IN THE EMPLOYMENT COURT
WELLINGTON

[2016] NZEmpC 173
EMPC 333/2016

IN THE MATTER OF	an application for an injunction
BETWEEN	LYTTELTON PORT COMPANY LIMITED Applicant
AND	MARITIME UNION OF NEW ZEALAND INCORPORATED Respondent

Hearing:	19 December 2016 (heard at Wellington)
Appearances:	R Towner and E Coats, counsel for the applicant J Goldstein and L Ryder, counsel for the respondent
Judgment:	20 December 2016

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

An urgent question

[1] Should an imminent strike at the Port of Lyttelton be permitted to proceed?

[2] That is the issue raised by an urgent application for an interim injunction, brought by the Lyttelton Port Company Ltd (LPC) against the Maritime Union of New Zealand Inc (MUNZ or Union), whose 169 members propose to strike. LPC seeks an order restraining the proposed strike.

[3] LPC asserts that the Union's notice to strike relates to an essential service, and is defective on several significant grounds; the Union responds by stating that proper notice has been given, and that the strike is a legal response to difficulties the parties have encountered in bargaining for a new collective agreement.

Background

[4] Members of MUNZ have been bound by a collective employment agreement (CEA) with LPC for many years; the most recent such agreement expired on 7 March 2016.

[5] MUNZ initiated bargaining for a new CEA by notice dated 7 January 2016. Since 8 June 2016, the parties have met and bargained on approximately 30 occasions between June and 7 December 2016.

[6] Following a bargaining session on 1 December 2016, officials from MUNZ held a meeting to inform members that no progress was being made with regard to bargaining. A proposal which had been advanced for LPC at that time was rejected. A secret ballot was then conducted, with members voting unanimously in favour of strike action.

[7] The outstanding issues at that time related to a company proposal to change the start and finish time of workers on a nightshift, by up to four hours.

[8] When no further progress was made at a bargaining meeting on 7 December 2016, an advocate for MUNZ served a strike notice on the advocate for LPC.

[9] It was a one-page document, the text of which stated:

> **Strike Notice pursuant to Section 90 of the Employment Relations Act 2000**
>
> Take notice that the Maritime Union of New Zealand Incorporated 2012, Lyttelton Branch, Local 43 ("the Union") hereby gives notice of a strike. This notice of strike action is given by the Union on behalf of the employees named in the attached list who are employees of Lyttelton Port Company Limited and who are members of the Union and who are covered by bargaining for a collective employment agreement initiated on 7 January 2016.
>
> The strike action set out below will apply to all work berths and work areas controlled, directed, and operated by the employer, Lyttelton Port Company Limited.

> The strike action comprises continuous and total withdrawal of labour commencing at 0001 hours on Saturday, 24 December 2016. The strike will end at 23:59 hours on Sunday, 25 December 2016.
>
> Strike action will thereafter comprise a continuous and total withdrawal of labour commencing each weekend at 0001 hours on each Saturday thereafter. The strike will then end at 23:59 hours on each following Sunday.
>
> The period of notice given is in excess of 14 days.
>
> Dated this 7 December 2016

[10] It was signed by the Lyttelton Branch President of MUNZ, Mr Tristen Ornsby. There was no attached list of employees.

[11] On the same day, a further copy of the notice was sent by lawyers acting for MUNZ to Mr Peter Davie, the Chief Executive of LPC. Again, no list of employees was attached to the strike notice.

[12] In a letter dated 12 December 2016, lawyers acting for LPC wrote to MUNZ referring to various alleged defects in the notice, including the absence of a list of the MUNZ members who would strike.

[13] Later that day, lawyers acting for MUNZ responded, also by email, attaching what was described as "a list of members belonging to the Maritime Union of New Zealand 2012, Lyttelton Branch, Local 43".

[14] On the same day, the present proceeding was issued.

[15] On 14 December 2016, the Union issued a further strike notice under s 90 of the Act. It was in the nature of a backup notice, stating that strike action would occur from 12.01 am on 31 December 2016 until 11.59 pm on 1 January 2017. The notice appears to have been drafted to overcome the concerns that were raised by LPC in respect of the strike notice of 7 December 2016. LPC accepts that the second notice is valid.

