IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 41
ARC 19/12

IN THE MATTER OF	interim injunction and injunction
BETWEEN	PORT OF TAURANGA LIMITED Plaintiff
AND	RAIL AND MARITIME TRANSPORT UNION INC First Defendant
AND	PHILIP SPANSWICK Second Defendant
AND	KELVEN MARTIN AND 29 OTHERS Third Defendant

Hearing:	Following a hearing by telephone on 4 and 5 March 2012 (Heard at Auckland)
Counsel:	Andrew Caisley and David France, counsel for Ports of Tauranga Geoff Davenport, counsel for RMTU No appearance for the second and third defendants
Judgment:	6 March 2012

REASONS FOR ORAL INTERLOCUTORY INJUNCTION OF JUDGE B S TRAVIS

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[1] On Sunday 4 March 2012, after a "Pickwickian" telephone conference call hearing, where the first defendant was represented by Mr Davenport as counsel who had not yet been served with the proceedings, I issued interim injunctions against the defendants.

[2] After a further hearing by telephone conference call in the evening of 5 March, initiated by Mr Davenport, I modified the wording of the injunctions to read as follows:

> 1. The first defendant and the defendant's officers, employees (including the second defendant) and/or agents are restrained from participating in, or continuing to participate in, counselling, procuring, aiding and/or abetting unlawful strike action against the plaintiff during the term of the current collective employment agreement between the plaintiff and the first defendant until further order of the Court.
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> 2. The first and second defendants are restrained from advising members of the first defendant employed by the plaintiff (including the third defendants) not to cross a picket line established by MUNZ at Tauranga, until further order of the Court.
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> 3. The third defendants are restrained from participating or continuing to participate in unlawful strike action by refusing to cross a picket line established by MUNZ at Tauranga until further order of the Court.

[3] The following are my reasons for issuing those orders.

[4] The plaintiff employs members of the first defendant, the Rail and Maritime Transport Union Inc (RMTU) pursuant to a collective agreement, to undertake various work at the port of Tauranga.

[5] The plaintiff employs approximately 160 employees of whom 60 are members of the RMTU and their collective agreement covers a range of work including linesmen who handle the mooring lines between the vessel and the wharf, crane drivers, electrical workers, security work and certain operational work. The collective agreement came into force on 1 April 2010 and expires on 31 March 2012.

[6] In proceedings issued on Sunday 4 March, the plaintiff claimed that the third defendants, employee members of the RMTU (the employees) had declined to cross the picket line formed by members of the Maritime Union of New Zealand (MUNZ) on the road leading to the container terminal at Tauranga.

[7] In affidavit evidence in support of the interim injunction application, it was said that the plaintiff's managers had instructed four of the employees to attend work and to tie up a vessel owned by the Maersk Shipping Line, the MV Irenes Remedy (the vessel). The vessel had allegedly been serviced by non-union labour whilst it was in the Port of Auckland. After discussions with the employees and with Phillip Spanswick, the local RMTU organiser (the second defendant), the plaintiff's managers were given to understand that Mr Spanswick had told the employees that

there was a picket and that they were not to cross the picket line. These events took place at about 0230 hours on 3 March 2012.

[8] Sometime later that day it appeared that the picket line had been lifted and the vessel was able to dock with the assistance of linesmen employee members of the RMTU who are responsible for the tying up and letting go of all shipping that enters the Port of Tauranga. The picket line was then reformed after the vessel was tied up. Employees were instructed to carry out crane driving duties which they refused.

[9] It is claimed that the presence of the vessel prevents other vessels from tying up at the Port. At the time of the hearing, six other vessels were waiting to tie up at the Port and were allegedly being impeded because of the inability to complete the unloading and loading of the vessel and its casting off. Other vessels are scheduled to arrive.

[10] The affidavits state that the plaintiff is suffering losses as a result of the refusal of its employees to work the vessel with consequent delays and costs to other shipping lines, to various stevedoring companies who were scheduled to work the delayed vessels and to importers and exporters whose goods are not able to be moved as planned. It is said that, on average, a vessel will cost approximately US$40,000 a day while it is waiting to be loaded or unloaded.

[11] The application for interim injunctions, which was filed on Sunday, was on notice to the defendants, but counsel for the plaintiff sought urgency and a hearing of the application that day. A telephone conference hearing was duly convened and although Mr Davenport indicated he was instructed by the first defendant, he had not yet seen the papers. There was no appearance on behalf of the second and third defendants.

[12] Mr Caisley summarised the plaintiff's case, addressing the three factors to which the Court must have regard in deciding whether or not to grant interim relief, namely an arguable case, the balance of convenience and the overall justice of the case.

[13] As to the arguable case, Mr Caisley submitted that the affidavits filed established an arguable case that the actions of the plaintiff's employees in refusing to cross the picket line, amounted to an unlawful strike. He submitted that their actions constituted a strike as defined in s 81 of the Employment Relations Act 2000 (the Act) as the employees had discontinued their employment whether wholly or partially, or had reduced the normal performance of it and had refused or failed to accept engagement for work in which they were usually employed, thereby also reducing their normal output.

