IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2012] NZEmpC 44
CRC 9/12

IN THE MATTER OF	an application for injunction
BETWEEN	LYTTELTON PORT COMPANY LIMITED Plaintiff
AND	MARITIME UNION OF NEW ZEALAND INC First Defendant
AND	THE RAIL AND MARITIME TRANSPORT UNION INC Second Defendant

Hearing: 7 March 2012

Appearances: Rob Towner, counsel for plaintiff
Peter Cranney, counsel for first defendant
Geoff Davenport, counsel for second defendant

Judgment: 7 March 2012

ORAL JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] A little more than 24 hours ago the application for an interlocutory injunction to prevent anticipated unlawful strike action was filed and shortly afterwards there was a telephone conference call with counsel for the parties. Today's hearing, which began shortly after 4.30 pm, was arranged, giving the greatest time available to the defendants in particular to prepare for this hearing before the events said to constitute unlawful strike action were scheduled to commence.

[2] About now, literally, a container ship known as *Lisa Schulte* is scheduled to arrive at the Port of Lyttelton to discharge and load cargo. The stevedoring company responsible for the vessel's berthage and cargo turnaround is Lyttelton Port Company

Limited (LPCL). LPCL also owns and operates Lyttelton Port. Unless required to do so by injunctive order, members of the defendant unions, who are employed by the plaintiff to do this work, will not do so. In these circumstances, and even if the vessel is able to berth, the loading and unloading of cargo will be at least significantly delayed, affecting the vessel's sailing schedule, the ability of the plaintiff to make money from its stevedoring operations, and a range of other persons who will be unable to have their cargoes unloaded and loaded as scheduled.

[3] This situation arises because the *Lisa Schulte* has previously berthed at the Port of Auckland where members of the first defendant have been until very recently at least, and may still be, on strike. The *Lisa Schulte* was apparently, however, able to be worked in Auckland but by a combination of waterside workers who are not members of the Maritime Union of New Zealand Inc (MUNZ) (and who are not therefore on strike) and port company managerial staff. Although there has been reference by some to the *Lisa Schulte* having been worked by 'scab' labour in Auckland, there is no suggestion that this involved illegality and, in particular, any breach of s 97 of the Employment Relations Act 2000 (the Act) which governs the engagement and deployment of strike and lockout breaking. Although such persons as worked on the *Lisa Schulte* in Auckland may have done so within sight of a MUNZ picket line, it seems they are entitled in law to have so worked and not to be members of that union or any union. So in Auckland at least and in relation to this vessel, it was not a situation of members of one union crossing the picket line of another.

[4] The position in Lyttelton is different. Members of both defendant unions are engaged at this port and I assume the plaintiff is unable to service the *Lisa Schulte* without recourse to members of one or both unions, at least in the time that it has contracted to do so.

[5] There is no argument that both unions have called on their members not to work the *Lisa Schulte* or indeed other vessels that may have called recently at Auckland and have been worked in the same circumstances. It is a distinct possibility, if not probability, that there will be other vessels, with the same voyage pattern as the *Lisa Schulte*, arriving subsequently at Lyttelton Port.

[6] As is well known, this is the third in a series of interim injunction applications heard in as many days involving the same general dispute but relating to different ports. Last Sunday evening, the Court in Auckland made interlocutory injunctive orders in proceedings relating to Port of Tauranga Limited in which the Rail and Maritime Transport Union Inc (RMTU) was a party. The Judge's reasons for those orders are contained in two judgments[1] issued yesterday. Yesterday afternoon the Court in Wellington granted interlocutory injunctive relief to CentrePort Wellington Limited in respect of a vessel there but not being worked.[2]

[7] As those judgments illustrate and this does, the Court must address three questions in determining whether to grant interlocutory injunctive relief. The first is whether there is a serious arguable case for trial substantively between the parties. If so, the second question is where the balance of convenience will lie between them pending substantive judgment. The third consideration is whether the overall justice of the case warrants the making of an interlocutory injunctive order because it is equitable and discretionary.

[8] The defendants contend that what they accept will be otherwise unlawful strike action will nevertheless not be so because their members are not required to perform the work that they will refuse to do. This argument relies on an interpretation and application of s 81 of the Act which provides:

> **81 Meaning of strike**
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> (1) In this Act, strike means an act that—
>
> (a) is the act of a number of employees who are or have been in the employment of the same employer or of different employers—
>
> (i) in discontinuing that employment, whether wholly or partially, or in reducing the normal performance of it; or
>
> (ii) in refusing or failing after any such discontinuance to resume or return to their employment; or
>
> (iii) in breaking their employment agreements; or
>
> (iv) in refusing or failing to accept engagement for work in which they are usually employed; or
>
> (v) in reducing their normal output or their normal rate of work; and

[1] *Port of Tauranga Limited v Rail and Maritime Transport Union* Inc [2012] NZEmpC 41; *C3 Limited v Rail and Maritime Transport Union Inc* [2012] NZEmpC 42.
[2] *CentrePort Wellington Limited v The Rail and Maritime Transport Union Inc* [2012] NZEmpC 43.

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

(2) In this Act, strike does not include an employees' meeting authorised—
(a) by an employer; or
(b) by an employment agreement; or
(c) by this Act.

(3) In this Act, to strike means to become a party to a strike.

[9] Mr Cranney in particular, although in argument that was adopted by Mr Davenport, submitted that LPCL is unable to identify any contractual position which requires their employees to work in relation to a vessel that has been loaded elsewhere by non-union labour. Although an affidavit has been filed late this afternoon in support of that contention, analysis of that affidavit of Mr Les Wells discloses that it really consists of a statement of what he, as an official of MUNZ in Christchurch, might wish the law and the contractual position to be and an assertion that MUNZ is entitled to impose such black bans on vessels. The affidavit really does not support a contention that this is the position in fact.