Key legislative provision

[16] At the heart of LPC's application are the requirements of s 90 of the Employment Relations Act 2000 (the Act). It provides as follows, with emphasis on the provisions which require particular consideration in this judgment:

> **90 Strikes in essential services**
>
> (1) No employee employed in an essential service may strike—
>
> (a) unless participation in the strike is lawful under section 83 or section 84; and
>
> (b) if subsection (2) applies,—
>
> (i) without having given to his or her employer and to the chief executive, within 28 days before the date of the commencement of the strike, notice in writing of his or her intention to strike; and
>
> (ii) before the date and time specified in the notice as the date and time on which the strike will begin.
>
> (2) The requirements specified in subsection (1)(b) apply if—
>
> (a) **the proposed strike will affect the public interest**, including (without limitation) public safety or health; and
>
> (b) the proposed strike relates to bargaining of the type specified in section 83(b).
>
> (3) The notice required by subsection (1)(b)(i) must specify—
>
> (a) the period of notice, being a period that is—
>
> (i) no less than 14 days in the case of an essential service described in Part A of Schedule 1; and
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> (ii) no less than 3 days in the case of an essential service described in Part B of Schedule 1; and
>
> (b) **the nature of the proposed strike, including whether or not the proposed action will be continuous; and**
>
> (c) the place or places where the proposed strike will occur; and
>
> (d) the date and time on which the strike will begin; and
>
> (e) **the date and time on which, or an event on the occurrence of which, the strike will end.**
>
> (4) The notice—
>
> (a) must be signed by a representative of the employee's union on the employee's behalf:
>
> (b) **need not specify the names of the employees on whose behalf it is given if it is expressed to be given on behalf of all employees who—**
>
> (i) **are members of a union that is a party to the bargaining; and**

(ii) **are covered by the bargaining; and**

(iii) **are employed in the relevant part of the essential service or at any particular place or places where the essential service is carried on.**

(Emphasis added)

[17] The key issues raised by the parties as to the notice are:

a) Whether the proposed strike would affect the public interest.

b) Whether the notice provides sufficient clarity as to the nature of the proposed strike action; in particular whether the proposed strike would be a single continuous strike, or a series of separate strikes.

c) Whether the notice specifies the date and time on which, or an event on the occurrence of which, the strike would end.

d) Whether the identity of the employees on behalf of whom the notice has been given was specified as required by s 90.

Relevant principles

[18] The parties are agreed that the correct approach in determining an application for interim relief is to determine first whether there is an arguable case as to the merits of the claim. The Court must then assess where the balance of convenience lies. Finally the Court must stand back and examine whether the overall justice of the case requires the granting of the relief sought, taking into account whether there are alternative remedies: *Klisser Farmhouse Bakeries Ltd v Harvest Bakeries Ltd*.[1]

[19] If a plaintiff's interim application will effectively dispose of the defendant's substantive rights to strike on the basis of notices already issued, then something more than a barely arguable case is required. So, in *Tasman Pulp & Paper Co Ltd v New Zealand Shipwrights Union*,[2] the full Court observed that where the proposed action is incapable of being deferred without effectively being cancelled so that the

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1 *Klisser Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (HC).

2 *Tasman Pulp & Paper Co Ltd v New Zealand Shipwrights Union* [1991] 1 ERNZ 886 (EmpC) at 898.

grant of the interim relief effectively becomes a summary judgment, the more relevant to the overall justice of the case are the relative strengths and weaknesses of the party's cases. In such a case, the Court must be satisfied that there is a strongly arguable case.[3]

[20] The Court has previously held that, for interim injunction purposes, the Court normally prefers the plaintiff's affidavit evidence and assumes that is the position which is likely to be established at trial. In *Golden Bay Cement v New Zealand Merchant Service Guild* Judge Travis stated in respect of an application for interim injunction:[4]

> … The plaintiff is entitled to the benefit of a presumption that evidence which has not been demonstrated to be fundamentally flawed at the interim hearing will be able to be established as the basis of the plaintiff's claim at the substantive hearing.

