IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

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

[2021] NZEmpC 55
EMPC 146/2021

IN THE MATTER OF	an application for a permanent injunction
AND IN THE MATTER OF	an application for interim injunction
BETWEEN	HUGH MACLEOD AND OTHERS First Plaintiffs
AND	KITTY TAEWA AND OTHERS Second Plaintiffs
AND	NEW ZEALAND TRAMWAY AND PUBLIC PASSENGER TRANSPORT EMPLOYEES' UNION WELLINGTON BRANCH INCORPORATED Third Plaintiff
AND	WELLINGTON CITY TRANSPORT LIMITED First Defendant
AND	CITYLINE (NZ) LIMITED Second Defendant

Hearing:	24 April 2021 (Heard at Wellington by telephone)
Appearances:	P Cranney, counsel for plaintiffs (Messrs O'Sullivan and Dawson in attendance) A Caisley and S Worthy, counsel for defendants J Laing, counsel for Greater Wellington Regional Council (under a watching brief)
Judgment:	24 April 2021
Reasons:	26 April 2021

REASONS FOR JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Late on Friday 23 April 2021, the plaintiffs filed an application for an urgent interim injunction to restrain the lockouts of drivers operating bus services, under notices served on the third plaintiff by the defendant on Thursday 22 April 2021.

[2] An urgent hearing was timetabled and convened for Saturday 24 April 2021.

[3] Soon after the hearing, I issued an interlocutory judgment confirming that relief should be granted to the plaintiffs, as sought.[1] I indicated that these reasons for judgment would be issued as soon as possible.

Background

[4] Wellington City Transport Limited (WCTL) provides bus public transport services in the Wellington region, and is part of the NZ Bus group of companies. Cityline (NZ) Limited (CNZL) also provides bus public transport services in the Wellington region. It too is part of the NZ Bus group of companies.

[5] WCTL is party to a collective agreement with the New Zealand Tramways and Public Passengers Transport Employees' Union Wellington Branch Inc (Tramways Union). That agreement came into effect on 15 October 2018. It was expressed to expire on 17 October 2020. On 17 August 2020 the Tramways Union initiated bargaining with WCTL for a new collective agreement with that entity, which continues.

[6] CNZL is also a party to a collective agreement with the Tramways Union which came into force on 15 October 2018 and was expressed to expire on 17 October 2020. On 17 August 2020 the Tramways Union initiated bargaining with CNZL for a new collective agreement, and that bargaining is also ongoing.

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1 *MacLeod v New Zealand Tramways and Public Passenger Transport Employees' Union Wellington Branch Inc* [2021] NZEmpC 54.

[7] In the bargaining meetings and discussions which have occurred since, meetings between the parties have been "joint" – that is, meetings about new terms and conditions for operator employees of both WCTL and CNZL were combined, although the parties' discussions have related to terms and conditions that will apply to the persons who are employed by each entity.

[8] Mr Jay Zmijewski, Chief Operating Officer for the NZ Bus group of companies including for WCTL and CNZL, said it is common ground between the parties that there should be no difference between the terms and conditions for the WCTL employees and the CNZL employees.

[9] He also said that there were many differences between the parties, but the one thing on which there has been agreement is that employees should have common terms and conditions. For their part, WCTL and CNZL also wish to adopt industry terms that would apply to not only these two companies, but other associated entities.

[10] On two occasions, the companies tabled proposals for one collective agreement between the two companies and the Tramways Union; the first was on 17 March 2021; a revised version was tabled on 16 April 2021.

[11] Although bargaining has continued for eight months, no consensus has resulted. The Court was told that face-to-face bargaining, mediation, and interest-based bargaining facilitated by the Ministry of Business Innovation and Employment, have been attempted; and other attendees have also attended bargaining sessions to help the parties progress their differences. Mr Zmijewski says the parties are still far apart.

[12] At 3 am on 23 April 2021, notice of strike action was given by the Tramways Union, which took effect from 4 am on that day.

[13] In response to this action, WCTL and CNZL took industrial action of their own.

[14] They issued two lockout notices addressed to the Tramways Union. These are the subject of the present application,

[15] The first notice was dated 22 April 2021, stating that the first plaintiffs, employees of WCTL, would be continuously locked out from 4 am on 24 April 2021, until they accepted the proposed collective agreement which was tabled on 14 April 2021; it identified both the first and second defendants as "the employer".

[16] A second notice, also dated 22 April 2021, relates to employees of CNZL. It was to the same effect.

