IN THE EMPLOYMENT COURT
AUCKLAND

[2010] NZEmpC 160
ARC 111/10

IN THE MATTER OF	a declaration of jurisdiction
BETWEEN	JEFFREY REGINALD MCCULLOCH First Plaintiff
AND	BOYD GORDON RAINES Second Plaintiff
AND	NEW ZEALAND PROFESSIONAL FIREFIGHTERS UNION Third Plaintiff
AND	NEW ZEALAND FIRE SERVICE COMMISSION Defendant

Hearing: 7 December 2010
(Heard at Auckland)

Appearances: Peter Cranney, counsel for plaintiffs
Geoff Davenport, counsel for defendant

Judgment: 15 December 2010

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] The issue for decision is whether the Employment Court has exclusive jurisdiction to hear and determine proceedings between the New Zealand Fire Service Commission (the Commission), on the one hand, and the New Zealand Professional Firefighters Union (the union) and two of its officials, on the other. The Commission has issued its proceedings in tort in the High Court at Auckland. Those have been stayed by the High Court until the issue of exclusive jurisdiction is decided by this Court. For this purpose, the union and its officials have instituted

pro forma proceedings here for a declaration of exclusive jurisdiction. These proceedings are opposed by the Commission. By agreement, the case has been heard by reference to the statements of claim and defence in the High Court proceedings, affidavit evidence filed in the High Court proceedings, some further affidavit evidence filed by the Commission in this Court, and by submissions made by counsel for the parties.

[2] There have been two judgments issued by the High Court, both in proceedings known as *The New Zealand Fire Service Commission v McCulloch & Ors.*[1] The first was the oral judgment of Bell AJ delivered on 10 May 2010. The second was the judgment of Lang J on a review of the Associate Judge's judgment issued on 20 October 2010. The outcome of the two judgments is that the High Court has stayed the Commission's proceedings there on the basis that there should be no progress of them until this Court has determined whether it has exclusive jurisdiction to hear and determine them. Although by a different process with a different outcome, the arguments in the High Court and before this Court have been essentially the same and I have been assisted considerably by both judgments in that court.

[3] As already noted, the High Court allowed for some affidavit evidence in its considerations of these jurisdiction issues and, at the Commission's insistence, some additional affidavit evidence has been admitted in this Court. However, the jurisdictional issue is a preliminary one that is to be decided primarily on the pleadings. For self-evident reasons, it would be inappropriate for the Court to embark upon a hearing and determination of contested evidence going to the substance of the alleged torts to decide the court in which the proceedings should be filed.

[4] As Lang J pointed out in his judgment in this matter, the proper course for the union and its officers would have been to enter an appearance in the proceeding in the High Court with an objection to jurisdiction rather than, as they did, filing a comprehensive statement of defence before moving to stay or strike out. It would, however, now be artificial for this Court not to have the benefit of that statement of

[1] CIV-2009-404-1088.

defence in determining the issue of exclusive jurisdiction at this stage. Together with the amended statement of claim, it assists in clarifying the nature of the issues between the parties.

[5] Messrs McCulloch and Raines and the union are the plaintiffs and the Commission the defendant in this proceeding. In the present High Court proceedings and in any proceedings that may be issued in this Court if it has full and exclusive jurisdiction, those current roles are or would be reversed. To avoid confusion I will refer to the parties by their names or abbreviations thereof.

[6] Messrs McCulloch and Raines were, at relevant times, firefighters employed by the Commission and office holders in the union. The union's predominant membership consists of Commission employees and firefighters in particular. Most Commission firefighters are members of the union. Managerial employees of the Commission are not covered by the union or its collective agreement with the Commission.

[7] The proceedings result from an employment practice known as "acting-up" by which an employee may undertake temporarily, higher ranked duties. Actings up may take place in circumstances of absences from duty or vacancies or for other special purposes. Acting-up has a statutory basis under s 66(1) of the Fire Service Act 1975. The Act empowers the chief executive of the Commission to authorise any member (employee) to perform all of the functions and duties and exercise all of the powers of any rank or position higher than his or her own or may appoint any member of the Fire Service temporarily to any higher rank or position.

[8] From time to time, although not frequently, the Commission has temporary vacancies including within its managerial structures. In these circumstances it invites expressions of interest from lower ranked staff to act up temporarily in the higher position. The Commission's case is that any acceptance by an employee of an acting role will be entirely voluntary and that there is no expectation, lawful or practical, that any employees will seek consideration for acting-up positions. There is no dispute about this.