[21] Before analysing the competing contentions of the parties, it is necessary to refer to previous decisions which have commented on the correct approach to the construction of strike notices. An important decision is *Secretary for Justice v New Zealand Public Service Assoc Inc.* In that judgment, Cooke P (as he then was) stated:[5]

> The purpose of the notice requirement is to protect the public interest as far as reasonably possible. The services listed in the Act include the supply of water, electricity, medicines, petroleum, sewage disposal, fire brigade work, sea and air transport, ambulances and hospitals. If services essential to the community are going to be withheld, contingency or emergency planning will be needed. Steps will have to be taken to adjust the functioning of society to the repercussions. It may be crucial that this should be able to proceed on a reliable basis. While the Act recognises strike action as a legitimate and 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.

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3 *Golden Bay Cement v New Zealand Merchant Service Guild* [2002] ERNZ 456 (EmpC); *Chief Executive Officer of the Department of Corrections v Corrections Assoc of New Zealand* [2006] ERNZ 235 (EmpC) at [53].

4 *Golden Bay Cement v New Zealand Merchant Service Guild* above n 3, at [17]; and see also *New Zealand Stevedoring Co Ltd v New Zealand Waterfront Workers Union* (1990) 3 NZILR 308 (LC); *Kendall v Presbyterian Support Se*rvices *(Northern)* [1992] 2 ERNZ 413 (EmpC); *Grey Advertising (New Zealand) Ltd v Marinkovic*h [1999] 2 ERNZ 844 (EmpC) and *New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc v Zeal 320 Ltd* [2009] ERNZ 215 (EmpC).

5 *Secretary for Justice v New Zealand Public Service Assoc Inc* [1990] 2 NZLR 36 at 41.

[22] Later, Cooke P referred to the need for clarity and certainty in such a notice.[6]

[23] In a similar vein, Hardie Boys J emphasised that:[7]

> … The nature and extent and timing of the strike must be made clear and that … to the extent that the section directs clarity, and from clarity certainty, are of prime importance.

[24] In *Attorney-General on behalf of the Chief Executive of the Department of Corrections v Corrections Assoc of New Zealand* the Court stated:[8]

> A strike in an essential service is unlawful if advance notice is required and either the notice is not given or the notice is defective because it does not specify or adequately specify the matters it is required to specify. The most important of these is the date of commencement of the strike because s 90 expressly prohibits striking before that date. A notice of something is a means of making that something known to the recipient of the notice. A notice that is required to specify something fails in its purpose if, in the process, it obscures instead of disclosing what it is to specify. To specify means, of course, to state expressly.

[25] In this passage, the Court referred to the date of commencement of the strike; no reference was made to any requirement to specify when a strike would end. That is because s 90(3)(e) had not been enacted at that point; this occurred with effect from 6 March 2015. In my opinion, a requirement to specify the date and time on which, or an event on the occurrence of which the strike will end is also now a significant requirement. The effect of the additional provision is that an employer is entitled to be informed of the timeframe within which intended strike action will take place. The amendment assists in providing clarity and certainty.

[26] Mr Goldstein, counsel for the Union, also made reference to a more recent Court of Appeal decision, the *New Zealand Airline Pilots' Assoc IUOW Inc v Air Nelson Ltd*.[9] This judgment considered the requirement in s 90(3)(a) that a period of notice needed to be specified which was no less than 14 days in the case of an essential service. Mr Goldstein argued that the decision indicated that when

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6 At 41.

7 At 44.

8 *Attorney-General on behalf of the Chief Executive of the Department of Corrections v Corrections Assoc of New Zealand* [2001] ERNZ 702 (EmpC) at [44].

9 *New Zealand Airline Pilots Assoc IUOW Inc v Air Nelson Ltd* [2009] NZCA 547, [2009] ERNZ 312.

considering the adequacy of a notice to strike, a technical approach was no longer required.