Interim injunction principles

[17] There is no controversy as to the applicable principles when considering an application for an interim injunction. These were authoritatively stated in *NZ Tax Refunds Ltd v Brooks Homes Ltd*, when the Court of Appeal said:[2]

> The approach to an application for an interim injunction is well established. The applicant must first establish that there is a serious question to be tried or, put another way, that the claim is not vexatious or frivolous. Next, the balance of convenience must be considered. This requires consideration of the impact on the parties of the granting of, and the refusal to grant, an order. Finally, an assessment of the overall justice of the position is required as a check.

[18] The Supreme Court, in its consideration of the *Brooks Homes* litigation, stated that the merits of the case, insofar as they can be ascertained at the interim injunction stage, have in New Zealand been seen as relevant to the balance of convenience and to the overall justice of the case.[3]

[19] I proceed on the basis of these principles.

A serious question/arguable case

The first three causes of action

[20] Underlying the first three causes of action is the premise that it is not legal under the Employment Relations Act 2000 (the Act) to conduct a lockout which is a

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2 *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90, (2013) 13 TCLR 531 at [12]. Footnotes omitted)

3 *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60 at [6].

multi-employer collective agreement, where bargaining has been initiated for two single collective employment agreements.

[21] The parties' arguments require consideration of a number of provisions of the Act. At this stage it suffices to set out the three provisions, insofar as they are relevant. Section 33 materially provides:

> **33 Duty of good faith requires parties to conclude collective agreement unless genuine reason not to**
>
> (1) The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to.
>
> …

[22] Section 45 materially provides:

> **45 One or more unions proposing to initiate bargaining with 2 or more employers for single collective agreement**
>
> (1) This section applies to—
>
> (a) 1 union proposing to initiate bargaining with 2 or more employers for a single collective agreement:
>
> (b) 2 or more unions proposing to initiate bargaining with 1 or more employers for a single collective agreement.
>
> (2) Before bargaining for the single collective agreement is initiated under section 42, the union or each union (as the case may require) must hold, in accordance with its rules, separate secret ballots of its members employed by each employer intended to be a party to the bargaining.
>
> (3) A secret ballot may be held only if the members of the union employed by the employer are—
>
> (a) not covered by an applicable collective agreement that is in force; or
>
> (b) covered by an applicable collective agreement that is in force and the secret ballot is held not earlier than 60 days before the time within which bargaining may be initiated by the union under section 41.
>
> (4) The result of a secret ballot of members of the union employed by an employer is determined by a simple majority of the members who are entitled to vote and who do vote.
>
> …

[23] Section 47 materially provides:

> **47 When secret ballots required after employer initiates bargaining for single collective agreement**
>
> (1) This section applies to—
>
> (a) 2 or more unions in relation to which 1 employer has initiated bargaining for a single collective agreement:
>
> (b) 1 or more unions in relation to which 2 or more employers have initiated bargaining for a single collective agreement.
>
> (2) A union to which subsection (1)(a) applies must hold a secret ballot of its members employed by the employer if the union considers that a majority of its members employed by the employer would disagree with bargaining for a single collective agreement.
>
> (3) A union to which subsection (1)(b) applies must hold a secret ballot of its members employed by an employer to which subsection (1)(b) applies if it considers that a majority of its members employed by the employer would disagree with bargaining for a single collective agreement.
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> …

Parties' cases

[24] The plaintiffs' argument has three planks. In summary, they contend:

(a) Section 33 of the Act requires the first defendant to conclude a collective agreement with the third plaintiff. Neither the first nor second defendant is entitled to substitute another entity as the employer party to the collective bargaining. Consequently, the right to lock out cannot extend to compelling a union or workers in single employer bargaining to enter into either a MECA or one in which two employers replace the single employer initiated against.

(b) A union may only enter into a single multi-employer agreement, a MECA, if it conducts pre-initiation ballots with the employees of the proposed employer parties prior to initiation: s 45 of the Act. On one interpretation, a single multi-employer agreement has been offered. The lockout demand requiring acceptance could not be met without the third plaintiff breaching s 45 because there has been no ballot under that section. Accordingly, the lockouts are not lawful.

(c) Alternatively, two employers may only enter into a multi-employer agreement, a MECA, if they first comply with s 47 of the Act, and

thereby enable the union concerned to conduct the ballots required by s 47(3). On one interpretation, such a document has been offered. Such an agreement may only be settled if the employers have initiated bargaining and met the other requirements of the Act. It is not lawful to seek to avoid these requirements by way of a jointly organised lockout requiring a MECA.