[9] Although relevant at this stage only to the preliminary question, it appears that firefighters who are union members, but are promoted temporarily on acting-up arrangements, fall outside the coverage of the collective agreement for that interim period of secondment. That absence of coverage may also affect their status as union members but, as already noted, it is unnecessary to determine that question at this point.

[10] Two managerial vacancies in the Auckland area occurred in late 2008 to early 2009. The Commission sought expressions of interest from staff. The union purported to ban its members from seeking such positions and from occupying them. Two union members, Messrs Chris Best and Chris Scott, defied the union's ban and lodged expressions of interest for these positions. The union and Messrs McCulloch and Raines sought unsuccessfully to dissuade them from doing so. Messrs Best and Scott were appointed temporarily to the acting-up positions and their individual employment agreements with the Commission were no doubt varied accordingly. They subsequently came under pressure from the union and Messrs McCulloch and Raines to relinquish those roles which they did in response to that pressure.

[11] At the time of their taking up the new temporary positions, Messrs Best and Scott were senior operational firefighters rostered on shifts or watches that provided for what is known colloquially as 24/7 coverage. Their acting-up positions were different in the sense that they were not based at fire stations, did not crew fire appliances or usually attend fires or other emergency incidents, and they worked normal business hours. They were a part of the Commission's command structure occupying managerial or supervisory based roles. That said, it is inescapable that they were appointed to acting-up positions based upon their skills and experience as senior firefighters and were expected to apply these attributes as well as to acquire new and different skills and experience in command or managerial roles. The acting-up positions were for limited durations of several months at most. It was the expectation of all concerned that after the conclusion of those temporary secondments, Messrs Best and Scott would probably return to their former firefighter roles. They were not replaced in these for the period of their secondments: rather, the Commission covered their absence from their watches by other similarly qualified and experienced firefighters doing more overtime.

[12] I agree with both the Associate Judge and the Judge in the High Court that, but for the ban, some firefighters, including union members, would ordinarily seek acting-up positions and, if appointed, would act up following this longstanding employment practice in the Fire Service. Indeed, Messrs Best and Scott did so at that time. At the time the Commission seems to have assumed that the purported prohibition amounted to unlawful strike action. As the Commission's chief executive wrote to the union's Derek (not to be confused with Chris) Best on 20 January 2009 in the course of the events leading to this litigation: "We also consider that your instructions to members not to act up in roles which they would normally apply for constitutes unlawful industrial action."

[13] "[I]ndustrial action" is a longstanding euphemism for a strike. Although the Commission's chief executive's words do not of course amount to a concession on a matter of law that binds the Commission, they are indicative of the normality of the Commission having acting-up roles and union member firefighters applying for those before the union purported to ban its members from doing so in late 2008.

The claims in tort

[14] The Commission asserts that despite firefighters being entitled lawfully to enter into acting-up arrangements with individual employees, Messrs McCulloch and Raines and the union attempted to prevent employees from taking acting-up positions and are said to have intimidated two of them into resigning from or abandoning these. The Commission alleges that these dissuasive actions are unlawful. The Commission has six causes of action in tort against the union and Messrs McCulloch and Raines.

[15] The first, second and third causes of action (all in the tort of intimidation by unlawful means) differ really only in the identity and role of the alleged tortfeasors, being Messrs McCulloch and Raines and the union.

[16] The fourth cause of action is pleaded against both union officials and the union and is in the tort of unlawful interference in economic interests.

[17] The fifth cause of action is also against all alleged tortfeasors collectively and is in the tort of conspiracy by unlawful means.

[18] The sixth cause of action is likewise pleaded and alleges the tort of interference with contractual relations.

[19] The remedies claimed for each of the causes of action are materially identical. They are:

- for declarations that the alleged tortfeasors have committed those torts;
- for special damages for (modest) pecuniary losses allegedly suffered by the Commission;
- for unspecified exemplary damages against the alleged tortfeasors; and
- for legal costs.