[10] As counsel argued unsuccessfully in Wellington yesterday, they reiterate that the Court cannot be satisfied that the employees will refuse or fail to accept engagement for work in which they are usually employed or will reduce their normal output. That argument was rejected yesterday in Wellington although in many respects on an absence of evidence. That position has been able to be corrected today. Nevertheless, the argument advanced by Mr Cranney really strikes me as inherently very weak. That is for the following reasons.

[11] The engagement for work in which affected employees are usually employed is, by reference to the relevant operative collective employment agreement and otherwise, the berthing, unloading, loading, and departure from port of cargo vessels or perhaps even container ships in particular. That work is not defined by reference to where those vessels may have docked previously or, even more particularly, whether the employees who worked on them were members of a particular or any union. Theoretically at least, and in Auckland in particular, some of those employees would appear to be often (perhaps always) people who have elected not to be members of a particular or any union. Put another way, even if Mr Cranney is

correct in his interpretation of s 81(1)(a)(iv) and (v) of the Act which I find he is not, vessels such as the *Lisa Schulte*, which may have come from ports including Auckland, will have been worked lawfully and usually by non-union labour. Put simply, it is "usual" or "normal" for non-union employees to work vessels such as the *Lisa Schulte*, at least in Auckland and perhaps elsewhere.

[12] Mr Cranney sought to refine the position by saying that it related to people who were engaged in strike breaking but I think that does not advance the position much, if at all, either as one of principle interpreting the Act or in practice.

[13] Unless the intended action does not qualify as a strike under s 81, it is clearly unlawful on at least two grounds and the defendants accept this. The first is that it will be undertaken by employees who are subject to a current collective agreement with LPCL. Independently, strike action can only be given on no less than 14 days' notice in respect of the port's operations and no notice in the required statutory form has been given, let alone 14 days' notice.

[14] I consider that the intended black banning of the *Lisa Schulte* and potentially other vessels in the same circumstances meets the definition of a strike in more than just s 81(1)(a)(iv) and (v). It would amount also, under s 81(1)(a), to a partial discontinuance of the employment of the employees or a reduction in the normal performance of it. It may also amount to the breaking by the employees of their employment agreements under s 81(1)(a)(iii).

[15] I do not find that there is a tenable arguable case for the defendants to either so interpret s 81 or, even if it is so interpretable, to be sustained on the facts. It follows that there is a very strong argument of unlawfulness of the proposed strike action.

[16] Assessing the balance of convenience, the strengths of the parties' cases is a relevant factor and, for reasons already set out, this favours the plaintiff's position. In addition, the potential losses, both of income and commercial reputation that the port company is likely to suffer will be difficult to quantify. Although I acknowledge

that it is important to the defendants to signal their solidarity for Auckland members, the law does not favour their doing so by strike action in this case.

[17] I should mention the principal argument advanced by Mr Davenport at this point. This was that the plaintiff's application to the Court for the blunt remedy of interim injunction is not in accordance with the good faith spirit of the Act. The difficulty with that submission is, as the Court has previously found, good faith and the ability to strike and lock out must co-exist and a balance must be achieved between those obligations and rights under the Act. So, too, is the legislation very clear about lawful and unlawful strike action so that the statutory remedies to restrain unlawful strike or lockout action must likewise co-exist with good faith obligations. I accept that it is unfortunate that these events in Canterbury have escalated very quickly and recently but I do not think it would be a proper exercise of the Court's discretion to decline interlocutory injunctive relief by doing so in reliance on good faith arguments. There are other avenues that will now be available to the parties including the mediation that I will direct which will enable those important elements of their ongoing employment relationship to take place.

[18] The exercise of the Court's residual discretion to grant an injunctive order will follow the strong arguable case and the strong balance of convenience findings that I have made.

[19] There will, therefore, be an order in the following terms that may be sealed by the plaintiff and the sealed order will have to incorporate the undertaking as to damages as is required by the High Court Rules. The orders will vary slightly from that applied for. The orders that I make are follows:

> **The Maritime Union of New Zealand Inc and The Rail and Maritime Transport Union Inc and their officers, employees, agents and members are restrained from being a party or parties to, or directing, encouraging or inducing those members employed by Lyttelton Port Company Limited from participating in unlawful strike action and, in particular, in relation to the arrival, working and departure of the vessel known as**

Lisa Schulte **and other vessels until further order of this Court. This injunctive order takes effect immediately.**

[20] As in the case of the *CentrePort* proceedings[3], I now direct the parties to mediation pursuant to s 188(2)(b) of the Act. As in the Wellington case also, if mediation is unsuccessful, then the Registrar of the Court should arrange a telephone directions conference at which the substantive proceedings can be timetabled to a hearing.

[21] Given the current proliferation of such proceedings which, although they involve different employer parties and a number of similarities, consideration should be given to a consolidation of those substantive proceedings if they are to go further.

[22] I reserve costs on this application.

[23] Finally, I wish to say this. The Court is aware that despite the fraught circumstances in which the Court has sat and granted similar injunctive orders over the last few days, there has been no suggestion that they would not be complied with. That is a responsible and commendable restraint by the people who are subject to those orders in trying circumstances. And although, in one sense, it is axiomatic that people are expected to comply with the law including Court orders, the willingness to accept, even if reluctantly, what the law requires of people in these situations is admirable and I think is assisting the present industrial difficulties. For that reason, the orders I have made are the minimum restraint appropriate in the circumstances. I am obliged to counsel who have presented their arguments before me this evening, and the patience and good humour of those people who have come to Court to listen to the case affecting their port.

GL Colgan
Chief Judge

Judgment delivered orally at 6.18 pm on Wednesday 7 March 2012

[3] At [21]