[25] The defendants say all these points are erroneous in law or in fact. Thus:

(a) Section 33 of the Act does not require WCTL and CNZL to conclude separate collective agreements with the Tramways Union. In *Service and Food Workers Union Nga Ringa Tota v Auckland District Health Board*, this Court held that the requirement to conclude a collective agreement does not require the conclusion of any particular kind of a collective agreement.[4]

(b) The issue about who the parties to a collective agreement should be is a fundamentally bargainable issue.[5] Once bargaining has been initiated, the parties clause, along with all other terms and conditions, can be bargained. There is nothing unlawful about locking out employees to achieve a MECA which binds all the employees in bargaining.

(c) Sections 45 and 47 of the Act relate to initiation of bargaining, and have no application to this case because it does not concern that topic. This case concerns the other end of the process, the conclusion of bargaining.

(d) It is factually erroneous to assert that the companies are trying to substitute another entity as the employer party to the collective bargaining. The wish to have the same terms and conditions applicable with both WCTL and CNZL has been one of the few points of common

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4 *Service and Food Workers Union Nga Ringa Tota Inc v Auckland District Health Board* [2007] ERNZ 553 at [60].

5 *Service and Food Workers Union*, above n 4, at [92].

> ground between the parties. It was entirely unsurprising that those entities would table a proposal for a collective agreement between the two companies and the Tramways Union. They were not substituting one employee entity for another; rather, they were proposing a collective agreement which was in line with the parties' expectations.

Analysis

[26] In my view, the plaintiffs' causes of action are arguable. Conceivably, the proposed collective agreement is one falling under s 45(1)(a). It proceeds on the footing that the Tramways Union initiated bargaining with two employers who may be treated as one, since the two companies are described in the proposed agreement as "the employer". But the Tramways Union did not initiate bargaining on that basis under s 45. There has been no ballot under that section. The lockout notices incorrectly sidestep this requirement.

[27] If, alternatively, the document is a MECA, as the defendants assert, then I accept the decision relied on by these parties is not on point. The *Service and Food Workers Union* case broadly establishes that if a party initiates for a MECA, it is legitimate to settle single-employer collective agreements, that is SECAs. But there is no case which goes the other way, involving a situation where bargaining is initiated for SECAs, and a MECA is offered.

[28] This is a valid distinction, as was recognised by the Court of Appeal in *Chief Executive, Unitec Institute of Technology v Tertiary Education Union*.[6] That decision considered the effect of s 43 of the Act, where there is a negative ballot of union members. It held that where that occurs, the parties are not permitted to continue bargaining.

[29] The Court went on to comment on the dicta of the *Service and Food Workers* case relied on by the defendants. It said:[7]

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6 *Chief Executive, Unitec Institute of Technology v Tertiary Education Union* [2011] NZCA 286, (2011) 9 NZELC 93,873, (2011) 8 NZELR 616.

7 *Service and Food Workers Union*, above n 4 at [31]. (footnotes omitted)

> … In that case, the Employment Court observed that the Act "contemplates one set of negotiations for the same parties initiated either by a union or unions or by an employer or employers". If the negative ballot under s 47 can stop the employer-initiated process, [counsel] says that will mean the initiation of a new set of negotiations on the Union's terms. The Court in the *Service and Food Workers* case was, however, dealing with the situation where negotiations had been underway for some time and the union sought to counter-initiate within that process. *Section 47 deals with a different situation, namely, whether a precondition for continuing the employer-initiated bargaining has been met.*
>
> (Emphasis added)

[30] That dicta recognises that the necessity for a ballot arises as a precondition for the continuation of employer initiated bargaining. A lockout which proceeds on the basis of a multi-employer single union agreement must first comply with s 47. That obligation cannot be sidestepped.

[31] On either basis, I am satisfied that the plaintiffs' case is arguable.

[32] I turn to s 33. It is a provision which cannot be considered in isolation. It sits alongside the other rules of bargaining contained in pt 5 of the Act. The reference in s 33(1), requiring "a union and an employer bargaining for a collective agreement to conclude a collective agreement …" is a reference to bargaining as initiated under s 40 of the Act, but subject to such other rules as may apply, including ss 45 or 47.

[33] Mr Caisley, counsel for the defendants, argued that the course taken is no more than legitimate counter-initiation which is permissible within bargaining, again as mandated in the *Service and Food Workers Union* case. However, that case was one concerning who the other parties to an agreement would be, where a union had initiated collective bargaining for a MECA. It was the identity of those other intended employers which was the "fundamental bargainable point" alluded to by the Court. A SECA could be settled even although a MECA was sought.