Legislation

[20] At the heart of the question for decision now is s 99 of the Employment Relations Act 2000 (the Act). This provides as follows (with relevant passages underlined):

> **99 Jurisdiction of Court in relation to torts**
>
> (1) The Court has full and exclusive jurisdiction to hear and determine proceedings founded on tort—
>
> (a) issued against a party to a strike or lockout that is threatened, is occurring, or has occurred, and that have resulted from or are related to that strike or lockout:
>
> (b) issued against any person in respect of picketing related to a strike or lockout.
>
> (2) No other court has jurisdiction to hear and determine any action or proceedings founded on tort—
>
> (a) resulting from or related to a strike or lockout:
>
> (b) in respect of any picketing related to a strike or lockout.
>
> (3) Where any action or proceedings founded on tort are commenced in the Court, and the Court is satisfied that the

proceedings resulted from or related to participation in a strike or lockout that is lawful under section 83 or section 84,—

(a) the Court must dismiss those proceedings; and

(b) no proceedings founded on tort and resulting from or related to that strike or lockout may be commenced in the District Court or the High Court.

[21] As may be seen, it is an essential prerequisite of this Court's exclusive jurisdiction that the proceeding be issued against a party to a strike or lockout that is threatened, is occurring, or has occurred and that the proceedings have resulted from or are related to that strike or lockout. There is no suggestion in this case of the alternative basis for jurisdiction under s 99(1)(b) covering picketing.

[22] Whether there is or was a strike is governed by s 81 of the Act. It reads (again with relevant passages underlined)

81 Meaning of strike

(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

(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.

[23] As Mr Cranney points out, the lawfulness of any strike action is not in issue or for decision at present. The jurisdictional question turns on the existence of strike action, whether lawful or unlawful. The issue is only which court hears the proceedings in tort. Irrespective of which court that is, lawfulness of the actions of the union and the employees will be in issue eventually. One aspect of that will be

the question of statutory lawfulness of the strike action. That is because (in proceedings in this court), s 99(3)(a) of the Act creates immunity from suit for those who would otherwise be tortfeasors if the impugned actions relate to or result from a lawful strike.

Establishment of jurisdiction

[24] The standard to be attained by the union and its officials in this Court to determine its exclusive jurisdiction, is higher than it was in the High Court for a stay of the proceeding there. It is certainly more than a mere assertion that there has been a strike and the proceedings relate to that. Even on a question of stay, the Court of Appeal noted in *New Zealand Labourers Union v Fletcher Challenge Ltd*:[2]

> … a defendant applying for a stay should usually be granted one if on the pleadings and any supporting evidence he satisfies the High Court Judge that it is reasonably arguable that the conditions stated in s 242 are fulfilled. Although a plaintiff is not lightly to be deprived of his right to seek a High Court adjudication, we consider that in general the governing principle in the exercise of the High Court Judge's discretion should be that serious and substantial questions of labour relations law and similar questions of fact are best determined in the Labour Court, subject to the statutory rights of appeal.

[25] At para [21] of his judgment in this case, Lang J concluded:

> The threshold for the defendants was therefore not particularly high. They only needed to show that it was reasonably arguable that the ban on acting up amounted to a strike in terms of s 81. They did not need to persuade the Court of the correctness of the proposition.

[26] The standard is higher in this proceeding for a declaration of exclusive jurisdiction than it was for the union and its officials in the High Court seeking a stay. Here, the effect of the judgment is, subject to appellate rights, finally determinative of which court hears the case.

The scope of the conduct alleged to be tortious

[27] Mr Davenport for the Commission submitted that its causes of action in tort do not rely upon events leading up to the agreements by Messrs Best and Scott to

[2] [1988] 1 NZLR 520.

take the acting-up positions and focus only on the actions of the union and its officers in persuading those two employees to resign from those positions. However, that is not the way the Commission's case is pleaded. Its amended statement of claim in the High Court dated 1 July 2009 is the primary pleading upon which this application for declaration is determined. It does not exclude reliance on events leading to acting-up appointments as Mr Davenport submitted in argument in an attempt to bring the causes of action outside the statutory definition of a strike.

[28] On its face, the amended statement of claim in the High Court relies upon both pre and post acting-up appointment actions by the union and Messrs McCulloch and Raines to establish the torts alleged against them: see, for example, para 31 of the High Court amended statement of claim referring to threats and intimidation set out in para 30 which, in turn, relied on a repetition of the recital of allegations in paras 1 to 29 of that amended statement of claim which included pre acting-up appointment events.

