IN THE EMPLOYMENT COURT
WELLINGTON

WC 18B/09
WRC 23/09

IN THE MATTER OF	an application for interim injunctions
BETWEEN	THE NEW ZEALAND FIRE SERVICE COMMISSION Plaintiff
AND	THE NEW ZEALAND PROFESSIONAL FIREFIGHTERS UNION First Defendant
AND	JEFFREY REGINALD MCCULLOCH Second Defendant
AND	BOYD GORDON RAINES Third Defendant

Hearing: 10 August 2009
(Heard at Wellington)

Appearances: Geoff Davenport, counsel for plaintiff
Peter Cranney, counsel for defendant

Judgment: 12 August 2009

REASONS FOR ORAL JUDGMENT OF JUDGE B S TRAVIS

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[1] On 6 August 2009 I issued an oral judgment (WC 18/09) following an application by the plaintiff for interim injunctions to prevent what it alleged was an unlawful strike which had commenced at 8am on the morning of 6 August 2009. At approximately 5.30pm on Monday 10 August 2009, after hearing full submissions from counsel for the parties, I continued the injunctions in the following terms:

> *(a) an interim injunction will issue restraining the first defendant (including its officers, employees, agents or members) and/or the second*

defendant and/or the third defendant from continuing to participate in the allegedly unlawful strike action relating to the notice of strike the subject of these proceedings issued on 22 July 2009 and the first defendant's directive of 5 August 2009, which action is said to have commenced at 8am on 6 August 2009;

(b) an interim injunction will also issue requiring the first defendant to immediately contact its members requesting them to desist from continuing to participate in the allegedly unlawful strike action relating to the notice of strike the subject of these proceedings issued on 22 July 2009 and the first defendant's directive of 5 August 2009, which action is said to have commenced at 8am on 6 August 2009. This communication is to include email and phone communication with a view to having the allegedly unlawful strike action suspended forthwith.

[2] The following are my reasons for issuing those injunctions. I note at the outset that there was a conflict of evidence between the affidavits filed on behalf of the plaintiff and those filed on behalf of the defendants. Such conflicts may be resolved by credibility findings and after full disclosure of documents. That is not possible at the point of time when interlocutory matters are being considered. However, the plaintiff is entitled to a presumption that, unless its allegations are demonstrably false, which is not the case here, the plaintiff will be able to be prove them at a substantive hearing.

[3] Although interim relief is being sought, because the particular strike would have only lasted until 13 August 2009 the interim orders I have made have the effect of granting the plaintiff substantive remedies, without the burden of a full hearing. I have therefore viewed the key principles for an interim injunction: arguable case, balance of convenience, and overall justice, with that consideration in mind. For the reasons which I will set out I have found that all these considerations favour the plaintiff.

Factual background

[4] The plaintiff and the first defendant union are bargaining for a collective agreement. On 1 July 2009 the union gave 14 days' notice of a strike to commence on 16 July 2009 in the South Island, the nature of the strike being "*a ban on the use of any computer keyboard or computer mouse by any Union member…*". Similar notices were given for strikes in the North Island and again in the South Island.

[5] On 2 July the New Zealand fire service chief executive, Mike Hall, issued a media statement under the heading: "*Safety Not Affected by Union Action Says Fire Service*", which stated in the opening paragraph:

> *New Zealanders' safety would not be compromised by planned industrial action announced yesterday by the New Zealand Professional Firefighters Union, said New Zealand Fire Service Chief Executive Mike Hall. Action would be low level, related to administrative tasks and would not affect the Service's ability to respond to both emergency and non-emergency calls.*

[6] On 22 July the union issued a further 14 days' notice, advising that the strike would commence at 0800 hours on 6 August 2009 and conclude at 0800 hours on 13 August 2009, would be continuous and would occur wherever members are employed throughout New Zealand, but excluding the northern, central and southern communications centres. The nature of the strike was said to be:

- a ban on logging on to the fire service intranet by any member employed anywhere in New Zealand other than members employed in the northern, central and southern communications centres.

- a ban on making and/or creating and/or maintaining any manual record or records apart from those relating to additional pay claims and/or accident reports and/or absence from duty.