[27] However, the Court specifically affirmed that the *Secretary for Justice* decision is the leading Court of Appeal authority as to strike notices. The dicta of that case continues to be important. Moreover, the decision of the Court of Appeal in the *Air Nelson* case focused on whether the language in question under s 90 had been complied with. The Court did not override or dilute the requirements of s 90.

Arguable case

[28] Before dealing with particular issues, I refer to two evidential matters about which there is no controversy.

[29] The first is that the workers involved are employed in an essential service. The activities of LPC plainly fall within this definition:[10]

> The provision of all necessary services in connection with the arrival, berthing, loading, unloading, and departure of ships at a port.

[30] Also not in dispute is the requirement under s 90(2)(b) that the proposed strike relates to bargaining of the type specified in s 83(b) of the Act. That section provides the participation in a strike as lawful if it relates to bargaining for a collective agreement that will bind each of the employees concerned. That is the position in this case.

[31] I turn now to consider the particular issues which were raised with regard to the prerequisites of s 90 of the Act.

Public interest

[32] Section 90(1) makes it clear that the s 90 requirements apply where "the proposed strike will affect the public interest, including (without limitation) public safety or health". The latter restriction is not relevant in the present case, but the former is.

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[10] Employment Relations Act 2000, sch 1, pt A, cl 7.

[33] In *Golden Bay Cement v New Zealand Merchant Service Guild*,[11] Judge Travis traversed this requirement. He found that the working of ships was an essential industry, because this work had been included in the first schedule to the Act; but there was an additional threshold in s 90(2) which the plaintiff had to meet. The Court noted that the term "public interest" was not defined; it was apparent that Parliament had intentionally left this issue to be dealt with on a case by case basis. I respectfully agree with this analysis and observe that the issue is one of fact and degree.

[34] Mr Goldstein essentially submitted that the evidence filed for LPC on this point was scant and bereft of detail; if anything it tended to establish that the consequences of the strike would only affect LPC and its customers, rather than the general public.

[35] Mr Parker, the Container Terminal Manager of LPC, filed two affidavits which contain evidence on this topic which should be evaluated. In the first he stated that should the proposed strike or strikes proceed, there would be substantial disruption to freight distribution. This would have, he said, a significant impact on LPC and its customers, and potentially on other LPC employees. The question is whether these consequences might thereby affect the public interest.

[36] He referred, by way of example, to the position as to the work schedule which was to apply during the period of the first advised strike that is, 24 and 25 December 2016. He said three vessels are expected to berth in that period at the container terminal at Lyttelton Port. If the strike proceeded import cargo would not be able to be offloaded from, nor export cargo loaded to, those vessels when berthed. Even although other employees who were not members of MUNZ would be available, there would not be enough foremen to maintain work in the terminal, so that container vessels could not be worked at all.

[37] As a result, import cargo would be delivered to other ports. Export cargo would either not be loaded or shipped to international destinations, or the cargo

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[11] *Golden Bay Cement v New Zealand Merchant Service Guild*, above n 3.

would have to be trucked to other ports to be loaded at a later date. Thus, the interests of consignors and consignees would be affected.

[38] It was further said that because vessels operate on a circuit, an advance booking system requires them to arrive at a port at their booked time, and depart the port at a scheduled time. If they do not, and or there is delay, there is likely to be a disruption to the shipping schedules of other shipping lines which have vessels following in the circuit. In short, a delay in completing work on any or all of the three vessels would cause disruption to other vessels scheduled to arrive subsequently.

[39] In his second affidavit, Mr Parker said that a lack of a certain end date had created uncertainty for customers, and that this would cause them to take their business elsewhere. This was occurring in a period where LPC had experienced a 37 per cent increase in volume, since the start of November 2016, as a result both of the season and of recent earthquakes in Kaikoura and Wellington. From January 2017, he said, the increased volume was likely to be closer to about 15 per cent as a result of the earthquakes, although the actual impact was not yet precisely known.

[40] He also stated that LPC was putting contingency plans into effect by necessity. He considered these would be insufficient to maintain LPC's operations, and that there would be extreme disruption to its business.

