restraining the strike scheduled for 4 – 5 March 2022 should be made. I was also satisfied that a quia timet injunction in respect of the anticipated strike action by the defendant's members for 18 – 19 March 2022 should also be made. The public health circumstances will be even more serious by then, with the effect of a strike being more pronounced. It was accordingly appropriate to make the injunction sought.

Result

[80] In the interlocutory judgment I issued yesterday, orders were made as just described.[15]

[81] I reserve costs. The parties should discuss these directly in the first instance. I certify costs on a 2B basis. If the parties cannot resolve these issues within 21 days, an application may then be made, with the response given 14 days later.

B A Corkill
Judge

Judgment signed at 10.55 am on 4 March 2022

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15 *Capital and Coast District Health Board v Public Service Association, Te Pūkenga Here Tikanga Mahi,* above n 1, at [9].

SCHEDULE – LIST OF 20 APPLICANTS

Capital and Coast District Health Board

Northland District Health Board

Waitemata District Health Board

Auckland District Health Board

Counties Manukau District Health Board

Waikato District Health Board

Bay of Plenty District Health Board

Lakes District Health Board

Tairawhiti District Health Board

Taranaki District Health Board

Hawkes Bay District Health Board

Whanganui District Health Board

Mid-Central District Health Board

Hutt Valley District Health Board

Nelson Marlborough District Health Board

West Coast District Health Board

Canterbury District Health Board

South Canterbury District Health Board

Southern District Health Board

Wairarapa District Health Board