[29] Even more particularly, in the plaintiff's fourth cause of action and at para 52 of the amended statement of claim in the High Court, the Commission pleads that the union and the employees "without lawful justification … intended to and did interfere with the Plaintiff's business and/or economic interests, including by … placing pressure on Mr Chris Best and/or Mr Chris Scott to not commence the acting up roles …"

[30] In support of the sixth cause of action, para 61 of the amended statement of claim in the High Court alleges that the union and the employees interfered directly with the individual employment agreements between Messrs Best and Scott and the Commission and did so deliberately with a view to placing pressure on Messrs Best and Scott not to commence their acting-up roles. That is another indication of the ban and pre acting-up events being at least part of the target of the Commission's action.

[31] It is, of course, open to the Commission to amend its pleadings so as to narrow the scope of impugned actions by the union and its officers to the post acting-up appointment events involving Messrs Best and Scott. In these circumstances the

potentially narrower alleged factual basis for the causes of action must be examined to determine whether the definition of strike is met in respect of them.

The defence

[32] The union and the employees claim justification for the ban, for their actions in seeking to dissuade Messrs Best and Scott from applying and, for subsequently, persuading them to relinquish those roles, by reasons of health and safety. In essence, the union and the employees say that when firefighters such as Messrs Best and Scott relinquished temporarily those duties for acting-up managerial roles, responsibility for providing sufficient numbers of firefighters fell on the existing body of firefighters who were required to perform additional overtime duties beyond a safe level. The union and the employees say that their impugned actions were a strike or strikes as defined in the legislation but justified in law for reasons of health and safety. That justification is rejected by the Commission but it is unnecessary to determine this issue that will be for trial.

Arguments for the Commission

[33] In the introduction to his submissions made in this Court, Mr Davenport identified the two broad grounds which counsel submitted mean that this Court does not have jurisdiction.

> (a) The ban on applying for acting up vacancies in December 2008 was not a strike as defined by section 81 of the Employment Relations Act 2000 … ; (original emphasis)
>
> (b) If it was a strike (which is strongly denied) the proceedings in the High Court do not result from or relate to it.

[34] Although Mr Davenport submitted that acting-up is not "normal" for an employee of the plaintiff, I agree with the Judges in the High Court that this submission relies upon an incorrect use of the term "normal". It confuses frequency with what occurs, albeit infrequently. I agree with the High Court Judges that, on the pleadings and evidence adduced, it was "normal", from time to time, that acting-up vacancies would be advertised and it was also "normal" that firefighters would

apply for, and be appointed to, these. Although, sometimes, such expressions of interest and applications were not forthcoming, that does not cause such practices to be other than "normal". Put another way, absent the union ban on acting-up in late 2008, the arising of these temporary vacancies, the advertisements of them among staff by the Commission, and the taking up of those temporary vacancies by firefighters, would have been "normal" employment practice within the Fire Service.

[35] Deconstructing the essential elements of the s 81 definition of a strike, Mr Davenport for the Commission submitted first that the ban and other impugned actions were not "the act of a number of employees who are or have been in the employment of the same employer or of different employers …". Counsel submitted that the union and the officials have not been able to define which employees were on strike.

[36] I agree with the judgments of the High Court that the "number of employees who are in the employment of the same employer" are the union members acting collectively through their union. Their "act" was the imposition of the ban on union members applying for or taking up acting-up positions.

[37] Mr Davenport submitted that the absence of an act by a number of employees is illustrated when one considers how an injunction may have been sought to prevent or stop the action that was said to have been a strike. Counsel asked rhetorically which employee could have been served with the proceedings. Mr Davenport submitted that the answer to this rhetorical question was none because no one employee has any obligation at all to put forward an expression of interest for a temporary vacancy in what he described as "an entirely different job".

[38] I digress for a moment to deal with this role comparison which pervades a number of the Commission's different submissions. I accept that the nature of the work undertaken in this particular case by Messrs Best and Scott was not the same as that which they usually performed. However, they remained in the employment of the New Zealand Fire Service, their individual terms and conditions of employment were varied to take account of the temporary position, and that it was implicit in their doing so that upon completion of its term, each would return to his previous

role. So I do not accept Mr Davenport's description of the jobs as "entirely different". They were different but associated.

[39] Addressing the argument in which this was first raised, however, I consider that this mis-states the position. Coverage by s 81 does not turn on the question of whether any employee was obliged to put forward an expression of interest for a temporary acting-up vacancy. That no employee was required to do so is irrelevant to the question for decision. What s 81 focuses on is how employment occurs in practice which may be broader than the precise legal obligations on each of the parties to those employment relationships.

