IN THE EMPLOYMENT COURT
WELLINGTON

[2012] NZEmpC 43
WRC 5/12

IN THE MATTER OF	an application for an injunction
AND IN THE MATTER OF	an application for interim injunction, an application for urgency
BETWEEN	CENTREPORT WELLINGTON LIMITED Plaintiff
AND	THE MARITIME UNION OF NEW ZEALAND INCORPORATED First Defendant
AND	THE RAIL AND MARITIME TRANSPORT UNION INCORPORATED Second Defendant

Hearing: 6 March 2012
(Heard at Wellington)

Appearances: Michael Quigg and Tim Sissons, counsel for the plaintiff
Peter Cranney and Anthea Connor, counsel for the first defendant
Geoff Davenport, counsel for the second defendant

Judgment: 6 March 2012

INTERLOCUTORY JUDGMENT OF JUDGE A D FORD

Introduction

[1] On the afternoon of Sunday, 4 March 2012, the plaintiff filed an application for an interim injunction along with an application for urgency. I issued a minute on the same day directing a hearing for this morning and fixed a timetable for the filing of further affidavits. A directions conference was convened yesterday in which further issues were raised and dealt with. The stated grounds upon which urgency was sought were:

> 2.1 The members of the first and second respondents (defendants) commenced unlawful strike action upon the berthing of the Maersk Aberdeen at CentrePort on 2 March 2012 and continued such unlawful strike action on 3 March 2012.
>
> 2.2 The vessel the Maersk Aberdeen which is the subject [of] the unlawful strike action is scheduled to be worked by the members of the first and second respondents as from 19:30 today 4 March 2012.

[2] The application for the urgent interim injunction sought seven different orders, including declarations, but in the course of submissions, I indicated to counsel that it appeared to me that declarations were not an appropriate remedy in terms of interim injunctive relief insofar as the Court at this stage is concerned with only an arguable case scenario which does not involve the degree of certainty that would be required to substantiate a declaration. A shortened version of the order sought was subsequently submitted.

[3] The Court is obliged to counsel for their cooperation in relation to this urgent fixture.

Background

[4] The applicant, CentrePort Wellington Limited, operates the port of Wellington. Rather ironically, the issue before the Court has its genesis in a high profile, long-running industrial dispute at the port of Auckland between the Maritime Union of New Zealand Incorporated (MUNZ) and the Ports of Auckland Ltd. Since September 2011, both parties involved in the Auckland dispute have taken industrial action involving, since December 2011, a series of lockouts and strikes. From 24 February 2012, MUNZ members have been on strike at the port of Auckland. The Court was informed in an affidavit filed by Mr Joseph Fleetwood, General Secretary of MUNZ, that the port company is proposing to engage contractors to carry out the work of 350 MUNZ members which will result in them losing their jobs. On 1 March 2012, proceedings were commenced by MUNZ against the Ports of Auckland Ltd and they are still to be dealt with.

[5] On Wednesday, 29 February 2012 the Maersk Aberdeen, a container ship owned by the Maersk shipping line berthed in Auckland at the Fergusson container terminal. The vessel was then worked for approximately eight hours by a mix of

non-union employees and port company management. The Maersk Aberdeen left the port of Auckland and arrived at the port of Wellington late on the evening of Thursday, 1 March 2012. In an article published in the New Zealand Herald on 1 March 2012 under the heading, "Importers relieved as first cargo offloaded", the MUNZ president, Mr Gary Parslow, was reported as stating that, "shipping companies docking at the Fergusson terminal won't be welcome anywhere else in the world".

[6] Mr Stephen Harris, General Manager at CentrePort deposed in an affidavit that he had remained in active negotiations with MUNZ leading up to the arrival of the Maersk Aberdeen. He allowed the unions to undertake a four-hour stop work meeting (despite the required 14 days notice not having been given) around the time of the vessel's arrival, which he hoped would allow the unions to express their views about the ports of Auckland issue, "without having a significant impact on CentrePort's operations." He then told how hope had diminished by the night of 2 March 2012 when the Maersk Aberdeen was due to be worked. A picket commenced at approximately 9.00 pm outside the security guard house adjacent to CentrePort's main building. The picket line included Mr Fleetwood and other senior union officials, including officials from both defendants. They were holding placards stating this was an official MUNZ or RMTU picket line.