[7] The plaintiff, through its acting chief executive, Brett Warwick, issued an instruction to the plaintiff's staff on 3 August, referring to the wording in the strike

notice, stating that this wording was important in defining what the employees on strike can and cannot refuse to do, and stating:

> *This strike notice DOES NOT ban the use of computers, and it DOES NOT ban the use of NZFS computer applications like SMS, the Accident Kiosk, TMS, and the range of SMART applications used by NZFS employees. These programmes can be accessed directly from desktop icons, which are viewable once you have logged on to CITRIX. There is no need to log on to NZFS's intranet to access these programmes so they can all still be used during the industrial action. It is therefore unlikely that there will be any need to keep manual records during the industrial action so the ban on making and/or creating and/or maintaining manual records will have little effect. Any refusal to use these programmes will constitute illegal industrial action as this is not specified in the strike notice issued by the NZPFU.*
>
> *The strike notice bans the use of NZFS's intranet, which is FireNet. Currently FireNet automatically opens upon logging on to CITRIX. To ensure that NZPFU members do not inadvertently access FireNet during the strike and therefore compromise the strike action, this automatic opening will be disabled for the period of the industrial action.*
>
> *FireNet can still be accessed by those staff not taking industrial action by opening Internet Explorer. Opening Internet Explorer is the only way that the internet can be accessed, so those taking industrial action will not be able to access the internet, but there will be little other impact.*
>
> *If you have any questions about this notice, or you are not sure how to access a particular application, you should talk with your manager. The IT Help Desk can also assist if you are not sure how to access applications.*

[8] The union responded to this instruction in a newsletter posted on its website on 5 August, under the heading: "*Acting CEO, Brett Warrick Attempts to Mislead Members*", which stated, in part:

> *In terms of the Strike Notices, the ban on logging onto the Intranet means that access to application s such as S.M.S. cannot occur.*

The access to these applications is directly caught within the scope of the Union's Strike Notices.

Brett Warwick's e-mail is therefore to be ignored.

[9] The plaintiff responded by seeking and obtaining interim injunctions from the Court on 6 August in substantially the same terms as the injunctions set out above.

[10] Mr Warwick, in two affidavits in support of the interim injunctions, has deposed that there are a number of computer applications used by firefighters on a day to day basis that are critical to the plaintiff's ability to effectively respond to emergency incidents, undertake fire risk management and fire safety activities, and to maintain its overall response capabilities. The key application is said to be the Station Management System (SMS) which is used by firefighters to plan, manage, record, monitor and report on all planning and response activities. A number of other applications were referred to and, although they were the subject of heated debate between counsel, it does not appear that they are as important to the operations of the fire service as SMS. The conclusions I reached in granting the interim injunctions were largely based upon the union's advice that the strike action would ban the use of SMS by its members and I do not therefore refer to these other applications.

[11] The union has taken issue with the plaintiff's claim that SMS is critical to the operations of the fire service and has observed that the lack of the SMS application during the 3 weeks of strikes under notices which prevented any use of computers did not, according to the statement of Mr Hall, pose any safety risk. The defendants have gone further and said through their counsel that the actions of Mr Warwick amounted to scurrilous conduct by inventing an ambiguity in the nature of the strike action which did not exist in the notice as issued. Mr Warwick, in turn, has denied these allegations and has deposed that the plaintiff's concerns at the refusal of staff to undertake duties falling outside of the scope of the strike notice were entirely genuine and that the 4 August instruction was issued as part of the statutory obligations imposed upon Mr Warwick by the Fire Service Act 1975.

[12] I cannot resolve these conflicts but, as stated above, the plaintiff is entitled to a presumption in its favour that its allegations will be established at trial. It also appears on the face of the instruction that it was issued to clarify at least the plaintiff's understanding of the nature of the strike action, even if that has not turned out to be the same understanding as that of the defendants.

[13] The evidence of Mr Warwick is also supported by an affidavit by Paul McGill, the acting national commander and director of operations in training for the plaintiff. He has also deposed that the non-accessing of SMS and its components including rostering, risk planning, fire incident reporting, operational skills maintenance and others, will significantly undermine the plaintiff's ability to safely manage its operations and its staff.

[14] Mr McGill's affidavit also addressed the impact of the second aspect of the strike notice, the ban on the making, creating or maintaining any manual records. This was an element that was not included in the three strike notices that banned the use of computers.