[40] If one is needed, the answer to Mr Davenport's rhetorical service question would be that any proceedings to restrain a threatened or actual allegedly unlawful strike could have been served on the union and such members of it as participated in the action, such as the two employees nominated as individual defendants in the High Court proceedings, Messrs McCulloch and Raines.

[41] Next, turning to s 81(1)(a)(i) ("discontinuing that employment" or "reducing the normal performance of it"), Mr Davenport submitted that, contrary to the findings of the High Court Judges, this has not occurred. Again, counsel emphasised that the opportunity to act up is to participate in "an entirely different role" which contention I have already rejected. However, in my judgement, the Commission again focuses on the wrong element. It is not whether the acting-up role is sufficiently different from the role temporarily vacated. Rather, the focus is on the seeking of that acting-up role and the agreement to perform it which is relevant to s 81(1)(a)(i).

[42] I agree respectfully with Lang J who disagreed with Bell AJ on whether the first element of "discontinuing that employment" was met in this case. It cannot be said that the ban on applying for or accepting an acting-up position was discontinuing the employment of any employees or of Messrs Best or Scott in particular. That is because their employment by the New Zealand Fire Service would have continued in any event.

[43] However, I agree with both the other Judges that the ban was directed to a reduction of the normal performance of their employment by employees. That is in the sense that the normal performance of their employment was, for firefighter employees including those who were members of the union, expressing interest in acting-up vacancies and accepting these when offered to them.

[44] Mr Davenport attacked the conclusions of the High Court Judges and the essential argument for the other side that, but for the ban, it would be "normal" for firefighters to put forward expressions of interest so that the intended effect of the ban was a reduction in normal employment. Counsel submitted that the reasoning behind this conclusion is fundamentally flawed for a number of reasons which need to be addressed.

[45] Mr Davenport's first point under this heading was to ask rhetorically which employee or employees specifically have reduced their normal employment. Counsel submitted that is not sufficient, as the High Court found, to say that workforce employees generically have reduced their normal employment or have attempted to do so by the imposition of the ban. I disagree with the Commission's submission: by, in effect, banning acting-up, the union, as a collective of employees, threatened to strike.

[46] Second, the Commission relied on the uncontested evidence that it is not unusual for there to be no expression of employee interest in taking up an acting-up vacancy. Mr Davenport submitted that it cannot be said that the absence of any expression of interest itself amounts to a discontinuation of employment or a reduction in its normal performance.

[47] I consider this submission is ill-founded. That, on occasions, employees may not express interest in acting-up positions does not mean that it is not a normal incident of the employment relationship of those employees that expressions of interest are lodged and offers of temporary acting-up accepted. What is abnormal is that because of a ban on union members being involved in the process, employees may not do so.

[48] Third, counsel argued that the putting forward of an expression of interest for a different role within the Fire Service by an employee of his or her own choice, does not make that part of the performance of existing employment. Counsel emphasised that it is not an obligation or requirement of employment that employees do so.

[49] Again I disagree. The normal performance of their employment by firefighters includes these events even if such applications and acceptances are occasional and entirely voluntary acts on the parts of the employees.

[50] Mr Davenport emphasised that the cases on strikes and their definitions reveal that the conduct in question must be able to be assessed as, or is related to, an employment obligation enforceable by the employer by way of injunction. So, to use a Fire Service example, Mr Davenport submitted that a refusal to work overtime where that is a normal incident of day to day employment, and therefore part of the "normal performance" by firefighters of their employment, would be a strike. In contrast, counsel submitted, the giving of expressions of interest in a different employment role is not. Put shortly, counsel submitted that doing overtime is part of the existing job of a firefighter but acting-up to a managerial role is completely different. Although in the course of argument counsel could not confirm whether overtime work for firefighters was voluntary, I will assume solely for the purpose of argument that it is.

[51] In my view, Mr Davenport's example illustrates the normalcy of performance in relation to acting-up. In principle, it is indistinguishable from voluntary overtime work. But even if overtime is not voluntary in the Fire Service, a refusal to undertake voluntary overtime work that has been banned by a union will be a strike in other employment situations. For the purposes of this judgment, voluntary overtime and acting-up are analogous.