[34] Adopting the point made by the Court of Appeal in the *Unitec* case, the issue which arises in the present instance is different. Can a union enter into a MECA if SECAs are sought, and there has not been compliance with either s 45 or s 47 of the Act, each of which potentially requires the conducting of ballots within a union?

[35] In the circumstances which are before the Court, the defendants' case would require the Court to conclude that in such a case Parliament did not intend that there would be the protection of a ballot for a union and its members, unlike the position in ss 45 and 47. On a provisional basis that would seem to be inherently unlikely. No previous authority has approved such a scenario.

[36] Mr Zmijewski said that the Tramways Union's new point represented a very significant reversal of position, purely brought about as an excuse to challenge the lockouts. He went on to give an undertaking that if the Tramways Union actually wanted to enter into two separate agreements with WCTL and CNZL, each on the terms proposed, the companies would have no hesitation in agreeing to this.

[37] Mr Cranney, counsel for the plaintiffs, submitted that the 250-odd persons who were the subject of the lockout notices would, if those notices were allowed to stand, remain locked out under the demand that the Tramways Union sign a MECA and not two SECAs.

[38] Section 94 of the Act describes the form of the notice that is applicable to an employer providing passenger transport services. The notice must describe the date and time on which, or an event on the occurrence of which, the lockout will end. As noted, that event is described in the notices as the acceptance of a MECA; the lockouts would not be lawful if the end of those lockouts was in fact the acceptance of separate SECAs, since this event was not described in that way in the notices.

[39] It is trite that notices must be accurately expressed, so as to enable the recipients to address the impending event.[8]

[40] The plaintiffs are entitled to rely on the provisions of the Act in pt 5; it would not be within the objectives of the Act for them to be compelled to accept a MECA if the rules as to bargaining had not been complied with.

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8 *Secretary for Justice v New Zealand Public Service Assoc Inc* [1990] 2 NZLR 36, (1990) ERNZ Sel Cas 601, [1990] 1 NZILR 347; *Service and Food Workers Union Nga Ringa Tota Inc v Alsco NZ*, (2008) 8 NZELC 99,249, [2007] ERNZ 713 at [27].

[41] In summary, it is arguable that the demands made by the employer are ones which it cannot lawfully make, having regard to the carefully framed provisions which Parliament has seen fit to include in the Act. Having initiated for two SECAs, it is arguable that the MECA the companies have offered do not relate to the bargaining the Tramways Union initiated, so the criteria for a lawful lockout under s 83 are not satisfied.

Fourth cause of action – availability provision

[42] Clause 14.5 of the proposed collective agreement provides that rosters may be subject to change at the employer's reasonable discretion in certain circumstances.

[43] The plaintiffs submit that such a provision is an unlawful availability provision within the meaning of s 67D(3) of the Act, because the agreement does not comply with the compensation provisions of that subsection. They say that compelling workers to accept an unlawful agreement by means of a lockout renders the lockout unlawful.

[44] Section 67D(3) provides:

> **67D Availability provision**
>
> (1) In this section and section 67E, an availability provision means a provision in an employment agreement under which—
>
> (a) the employee's performance of work is conditional on the employer making work available to the employee; and
>
> (b) the employee is required to be available to accept any work that the employer makes available.
>
> (2) An availability provision may only—
>
> (a) be included in an employment agreement that specifies agreed hours of work and that includes guaranteed hours of work among those agreed hours; and
>
> (b) relate to a period for which an employee is required to be available that is in addition to those guaranteed hours of work.
>
> (3) An availability provision must not be included in an employment agreement unless—
>
> (a) the employer has genuine reasons based on reasonable grounds for including the availability provision and the number of hours of work specified in that provision; and
>
> (b) the availability provision provides for the payment of reasonable compensation to the employee for making himself or herself available to perform work under the provision.

> (4) An availability provision that is not included in an employment agreement in accordance with subsection (3) is not enforceable against the employee.
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> …

[45] The defendants submit that the clause is not an availability provision, but even if it was, it would not make the proposed collective agreement unlawful. Instead, the Act would operate so that an employee could refuse work under that provision.[9] Further, they say s 67F provides that an employee may not be adversely treated by the employer for refusing to perform this work.

[46] Although Mr Caisley submitted that on the authority of *Fraser v McDonald's Restaurants (New Zealand) Ltd*,[10] the assessment of whether a provision is an availability provision requires an understanding of how the parties applied the provision in practice, I do not think that decision is of assistance here.