[41] Mr Towner, counsel for LPC, submitted that in light of this evidence there was a serious issue to be tried with regard to the public interest prerequisite.

[42] He referred to the relevant definition of "essential services" and said that because the strike notice involved what was described as a "continuous and total withdrawal of labour" of 169 workers at "all work berths and work areas controlled, directed and operated by" LPC, all of which constituted a major port operation, there would obviously be significant disruption.

[43] Mr Towner submitted that this was not a case where, in an essential industry, there was to be a strike which would have minimal impact, such as one where

employees proposed to arrive late, or not perform a particular and relatively minor task.

[44] In my view, whilst it may well be correct to say that not every strike in an essential industry will necessarily affect the public interest, in this case it would.

[45] The first strike notice does not specify an end point, and is potentially of indefinite duration. Accordingly, the public interest has to be assessed with reference to an indefinite period where strikes could occur each weekend.

[46] I consider that such a strike would affect not only LPC and its customers, but others. An obvious illustration relates to the communities affected by the recent Kaikoura earthquakes. The evidence is that cargo volumes at Lyttelton have increased significantly as a result of those events. There must be a concern as to incoming cargo. Lyttelton is the nearest major port to the south of Kaikoura; the Court is entitled to note that southern road access to and from Lyttelton is available, but direct road access is not available to northern ports. The proposed strike would not only create delays in the port itself, but may result in outlying ports having to be used, which has the potential to increase the delay of incoming freight operations for the upper South Island. Consignees will thereby be affected. Members of the public who are already dealing with the aftermath of the earthquakes would potentially suffer the adverse consequences of such delay.

[47] For present purposes, I accept Mr Parker's evidence to the effect that there will be substantial disruption to freight distribution; it is probable this could impact on members of the public.

[48] Accordingly, I am satisfied that this prerequisite is established to the necessary level of persuasion.

Is the nature of strike action clear?

[49] Section 90(3) makes it clear that a strike notice must specify "the nature of the proposed strike, including whether or not the proposed action will be continuous".

[50] The parties differ on this issue. For LPC, it is submitted that it is unclear whether MUNZ proposes a single continuous strike, or a series of separate strikes. For the Union, it is submitted that a single strike action was notified.

[51] Whilst the notice itself states that the strike action "comprises a continuous and total withdrawal of labour" between the defined hours, the notice also refers to a potential series of strikes, which would take place over successive weekends.

[52] Mr Towner submits that because no strike action would be undertaken Monday to Friday in between each weekend, it could not be concluded that the strike action would "in fact" be continuous.

[53] For his part, Mr Goldstein submits that the notice clearly provides for one strike comprising the withdrawal of labour over consecutive weekends; and that any other conclusion would be unduly technical. LPC could be certain as to what would occur and it could make appropriate contingency plans.

[54] In my view, the section requires the notice to specify the nature of the proposed strike, and "whether or not" the proposed action will be continuous. That is, it is possible to describe a strike which is either continuous or not continuous in its effect, but the notice must spell this out.

[55] I am not assisted by those cases where the Court has been required to assess a series of sequential strike notices and whether these amounted to a continuous strike, such as occurred in *Health Care Hawkes Bay Ltd v Bickerstaff*.[12]

[56] Here, there are two aspects to this problem:

a) During any particular weekend when strike action occurs, there would be a continuous and total withdrawal of labour;

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[12] *Health Care Hawkes Bay Ltd v Bickerstaff* [1996] 2 ERNZ 419 at 431.

b) But because work will take place each Monday to Friday, strike action would not take place continuously for the duration of the notified industrial action.

[57] So as to achieve compliance with the section, it would have been preferable to have stated that strike action would not, in any given week, be continuous.

[58] However, it is necessary to stand back and assess whether LPC was fairly and sufficiently notified of the intended strike action. On the face of it, the strike notice is clear: it provides for strike action only during weekends. No other meaning can be attributed to it. Accordingly, I am not persuaded that the notice is defective in this respect.