[52] Mr Davenport maintained the susceptibility to injunction theme of his argument saying that if an employee cannot be compelled to carry out an employment obligation by injunction, an employee's decision not to do something in employment cannot be a strike under s 81. He submitted that firefighters could not

be required in law by injunction to submit voluntary expressions of interest or applications for an acting-up role in a "entirely different" position with the same employer. Whilst that may be correct as a matter of the common law of employment, the position is different where Parliament has legislated for a broad definition of striking including a collective refusal to undertake work usually performed irrespective of whether that may be required contractually or voluntarily.

[53] Finally in this regard, Mr Davenport submitted that the interpretation of s 81(1)(a)(i) is supported by reference to the scheme of s 81(1)(a)(ii) which refers to a resumption of, or return to, "their employment". So, counsel submitted, the "discontinuance" or "reduction" is of the employment. The Commission said that firefighters are not employed to put forward voluntary expressions of interest in acting-up positions – that is not "their employment".

[54] Again I must disagree with this submission. Whilst in one sense it is correct that firefighters are not employed to volunteer for acting-up positions or to agree to do so when offered them, the statutory scheme of s 81 is broader than a focus only on contractual rights and obligations. At the risk of reiteration because these arguments are essentially variations on a theme, the performance in practice of the employment relationship is to be considered in determining whether an act or omission is a strike.

[55] Turning to the next limb of s 81 at issue, Mr Davenport challenged the High Court's acceptance that the proceedings concern a refusal or failure "to accept engagement for work in which they are usually employed": s 81(1)(a)(iv). Counsel submitted that putting forward voluntarily an expression of interest in an acting-up position is neither a refusal nor a failure to accept engagement of work for which firefighters are usually employed.

[56] I accept the Commission's submission on the application of s 81(1)(a)(iv). Although the notion of accepting engagement for work may apply to the facts in this case, that must be work "in which they are usually employed". Here, however, it cannot be said that the firefighters were usually employed in acting-up positions. Rather, the work in which they were usually employed was as firefighters. So

s 81(1)(a)(iv) cannot mean that the ban and its operation in practice amounted to a strike.

[57] Next, Mr Davenport addressed the applicability of s 81(1)(a)(v) dealing with a reduction in the normal output or the normal rate of work. Counsel submitted that firefighters have no obligation in law to put forward expressions of interest for a different role they cannot be required to perform. Doing so cannot be "normal output" or "normal rate" because, in counsel's submissions, such expressions of interest are rare, they are for "completely different jobs", and they are not a requirement of the employment of a firefighter. Mr Davenport submitted that even if there was a reduction in output of the Commission's work in general, this is not the test which is the reduction in output of an individual worker.

[58] I agree that the facts of this case do not fall naturally within s 81(1)(a)(v). Providing expressions of interest in, or agreement to, acting-up is not the normal "output" or normal "rate" of work which focuses on issues of work quantity. Section 81(1)(a)(v) is a strike definition intended to capture elements of industrial action not at issue in this case.

[59] The Commission's fallback position is that even if a s 81 definition of a strike is satisfied, this proceeding has not resulted from, or is related to, a strike: s 99(1)(a). Mr Davenport invited me to follow the strict or narrow interpretation given to the word "related" in the Act by the High Court in *BDM Grange Ltd v Parker.*[3] In that judgment the High Court followed an earlier decision of another High Court Judge in *Pain Management Systems (NZ) Ltd v McCallum.*[4]

[60] Those narrow or strict approaches to the phrase have not been followed by this Court,[5] however, and, although persuasive, judgments of the High Court are not binding on the Employment Court.

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[3] [2005] ERNZ 343 at [54].
[4] HC Christchurch CP72/01, 14 August 2001.
[5] *Waikato Rugby Union v New Zealand Rugby Football Union* [2002] 1 ERNZ 752 followed, for example, in *Rolling Thunder Motor Company Limited v Kennedy* [2010] NZEmpC 109 but doubted on appeal in *Kennedy v Rolling Thunder Motor Company Limited* [2010] NZCA 582.

[61] These divergent approaches have arisen under s 161(1)(r) of the Act which deals with the Employment Relations Authority's jurisdiction and not this Court's under s 99. To the extent that they may be relevant, and despite the Court of Appeal's recent doubting of the correctness of a pure "but for" test under s 161(1)(r) in *Rolling Thunder*, I consider that Parliament intended a broad or liberal approach rather than a strict and narrow one in interpreting and applying s 99.