[15] Mr McGill deposed that the combination of having neither manual nor electronic records available for use on the ground at the scene of an incident fundamentally affected the approach to the incident. He referred in particular to the use of breathing apparatus by firefighters. There are procedures which require the manual recording of information relating to the use of breathing apparatus for firefighters who may have to enter a building using that equipment and the time they are due out of the building. Written reports are also made of any equipment which is shown up to be defective or has become contaminated at an incident. Further, incident action plans are manually created detailing the strategies and tactics to be deployed at an incident. Those plans are shared with the rest of the incident response crews and other agencies. There is also the need to record the movement of personnel during an incident, the filling out of hazard guide forms, dealing with hazardous substances and documentation relating to the maintenance of critical equipment, clothing and the like.

[16] In affidavits in opposition the defendants claimed that the recording of such matters are not considered to be manual written records within the fire service but no basis for that assertion was given. Again this is a matter which may require resolution at a later date. However, counsel for the defendants advised the Court near the conclusion of the hearing that those matters I have summarised above would not be included in the ban against making manual records.

[17] The plaintiff has also deposed through its witnesses that there is evidence that members of the union did not appreciate, until the union issued its directive on 5 August, that the ban referred to in the 22 July strike notice included a ban on accessing SMS and other applications. The defendants dispute this. Mr Warwick has also deposed that, because the plaintiff did not become aware until the 5 August directive from the union that SMS and other applications were also part of the ban, it has been unable to prepare any contingency plans to deal with a ban which will involve both the use of the plaintiff's computers and the manual recording of key information.

Arguable case

The law

[18] It was not in issue that "clarity is essential" in strike notices: *Secretary for Justice v NZPSA* [1990] 2 NZLR 36 CA; (19990) ERNZ Sel Cas 601; [1990] 1 NZILR 347. Mr Davenport cited two passages from the judgment of Cooke P (p41, p606, p352):

> *While the Act recognises strike action as a legitimate industrial strategy, in effect it also recognises that in a free and democratic society the right to strike must be subject to reasonable limits prescribed by law. In essential services one of the limits is that relating to notice. It is in accordance with the spirit of the Act if it is interpreted to mean that the organisers of the strike must make their intentions clear.*

And further at p41, p357, p607:

> *The question is not one of the actual intention of each sender of a communication but the objective one of what it would reasonably convey to the other party. If the giver of a notice under s235 (or s236)* [now s90 Employment Relations Act 2000] *accompanies or follows it by other communications likely to give rise to uncertainty to the date or the nature of the industrial action intended, the clarity essential under the legislation is not achieved. In such circumstances, in order to make the Act work as Parliament intended it, it becomes necessary to hold that the notice cannot be relied on.*

[19] It is clear from the authorities that there are two main purposes for the notice requirements: first to allow an opportunity for negotiations which may include mediation; second to allow for the preparation of contingency plans to deal with a strike that will affect the public interest: see *Service and Food Workers Union Inc v OCS Ltd* [2005] ERNZ 717, 728.

[20] There was no issue that the strike related to bargaining for a collective agreement (s83(b)(i)). The argument centred on whether or not, in terms of s86, it was unlawful as it was in an essential service and the requirements as to notice in s90 had to be complied with. The fire service is an essential service, described in clause 6 of Part A of Schedule 1 to the Act.

[21] The defendants took issue with whether there was a requirement to give notice as the proposed strike did not affect the public interest "*including (without limitation) public safety or health*" s90(2)(a).

[22] I am satisfied from the evidence led by the plaintiff that a national strike by firefighters banning the use of computers and making manual records does give rise to issues of public safety or health and the risk of damage to property and therefore 14 days' notice is required for the strike action to be lawful under s86 of the Act.

[23] The plaintiff's amended statement of claim alleged that the strike would be unlawful because the scope of the notice issued on 22 July was unclear as to the "*nature of the proposed strike*". Relying on the evidence in the affidavits filed, Mr

Davenport submitted that the plaintiff was in fact confused by the notice in the sense that it did not understand it meant what the union now contends it meant. It therefore did not arrange for any contingency planning, on the assumption that, although the union members going on strike would not log on to the intranet, computer programmes such as SMS would still be accessed and used. He submitted that there was a reasonable basis for that confusion and, compared to the previous strike notice, there was an assumption that when different words were used on 22 July, they could reasonably expect it to mean something else. The test was what the words in the notice would have conveyed to a reasonable employer.

[24] During the course of argument it became clear from Mr Cranney's oral submissions that the union viewed the 22 July notice as having effectively banned all use of the plaintiff's computers. This was because upon logging on to those computers the user would immediately be connected to the plaintiff's intranet, known as FireNet, and from there would be able to access SMS and the other computer applications. Thus, in the context in which the notice had been issued on 22 July, the union was certain that banning the use of the intranet would also ban the use of all applications able to be accessed through the intranet.