[14] Mr Caisley also submitted that this action was due to a combination or agreement, or common understanding, or concerted action, whether express or implied, made or entered into by the employees in terms of s 81(1)(b). The affidavit evidence asserts that the employees refused to cross the picket line as a result of directions from the RMTU's organiser.

[15] The strike was said to be unlawful in terms of s 86 of the Act because it was occurring while a collective agreement binding the employees participating in the strike was in force. Further, it is said that the operations carried out by the plaintiff in the Port of Tauranga constitute an essential service, as defined in cl 7 of schedule 1 of the Act, involving the provision of all necessary services in connection with the arrival, berthing, loading, unloading and departures of ships at a port. In terms of s 90, no employee employed in an essential service may strike unless the participation in the strike is lawful under s 83 or s 84, which it is argued this strike is not, unless 14 days' notice has been given. No such notice has been given.

[16] Section 83 makes participation in a strike lawful if it relates to bargaining. There is no evidence that this strike relates to bargaining which binds each of the employees of the plaintiff concerned in the strike.

[17] Section 84 provides that participation in a strike is lawful if the employees who strike have reasonable grounds for believing that the strike is justified on the grounds of health and safety.

[18] Mr Caisley submitted that, on the basis of the affidavit evidence, it was clear that the picketing by, or on behalf of MUNZ, had been carried out in a lawful manner with no threats to those who might cross the picket line. He contended that there was evidence that the employees allegedly on strike had been told to say that there was a health and safety issue but because the picketing in both Auckland and Tauranga had been entirely peaceful and MUNZ had been very proud to say in the media that this was a new form of picketing that is not unlawful, Mr Caisley submitted there were no health and safety issues.

[19] Mr Davenport submitted there were genuine concerns held by the individuals who had refused to cross the picket line as to their health and safety. He cited *Ports of Napier Ltd v Maritime Union of New Zealand*[1] to the effect that no notice of strike was required to be given if there were health and safety issues in terms of s 84.

[20] On the material presently before the Court, I am not persuaded that there are any reasonable grounds for the third defendants to believe their refusal to cross the picket line is justified on the grounds of safety or health. The evidence suggests that the picketing carried out on behalf of MUNZ has been lawful and unthreatening. The affidavit evidence deposes that there are no MUNZ members employed by the Port of Tauranga at the container terminal, so there is no issue of the employees concerned having to work in the same workplace as MUNZ members. The affidavit evidence also states that, although employees refusing to cross the picket line have been spoken to by the plaintiff's managers, none have expressed any concern about their health and safety.

[21] Further, as the third defendants would be compelled by the Court's injunction to cross the picket line, the position would be that they had not done so of their own free will but only under the compulsion of a Court order. This should free them from any perceived risks.

[22] Mr Davenport also submitted that the refusals to cross the picket line had been the action of individual employees who had made up their own minds and therefore there was no concerted action, as required by s 81(1)(b). I considered there

[1] [2007] ERNZ 826 at [37].

was evidence that the refusals were as a result of directions by the RMTU and the matter was therefore arguable.

[23] In summary, I accepted Mr Caisley's submissions, and found there was a strongly arguable case that the actions of the third defendants were taken in collusion with the RMTU and constituted unlawful strike action.

[24] I should note that, although it was not discussed, it was clear on the papers that the plaintiff had more than sufficient means to meet its undertaking as to damages, should it be found that the interim relief should not have been granted and that the defendants had sustained damage as a result.

[25] The evidence of the disruption to port facilities, the stevedoring companies, ship owners, importers and exporters alike, satisfied me that both the balance of convenience and the overall justice of the case pointed to the need to grant the interim relief sought.

[26] I invited counsel to consider whether the interim injunction should apply only until the matter could be heard by the Court with a hearing able to be accommodated on the following Monday morning or the ensuing days. A hearing on Monday morning, understandably, caused Mr Davenport some difficulty.

[27] A timetable was set out which required the defendants to file and serve their notices of opposition and affidavits in opposition by 12 noon on Tuesday 6 March 2012 with a hearing of the interim injunction application at 10am on Wednesday 7 March 2012.

[28] Mr Davenport subsequently filed a memorandum on behalf of the RMTU advising that he and his client did not consider that the important issues involved in this case could be effectively addressed on the papers on Wednesday in the setting of an interim injunction application. He sought to have the wording of the injunctions modified, as is reflected in paragraph [2] of these reasons, and a direction to mediation on the substantive issues involved in these proceedings. On this basis, he sought to have the hearing on Wednesday adjourned.

[29] After the further telephone conference call and without objection from the plaintiff, the hearing on the interim injunction was adjourned. The parties were directed to mediation on the matters at issue between them, pursuant to s 188(2)(b) of the Act and such mediation is to be completed before any substantive proceedings arising out of these issues are set down for hearing.

[30] Costs were reserved as well as leave to apply for further directions.

B S Travis
Judge

Judgment signed at 3.45pm on Tuesday 6 March 2012