[62] Further, Mr Davenport submitted that if a broad or liberal interpretation had been intended by Parliament in its enactment of s 99(1)(a), it would have been unnecessary for it to have added expressly references to picketing in ss 99(1)(b) and 99(2)(b). I do not agree with that assumption about Parliament's intent. Including picketing expressly may equally have been to clarify coverage of that activity. More fundamentally, however, picketing may take place in the absence of a strike or lockout so that its express inclusion in s 99 was necessary for the Employment Court to deal with this essentially "industrial" activity.

[63] Finally, Mr Davenport sought also to rely on the judgment of the Court of Appeal in *Conference of the Methodist Church of New Zealand v Gray*.[6] Counsel submitted, succinctly, that the key to determining the application of s 99(1) in this case is whether the ban was the foundation of the proceedings which, the Commission says, it was not. *Gray* is, however, distinguishable and not to the point in this case. It dealt with the phrase "founded on" in an earlier statute and not the broader notion of "relation" to under the current legislation. It does not assist in the determination of this proceeding.

[64] So, the Commission contends, the necessary nexus between strike action and the basis of the proceedings does not exist. Mr Davenport argues that the ban was only a background circumstance but is not at the core of or the basis of these proceedings. Rather, the Commission says it was the persuasion of Messrs Best and Scott by the union and Messrs McCulloch and Raines which triggered the proceeding, formed the basis of the causes of action, and are not related to strike action even if this existed.

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[6] [1996] 1 ERNZ 48.

[65] I do not agree. But even on a narrow definition of resulting from or relating to, the acts of dissuasion of Messrs Best and Scott by the union and its officials both resulted from and related to the ban. They resulted from it in the sense that after Messrs Best and Scott defied the ban and took acting-up positions, the not unexpected result of this was the dissuasion from continuing in these roles which is the foundation of the proceedings in tort. But even if that could not be said to have been a result, it was, at the very least, related to the ban.

Decision

[66] It is appropriate to determine the issue in the case by examining, first, the application of s 99 of the Act. It is clear that the Commission's proceedings are founded on tort. Second, it is equally clear that the proceedings have resulted from, or are related to, the union's ban on members expressing interest in, or taking up, acting-up appointments. The actions of the union and its officials that are said to be tortious and which are said to have caused the resignations from or abandonments of their employment by Messrs Best and Scott, resulted from the ban as it was applied in practice by the union. Even if the allegedly tortious acts could not be said to have resulted from the ban, they were clearly related to it. When Messrs Best and Scott did not comply with the ban by taking acting-up positions, the union and its officials are alleged to have persuaded them to resign or abandon their employments by unlawful and tortious actions. There was a very close relationship between the ban and the alleged torts.

[67] Again, it is not difficult to conclude that the strike, if it did not occur, was certainly threatened. The real nub of the case, as Mr Davenport properly conceded, is whether, under s 99(1)(a), the proceedings have been issued against a party to a strike that was threatened or occurred. That brings me to decision of the question whether the ban was a strike as defined in s 81.

[68] There are a number of elements of the statutory definition of a strike that have been established clearly. First, the promulgation of the ban was the act of a number of employees who were in the employment of the same employer: s 81(1)(a). The union is the collective of individual employee firefighters. The ban

was imposed in the name of that collective and also, allegedly, by Messrs McCulloch and Raines.

[69] I find, pursuant to s 81(1)(a)(i), that the ban was at least intended to reduce, and depending on the evidence at trial, may have had the effect of, reducing the normal performance of their employment by union member firefighters. That was in the sense that the normal performance of their work by firefighters included submitting expressions of interest for acting-up positions and also agreeing to do so when offered those roles by the Commission. Normal performance of employment was not restricted to the performance only of the incidents of employment that are legal obligations. The phrase and its meaning are broader than that. It connotes the manner in which the employment relationship operates and what the employees do in the course of that relationship. Normality is not to be equated with frequency. The normal performance of employment may include elements that are infrequent and may also include elements that are entirely voluntary in the sense that some employees may elect not to perform that aspect of the work on occasions but for reasons other than that their union has imposed a ban on it.