[7] Mr Stephen Harris deposed that the employees who were due to work the Maersk Aberdeen arrived and were instructed to commence work but none of them did so. One of the employees then provided what Mr Harris said, "... seemed to be a standardised document headed 'Stance in Relation to Instructions to Cross Picket Lines'". That document indicated that the employees were refusing to work because, after receiving advice from their respective unions, they were concerned about their health and safety if they disobeyed the wishes of those on the picket line. The document concluded that if the employer had any concerns about the employees' refusal to cross the picket line, then it was to direct those concerns to the employees' union representative, who had authority to represent them in matters of health and safety.

[8] On Saturday, 3 March 2012, Mr Harris met with Mr Fleetwood and the latter informed him that the picket line and the employees' refusal to work the Maersk

Aberdeen were because that ship had been worked in Auckland by non-union labour. Mr Fleetwood went on to say that the picket line was related to the Ports of Auckland Ltd dispute in respect of which 350 staff could lose their jobs. Mr Harris deposed that, "It was only after making those statements that he (Mr Fleetwood) made any reference to the employees' refusal to work having anything to do with health and safety, by saying that the crossing of the picket line constituted a hazard which gave an 'arguable' basis for MUNZ members refusing to work."

[9] Later on 3 March 2012, CentrePort's counsel wrote to Mr Fleetwood alleging that in refusing to work the Maersk Aberdeen, the workers were engaged in an unlawful strike and notice was given that an urgent injunction would be sought unless the union could confirm in response that the vessel would be worked on the evening of Saturday, 3 March 2012. No response was received to the solicitor's letter. The Maersk Aberdeen was due to be worked again on 3 March 2012 at 9.00 pm, but when the workers were requested to accept orders to start work on the Maersk Aberdeen, they again refused. The vessel remains in port pending the outcome of this injunction application.

Submissions

[10] There was no dispute about the requirements for an interim injunction. The plaintiff must establish that it has an arguable substantive case, that the balance of convenience favours the granting of the injunctive relief as does the overall justice of the case. There was also no dispute that CentrePort is a party to a collective agreement with the unions that does not expire until 8 March 2013.

[11] The essence of Mr Quigg's submissions on behalf of the plaintiff were that there was clearly a strike in terms of s 81(1)(a)(i), (iv) and (v) of the Employment Relations Act 2000 (the Act) in that the employees had refused to perform usual work loading/unloading the Maersk Aberdeen on the nights of 2-3 and 3-4 March 2012; that the strike was unlawful under s 86 of the Act because a binding collective agreement was in force and it could not be claimed that the strike was lawful under s 84 of the Act, (which makes strikes and lockouts lawful on the grounds of safety or health) in that the defendants could not show reasonable justification for the strike on the grounds of safety or health.

[12] Counsel for the first defendant, Mr Cranney, did not seek to challenge Mr Quigg's claim that the strike could not be justified on the grounds of safety or health. Quite reasonably, he accepted that there was no evidence to suggest that the picket line involved violence or any hint of violence. On the contrary, he noted that the evidence indicated that "good humour" was maintained on the picket line.

[13] Mr Cranney advanced the (accepted novel) submission that the plaintiff had not been able to establish that the employees were on strike in that CentrePort was unable to point to any contractual provision which required the employees to work a vessel that had been loaded elsewhere by non-union labour. It followed, in Mr Cranney's submission, that the Court could not be satisfied that the employees had refused or failed to accept engagement for work in which they were usually employed or had reduced their normal output, within terms of the relevant subsections in s 81 of the Act.

[14] The short answer to this submission is that it was not supported by any affidavit evidence filed in this proceeding. If Mr Fleetwood, for example, had provided evidence in his affidavit that might support Mr Cranney's submission then the plaintiff would have had a proper opportunity to respond. Mr Fleetwood did not depose that there was no requirement for the plaintiff's employees to work vessels that had been previously worked by non-union labour. What he did depose was:

> 21. The aim was to encourage all shipping companies not to use non International Transport Federation (ITF) union affiliated labour to work their vessels at POAL during the dispute...