[59] I also find that the strike notice relates to a single course of industrial action. One notice has been issued with regard to what is described as "a strike". That has consequences for a submission made for LPC to the effect that there was non-compliance with s 90(1)(b)(i) of the Act. It was submitted that any strikes undertaken on weekends after the weekend of 31 December 2016 and 1 January 2017 would be more than 28 days after the strike notice had been given to the plaintiff. Since the commencement of the strike action (24 December 2016) falls within the 28-day period of service of the notice, this particular assertion is not established.

Date, time or event on which the strike will end

[60] Mr Towner submitted that there was a failure to comply with the requirement in s 90(3)(e) of the Act. He said there was no indication in the strike notice of when the strike action would come to an end; it was of indefinite duration, and it was not possible under the statute to give notice of an "indefinite strike".

[61] Mr Goldstein submitted that the sub-section requires only advice as to when the withdrawal of labour would cease, and that the notice specified this would occur on each Sunday night at 11.59 pm. He said the purpose of the statutory provision was to give the employer notice of the intended disruption so that it could make contingency plans; and that this was obvious from the notice.

[62] He also referred to dicta of Chief Judge Goddard in *Chief Executive of the Department of Corrections v Corrections Assoc of New Zealand*, who observed that a date or day can be described by reference to an event.[13] But this possibility is enshrined in the statute itself, because s 90(3)(e) indicates that the giver of a notice to strike has a choice as to how the end of a strike will be described; it can be described either by reference to date and time, or by reference to an event.

[63] The meaning of "strike" is provided in s 81 of the Act. As mentioned, Mr Goldstein described the relevant strike action in the present case as being a withdrawal of labour. Even accepting that paraphrase of the statutory language, and accepting also that each individual period during which labour is withdrawn is defined, the end point of the strike is not described.

[64] Relevant to this issue is the commentary of the Transport and Industrial Relations Committee, when reporting back on the Employment Relations Amendment Bill which resulted in the enactment of s 90(3)(e). It said:[14]

> We recommend amending cls 49 to 53 [which included the provision which became s 90(3)(e)] so that all notices for a strike or lockout must include both a start and end date and time, or specify an event (such as the reaching of agreement) which would mark the end of the strike or lockout. Specifying the date and time would provide certainty for the parties, and would help ensure that any pay deductions were made accurately; while allowing the end to be triggered by an event would provide useful flexibility. It would be open to the parties to issue another notice of industrial action should they decide that the action should continue beyond the end date and time originally specified.

[65] Mr Ornsby said in evidence that strike action "would continue until the strike notice is withdrawn". However, this particular possibility was not referred to.

[66] Next, Mr Goldstein referred to s 95AA, which provides:

> **95AA Withdrawal of notices of strike or lockout**
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> (1) A strike notice given under section 86A, 90, or 93 may be withdrawn at any time by a representative of the employees' union giving written notice of the withdrawal to–

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13 *Chief Executive of the Department of Corrections v Corrections Assoc of New Zealand*, above n 8, at 721.

14 Employment Relations Amendment Bill 2013 (105-2) (select committee report) at 11.

(a) the employees' employer; and

(b) the chief executive

…

[67] He submitted that there was a tension between this provision on the one hand, and the requirement to specify when a strike would end under s 90(3)(e) on the other. The statute itself gave a right to withdraw a notice at any time, and that event would obviously bring a strike to an end.

[68] I do not agree that there is such a tension, or that the two statutory provisions are in conflict. Section 90(3)(e) is not subject to s 95AA, and I do not agree that the latter should impliedly override the former. The two provisions were enacted at the same time. Parliament must have intended that the two sections would operate in harmony. An obvious example of the application of the section could arise where a strike notice is withdrawn prior to its specified end point. I do not consider that the terms of s 95AA meet the requirement to specify an end point under s 90.

[69] Mr Goldstein also referred to the possibility that the action notified in the notice should be regarded as a "partial strike" falling within the definition of s 95A. Such a possibility does not need to be considered in the present case. The characterisation of the proposed industrial action as a "partial strike", even if correct, could not override the s 90 requirements for a valid notice. The focus must be on the content of the notice.