[70] The requirement under s 81(1)(b) that the ban was due to a combination, agreement, common understanding or concerted action, whether express or implied, made or entered into by the employees, is also clearly made out. It was a union ban, the work of the collective of firefighter employees and therefore at least a combination or concerted action by them.

[71] For some, but not all, of the reasons that caused Bell AJ and Lang J in the High Court to stay the Commission's proceeding there, I find that this is a case that is within the exclusive jurisdiction of the Employment Court. The ban imposed on union members, prohibiting them from lodging expressions of interest and agreeing to fill acting-up positions, was a strike as defined in s 81 of the Act. It was one of the act or acts of a number of employees in the employment of the same employer in reducing the normal performance of their employment: s 81(1)(a)(i).

[72] The ban was due to a combination, agreement, common understanding or concerted action, whether express or implied made or entered into by the employees

through their union. The Commission's causes of action in tort, being the alleged intimidation of Messrs Best and Scott from agreeing to take up the acting-up positions with it and resigning or abandoning those roles allegedly because of intimidation by the union and Messrs McCulloch and Raines, resulted from or were related to the strike pursuant to s 99(1)(a) of the Act.

[73] It is appropriate, also, to stand back from the detail of the case, even at this preliminary stage, and consider whether the result accords with the general legislative intent about where such cases should be heard and decided. By any account, the issues are employment issues. The union, the collective of Fire Service employees, purported to ban its members from applying for, or agreeing to accept, acting-up positions within their employment relationships with the Commission. The case concerns allegations of intimidation of employees to not apply for, and/or to give up such positions.

[74] The defence to the proceedings in the High Court relies, among other things, upon justification for the actions of the union and the employees based on employee health and safety grounds and also raises as a positive defence alleged breaches by the Commission of the statutory good faith requirements set out in the Act. Those and similar considerations at issue in the proceedings are matters with which this Court is familiar in litigation and, I think it can fairly be said, with which the High Court is less familiar in a practical employment relations sense.

[75] Parliament has determined that where proceedings for specified torts result from or are related to strike (or lockout action or picketing), then such proceedings must be heard and determined in the specialist Employment Court. Of course not every proceeding relying on those torts that has an employment connection must be brought in the Employment Court. The necessary trigger is the relation to, or connection with, strikes, lockouts or picketing. The analysis of the case and its issues is consistent with the legislative scheme.

[76] For the foregoing reasons, the Employment Court has exclusive jurisdiction to hear and determine those proceedings in tort.

[77] If it wishes to proceed, the Commission must now file and serve its statement of claim in this Court and the union and Messrs McCulloch and Raines will have the statutory period for filing and serving a statement or statements of defence. Once those pleadings are in, the Registrar should arrange for a telephone conference call-over with a judge to deal with any outstanding interlocutory questions and with a view to setting the matter down for trial.

[78] Section 188 requires the Court to direct the parties to mediation or further mediation unless there are good reasons why this should not happen. Although the parties have already attempted, unsuccessfully, to settle their dispute by mediation, I consider that the most productive way of doing so may be by private mediation if agreement can be reached on the costs of doing so.

[79] The issue at the foundation of these proceedings is said by the union to be the extent of overtime worked by firefighters and the union's assertion that this is such as to raise issues of health and safety. That is said to be a consequence of existing establishment firefighters covering for duties undertaken previously by firefighters appointed to acting-up positions rather than by the replacement of such temporarily promoted firefighters by other firefighters. It is an issue that the parties themselves are best placed to discuss and attempt to resolve with the assistance of a mediator.

[80] Court proceedings may not address some of the issues in a manner that will help to resolve them as industrial issues. It is preferable in my view that the real dispute should be addressed. I am conscious that the Commission says that the union has no genuine claim that this is a health and safety issue but, rather, seeks simply to score points against the Commission. It is not possible to determine at this time where the truth of those divergent motivations lies but the fact is that the union has raised a health and safety issue that should be dealt with other than, or in addition to, being a defence in a claim for damages in tort.

[81] Accordingly, I direct the parties to mediation or further mediation on these questions that I expect will have been undertaken by the time of the next telephone conference to be held after the pleadings have been filed.

[82] Messrs McCulloch and Raines and the union are entitled to costs on the jurisdictional application in this Court but which I reserve to be dealt with at the same time as any other costs issues arising from the substantive proceeding between them in the Employment Court.

GL Colgan
Chief Judge

Judgment signed at 1 pm on Wednesday 15 December 2010