That is quite a different proposition from the submission Mr Cranney put forward. The evidence from Mr Harris satisfied me that the CentrePort employees rostered to work the Maersk Aberdeen were being required to carry out their normal duties in terms of the relevant collective agreement and in failing to carry out those duties they were participating in an unlawful strike. I agree with both Mr Quigg and Mr Cranney that there were no genuine issues of health and safety involved.

[15] Counsel for the second defendant, Mr Davenport, advanced two principal submissions. First, he stressed the importance of mediation "as the primary problem-solving mechanism" in terms of s 3 of the Act and he drew my attention to

a letter he had written to CentrePort's counsel on 3 March 2012 suggesting mediation in favour of litigation. Mr Quigg's response to that submission, effectively, was that in all the circumstances, particularly given the urgency of having the vessel worked, mediation was not a feasible option. Section 188(2)(b) of the Act recognises that a direction to mediation is inappropriate if it will undermine the urgent or interim nature of the proceedings. Mr Quigg did, however, indicate that CentrePort had no objection to mediation as a longer-term solution provided there could be a return to the status quo by having the Maersk Aberdeen worked in the meantime. I agree with Mr Quigg and note that the situation is not unlike the position in *Tranz Rail Ltd v Rossen*[1] where Judge Shaw ordered mediation but only after the granting of the injunction sought.

[16] The second submission made by Mr Davenport related to what he described as a "Fundamental deficiency in the proceedings filed in the Court by the Plaintiff". In essence the point made was that the plaintiff had chosen not to name any employees as a party to the proceedings whereas each employee had made their individual choice about health and safety at work in deciding not to cross the picket line. This submission, however, fails because I have found, as Mr Cranney accepted, that the facts in this case simply did not give rise to any plausible arguments about health and safety.

[17] Turning to the balance of convenience, I accept Mr Quigg's submission, affirmed by Mr Harris in his affidavit, that the events in question have had a significant potential impact on CentrePort and on CentrePort's reputation as a "can-do" port that gave the plaintiff an important competitive advantage. Damages, in these circumstances, would be difficult to quantify.

[18] Standing back and looking at where the overall justice of the case lies, again, I have no hesitation in finding that it favours the granting of the injunctive relief sought. In my view, the plaintiff has established a strongly arguable case that the defendants have been major participants in an unlawful strike. CentrePort took reasonable steps to attempt to avert strike action occurring by allowing time for a

[1] WC 30/03.

lengthy stop work meeting prior to the arrival of the Maersk Aberdeen but that was not successful. As Mr Quigg expressed it:

> 34. CentrePort respects the right to picket in a free and democratic society. ... However, that right does not extend to influencing workers to take unlawful strike action and thereby damage CentrePort's ability to fulfil its contractual duties.

Conclusion

[19] For the foregoing reasons, I am satisfied that the plaintiff has made out its claim for an urgent interlocutory injunction. The injunction I now grant, which is in slightly different terms from the draft submitted by the plaintiff, is as follows:

> Until further order of the Court, the First and Second Defendants and their officers, employees and agents are ordered to refrain from being party to or directing or encouraging or inducing their members to refrain from working the Maersk Aberdeen or any other vessel on grounds related to the dispute at the Ports of Auckland.

[20] I expect the terms of this injunction to be sufficient to allow the Maersk Aberdeen to be worked by CentrePort's employees at the earliest opportunity. If necessary, however, leave is reserved to the plaintiff to apply for any urgent ancillary directions.

[21] I direct the parties to mediation on the matters at issue pursuant to s 188(2)(b) of the Act. If the mediation is unsuccessful, then the Registrar is to arrange a telephone directions conference at which a timetable will be agreed to leading up to the substantive hearing.

[22] In the meantime, costs are reserved.

A D Ford
Judge

Judgment signed at 3.30 pm on 6 March 2012