[70] I regard the failure to specify the end point of the proposed strike as being a significant defect. The dicta of Cooke P applies: the purpose of the notice was to protect the public interest as far as reasonably possible. It is important that the employer is able to plan with certainty. A notice which is of indefinite effect does not achieve this object. I regard this point as being strongly arguable.

Employees covered by strike notice unclear

[71] As already mentioned, the strike notice when served on 7 December 2016 did not specify the names of the employees on whose behalf it was given, by list, as the notice itself suggested.

[72] That much is common ground. For the Union, however, it was argued that effective compliance occurred when a list was in fact provided some days later on 12 December 2016 after the issue was brought to its attention.

[73] There are at least two immediate problems relating to this requirement. The first is that the list, when forwarded, stated that it was a list of membership only. It did not stipulate who was participating in the proposed strike.

[74] But more significantly, the list of names was provided less than the 14 days before the strike was intended to commence, so that there was non-compliance with the provisions of s 90(3)(a)(i) of the Act.

[75] Mr Goldstein argued this omission was not fatal. First he submitted that it was open to an employer to seek clarification with regard to the strike notice. There is some obiter dicta to that effect;[15] but that dicta relates to uncertainty as to the nature of the intended industrial action, rather than as to the identity of participants to a strike. In my opinion, Parliament has understandably seen fit to require the giver of a strike notice with regard to an essential service to specify who the participants will be. Such a requirement provides certainty and clarity.

[76] Secondly, Mr Goldstein submitted that although reference was not made to all members of the Union being party to the bargaining, it was obvious that this was the case. In my view, the statute required the notice to specify whether the notice was given on behalf of all such members; this did not occur, and this particular issue cannot proceed on the basis of inference, as the cases show.

[77] In *Golden Bay*, Judge Travis was required to consider this issue. He reviewed two previous decisions wherein compliance of this particular requirement was emphasised.[16] The Court concluded that the statute was clear as to how compliance could be achieved. Either the notice was to be given on behalf of all employees who are members of the Union that was party to the bargaining, and were

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15 *Chief Executive of the Department of Corrections v Corrections Assoc of New Zealand*, above n 8.

16 *Tasman Express Line Ltd v New Zealand Seafarers Union Inc* EmpC Auckland AEC28/96, 11 June 1996; and *Air New Zealand Ltd v Northern Clerical etc Union* [1991] 1 ERNZ 46 (LC).

covered by the bargaining, and were employed in the relevant part of the essential service or at any particular place or places where it was carried on; or the names had to be specified. The Court concluded that failure to comply with the express provisions as to the identification of those participating in the proposed strike made it clearly arguable that the notice was invalid.[17]

[78] This requirement was not satisfied according to the requirements of s 90. I regard this breach as also being significant, and strongly arguable.

Severance

[79] Mr Goldstein argued that if MUNZ had not met any of the s 90 obligations relating to notice, the Court ought either to sever the individual parts of that notice, or ignore them, citing the approaches adopted in *Chief Executive of the Department of Corrections*[18] and *Healthcare Hawkes Bay v Bickerstaff.*[19] In the first of those judgments, the observations of the Court were obiter as already noted; and in the second the approach which was adopted of relying only on those valid parts of the notice was as a result of a concession made by counsel.

[80] Given the fundamental nature of the defects in this case – the failure to specify the end point of the proposed strike; and the failure to incorporate in the notice the names of the persons who would participate – I do not consider severance would be appropriate.

Conclusion as to arguable case

[81] I am satisfied that the plaintiff has raised a strongly arguable case to its entitlement to relief.

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17 Golden Bay Cement, above n 3, at [20] – [24].

18 *Chief Executive of the Department of Corrections v Corrections Assocof New Zealand*, above n 8, at [48].

19 *Health Care Hawkes Bay Ltd v Bickerstaff*, above n 12, at 427 – 428.

Balance of convenience

[82] Mr Goldstein submitted that this case was really only about the strike which was scheduled for 24 and 25 December 2016; this was because, he said, MUNZ could remedy any issue with the strike notice thereafter.