[25] The plaintiff's case was that by removing the automatic connection to the intranet, a step it was reasonably entitled to take as part of the contingency planning in response to the 22 July notice, SMS and the other applications could be accessed without the union members having to go through the intranet.

[26] A technical argument then ensued between counsel as to whether SMS and the other applications were intranet linked applications. SMS when accessed through an icon and not through the intranet had an address attached to it. This address appeared to be quite different to the address of FireNet. Mr Warwick was the senior member of the plaintiff involved in the setting up of SMS and had overall responsibility for the plaintiff's IT systems. Considerable weight may be attached therefore to his assertion that SMS and the other applications are not the "*intranet*".

[27] From this evidence I conclude that the plaintiff has a strongly arguable case that the 22 July notice did not reasonably convey to it that the ban on logging on to

the intranet was effectively the same as the ban in the earlier notices against any use of computer keyboards or computer mice.

[28] Although the notice itself is clear on its face that it applies only to the use of the intranet, the subsequent communication of the union on 5 August created an uncertainty as to the true nature of the ban. If the union had wanted to achieve reasonable certainty it could have used the same wording as it did in the other three notices.

[29] I am satisfied that, because the strike notice did not specify that the ban extended to accessing computer applications, which was apparently the union's intention, it is strongly arguable that the strike notice is uncertain and unlawful and in breach of s90 of the Act. Further, the conduct of the members of the union from 0800 hours on 6 August arguably exceeded the ban for which notice was given on 22 July, in that labour was being withdrawn from accessing computer applications. That action would therefore arguably be in breach of s86(1)(f) and unlawful because notice of such action had not been given.

[30] The plaintiff's amended statement of claim introduced a third cause of action contending that because of a lack of certainty as to what were "*manual records*" the strike notice was unlawful. The principal material relied on in support of that cause of action related to the use of breathing apparatus and other manual recording of events directly linked to the servicing of incidents. The arguments for and against this cause of action were not fully developed and the defendants had very little opportunity to prepare a response. I therefore did not take into account these matters in determining whether the plaintiff had established an arguable case. I do, however, express the tentative opinion that if a strike notice is issued totally banning some activity and then later, or even during the strike, the employees indicate that the ban is not going to be as total as the notice indicated, provided this does not cause the employer any difficulty in contingency planning, such a communication is unlikely to render the original notice unlawful for uncertainty.

Balance of convenience

[31] Having found that the union has a strongly arguable case that the strike action was unlawful it was necessary to consider the balance of convenience. Mr Davenport addressed the problems the plaintiff had experienced since the 5 August communication in matters such as rostering, risk plans and other contingency plans. He contended that therefore the balance of convenience favoured the plaintiff even though the strike was for a limited duration, citing *Quality Service Enterprises Ltd v Service and Food Workers Union* [2002] 2 ERNZ 377, 388. Mr Davenport addressed the balancing between the cost to the union and its members of not being able to proceed with the current industrial action as against the difficulties experienced by the plaintiff in having to deal with what effectively amounted to a total computer ban, and a ban on manual recording.

[32] Mr Cranney observed that granting an injunction would interfere with the industrial strategy of the union and its members and could exacerbate the situation between the plaintiff and its employees. He did, however, accept that the defendants could issue another 14 days' notice of strike and indeed confirmed that they intended to do so.

[33] The difficulty facing unions in situations like the present is that if a strongly arguable case has been established, it is difficult to conclude that the balance of convenience will favour a union and its members acting in an arguably unlawful way.

[34] I therefore accept the submissions of the plaintiff that the balance of convenience clearly favours its positions.

[35] Although not directly addressed by counsel, I consider that damages would not be an adequate remedy for the plaintiff if it is inhibited in carrying out its public functions as a result of an arguably unlawful strike.

Overall justice

[36] As to the overall justice of the case, the same considerations apply because no strike action can be lawfully taken on the basis of an invalid notice or where notice has not been given for the particular strike action taken. I accept Mr Davenport's submissions that breach of the requirements is no minor matter, especially where there is said to be a genuine risk to the public as a result.

[37] The overall justice of the case clearly favours the plaintiff.

Costs

[38] At the request of counsel, costs are reserved.

B S Travis
Judge

Judgment signed at 2.15pm on 12 August 2009