[47] In that case, the Court was concerned with a provision in an employment agreement as it operated in practice. Here, the question is whether the proposed provision is, on its face, legal. It is arguable that the clause falls within the definition of an availability provision as defined in s 67D(1). An employee would have to be available to accept particular hours of work, as required by the employer. If this point were to be accepted, then it would also be arguable that the provision should also provide for the payment of reasonable compensation for the employee making himself or herself available to perform work under the provision, which it does not.

[48] Section 162, which applies to the Court via s 190(1) of the Act, is relevant. Under those provisions, in any matter relating to an employment agreement, the Court may make any order that the High Court or the District Court may make under any enactment or rule of law relating to contracts, including pt 2 of the Contract and Commercial Law Act 2017.

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9 Employment Relations Act 2000, s 67E.

10 *Fraser v McDonald's Restaurants (New Zealand) Ltd* [2017] NZEmpC 95, [2017] ERNZ 539 at [53].

[49] Section 71(1)(b), in pt 2 of that Act, provides that an illegal contract "… includes a contract that contains an illegal provision, whether that provision is severable or not."

[50] If the availability provision is illegal, then the collective agreement may be regarded as illegal.

[51] Lockout notices based on it would be unlawful. In *Spotless Services (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc*, the Court of Appeal stated:[11]

> … If an employer's demand is unlawful, then both parties accept (and we agree) that the lockout will be unlawful. This is, however, not because the lockout does not meet the definition of lockout in s 82 … It will be a lockout but an unlawful one because ss 83 and 84 could not be interpreted to allow any person, whether a union, employer or employee, to act in a manner that is contrary to the ERA or is otherwise unlawful. Unlawfulness means more than making a demand that a union and/or employees are not obliged to accept. It must mean making a demand that the employer cannot lawfully make or one that an employee cannot lawfully accept. …

[52] For this separate reason, it is arguable that the lockout notices are illegal.

Summary as to arguable case

[53] I am satisfied that the plaintiffs' claims are not frivolous or vexatious, and are arguable.

Balance of convenience/overall justice

[54] I deal with balance of convenience and overall justice together, as did counsel.

[55] Mr Caisley submitted that the balance of convenience and overall justice favoured the parties to continue with their collective bargaining, including recourse to industrial action if they so chose.

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[11] *Spotless Services (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2008] NZCA 580, [2008] ERNZ 609 at [40].

[56] He said revoking the lockout notices would not do anything to advance the progress of bargaining since the parties would still retain their underlying rights to have recourse to industrial action.

[57] He argued that the Tramways Union escalated bargaining through the use of industrial action; it and the employees could neither be surprised, nor could they properly complain, when the defendants also initiated industrial action.

[58] It is the defendants' position that allowing the lockout to proceed, whilst it would cause disruption to services, would bring an urgency to bargaining that would promote resolution, and ultimately greater certainty.

[59] I agree that the parties have statutory rights to strike and lock out but, in exercising those rights, there must be proper compliance with the various provisions of the Act, given the very significant impact these initiatives may have on the other parties to the bargaining.

[60] For the plaintiffs, as already noted, it was submitted that it would be an appalling result if the Tramways Union was compelled to accept terms in the face of arguably unlawful lockouts.

[61] In my view, the factors raised for the plaintiffs are entitled to more weight than the factors raised for the defendants.

[62] For that reason alone, the balance of convenience and overall justice favour the granting of an interim injunction.

[63] But there is a further and more powerful factor, which relates to the interests of the public. Evidence has been placed before the Court as to the significant impact of the cessation of bus services on those third parties.

[64] It is apparent that the strike action was disruptive for many commuters and others, as would be expected in respect of a key passenger service.

[65] The strike was time-limited. The difficulty with the defendants' lockout is that it is indefinite; no prediction could be made as to the length of the lockout and thus when normal bus operations might resume. The lockouts would likely have a significantly more draconian effect on the public than did the strike. Since the lockout notices are arguably illegal, this is a strong factor justifying the grant of the application.

[66] A final persuasive point is that the Court is able to accommodate a very prompt hearing of the substantive fixture – an option I discussed with counsel in the course of the hearing – in the week of 3 May 2021. Counsel confirmed that they would be in a position to advance their respective cases. This means that any interim relief is likely to be for a confined period only.

Conclusion

[67] On the basis of the foregoing reasoning, in my interlocutory judgment I confirmed that, until further order of the Court, the defendants are prohibited from locking out employees in reliance on the two notices served by the defendants dated 22 April 2021.

[68] Costs were reserved.

BA Corkill
Judge

Judgment signed at 8.45 pm on 26 April 2021