[83] The evidence before the Court is that to all intents and purposes the port will not be operating on either 25 December 2016 or 1 January 2017. It is accordingly submitted that for the upcoming weekend, any inconvenience would be limited to 24 December 2016; and that in respect of the weekend 31 December 2016/1 January 2017, MUNZ has already issued a backup strike notice, which it is accepted is valid, so that strike action over that weekend is inevitable.

[84] Then Mr Goldstein argues that MUNZ can remedy any issue relating to weekends from 7 and 8 January 2017. However, there are two problems with this submission. The first is that there is no evidence before the Court that MUNZ either has or will issue notices for that period, although it obviously can. Secondly, the difficulty with the current notice is that it is indefinite in duration; if it is not the subject of an interim order, MUNZ would not need to issue any further strike notices until it chose to end the strike; its members would not be restrained from striking under the first notice, on an indefinite basis. The Court has to proceed on the basis that this is the effect of the notice.

[85] A range of consequences were referred to in evidence. These include the prospect of significant loss to revenue, but also possible consequences for other workers who are not members of MUNZ, but who would be affected by the strike in any event. But more significantly there is the point made in evidence for LPC that there is a potential for reputational harm. Reference is made to shipping lines that either have or are considering withdrawing their services, because of the indefinite nature of the strike action.

[86] Whilst a succession of (valid) strike notices may still give rise to such consequences, the fact is that such notices would have to comply with the time limits provided in s 90 of that Act, so that each strike action would have a defined date of

commencement, and a date when the strike would end; and LPC will be able to better manage probable consequences.

[87] As to alternative remedies I accept that there would be potential difficulties in assessing damages, especially those which relate to reputation. But the Court must also take into account the effect on third parties such as other employees who work for LPC; and the members of the community who may be affected by the proposed indefinite strike, particularly in North Canterbury.

[88] The balance of convenience clearly favours the grant of interim relief.

Overall justice

[89] Standing back, I consider that overall justice also favours LPC. If the Court were to exercise its discretion not to grant an injunction, this would allow MUNZ to strike by arguably illegal means, when there are lawful methods available to it under the Act.

Result

[90] I am satisfied that the order sought for LPC should be granted.

[91] There was some debate between counsel as to the form of the order; however, I am satisfied that the language in the application is in accordance with previous decisions; and is appropriate in the present case.[20]

[92] Accordingly I order that in relation to the strike notice dated 7 December 2016:

a) The Maritime Union of New Zealand Inc (and its officers, employees and agents) refrain from being party to or directing, encouraging or inducing its members employed by the applicant to participate in strike action pursuant to the strike notice; and

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[20] *Auckland Electric Power Board v New Zealand Electrical etc IUOW* [1992] 1 ERNZ 623 (EmpC) at 631; *Tasman Express Line Ltd v New Zealand Seafarers Union Inc* EmpC Auckland AEC28/96, 11 June 1996, at 11.

b) The Maritime Union of New Zealand Inc is required to advise its members employed by the applicant not to participate in any strike action pursuant to the strike notice and to perform their normal duties from 24 December 2016 as instructed by the applicant.

[93] This order shall apply until further order of the Court.

Other matters

[94] I discussed with counsel whether the Court should direct the parties to attend mediation, having done so already when the proceeding was first initiated. Counsel advised that further bargaining is to take place on 22 December 2016. At this stage, therefore, I do not consider it necessary to make such a direction.

[95] I also discussed with counsel as to whether an urgent substantive fixture should be directed. Counsel were agreed that if the order of interim injunction were to be made, it is probable that the issues in this case would be overtaken by events so that no substantive fixture would be required. Accordingly I make no directions in that regard.

[96] Finally, I reserve the question of costs. This issue should be discussed directly between counsel in the first instance. If unresolved, an application for costs may be made by memorandum and any supporting evidence filed and served by 25 January 2017. Any response is to be filed and served by 15 February 2017.

B A Corkill
Judge

Judgment signed at 4.45 pm on 20 December 2016