IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-001088

AND BETWEEN	THE NEW ZEALAND FIRE SERVICE COMMISSION Plaintiff
AND	JEFFREY REGINALD MCCULLOCH First Defendant
AND	BOYD GORDON RAINES Second Defendant
AND	NEW ZEALAND PROFESSIONAL FIREFIGHTERS UNION INC Third Defendant

Hearing: 10 May 2010

Appearances: P Wicks and G Davenport for Plaintiff
P Cranney for Defendants

Judgment: 10 May 2010

ORAL JUDGMENT OF ASSOCIATE JUDGE BELL

Solicitors/Counsel:
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[1] This is a proceeding in which there are claims of tortious interference with business relations. The claim is brought by the New Zealand Fire Service Commission, a body established under the Fire Service Act 1975, against two Auckland union officials, also firemen, Jeffrey Reginald McCulloch and Boyd Gordon Raines, and their union, the New Zealand Professional Firefighters Union Incorporated, a union registered under the Employment Relations Act 2000.

[2] The statement of claim contains six causes of action: a claim of intimidation by unlawful means against Mr McCulloch; a similar claim against Mr Raines, and a claim of intimidation by unlawful means, also against the union; a claim of unlawful interference with economic interests against all three defendants; a claim of conspiracy by unlawful means against all three defendants; and a claim of inducing breach of contract against all three defendants. All these causes of action arise out of the same basic facts.

[3] In December 2008, the Auckland local of the Professional Firefighters Union and Mr McCulloch and Mr Raines are said to have issued an instruction to other firefighters that no member should apply for advertised acting up vacancies. "Acting up" is used to define what happens when someone in the Fire Service temporarily takes a higher rank. Acting up happens under s 66 of the Fire Service Act 1975:

> **66 Provision in case of absence from duty**
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> (1) In the case of the absence from duty of any member of the Fire Service (whether by reason of illness or appointment to special duties or for any other reason whatever) or in the case of a vacancy (whether by reason of death, resignation, or otherwise), and from time to time while the absence or vacancy continues, or for any other special purpose, the Chief Executive, acting in accordance with the policy of the Commission, may authorise any member of the Fire Service to perform all the functions and duties and exercise all the powers, whether under this Act, or any other Act, of any rank or position higher than his own, or may appoint any member of the Fire Service temporarily to any higher rank or position.
>
> (2) Any authority or appointment under this section may be given or made before the occasion arises or while it continues; and no such authority or appointment, and nothing done by any member of the Fire Service acting pursuant to any such authority or appointment, shall be questioned in any proceedings on the ground that the occasion had not arisen or had ceased, or on the ground that the member had not been appointed to any rank or position to which the authority relates.

(3) The Chief Executive, acting in accordance with the policy of the Commission, may at any time revoke any authority given or any appointment made under this section.

(4) Nothing in section 65 of this Act shall apply to any appointment under this section.

[4] That section needs to be read in its statutory context and in particular against s 65 of that Act:

65 Appointments to vacancies

(1) The Chief Executive, in making an appointment under this Act, shall give preference to the person who is best suited to the position.

(2) Where the Chief Executive intends to fill a position that is vacant or is to become vacant in the Fire Service, the Chief Executive shall, wherever practicable, notify the vacancy or prospective vacancy in a manner sufficient to enable suitably qualified persons to apply for the position.

(3) The Chief Executive shall notify to the members of the Fire Service every appointment (other than that of an acting, temporary, or casual employee) made by the Chief Executive to an office or position in the Fire Service.

[5] Under s 65, the Chief Executive has certain special responsibilities he is required to carry out. He is under a duty to give preference to the person who is best suited to the position and the appointment has to be notified to everyone in the fire service. That does not operate under s 66 which operates very much as an exception to the requirements under s 65.

[6] On the facts, both parties agree that the union did issue an instruction to Auckland firefighters not to act up. However, two senior station officers, Mr Scott and Mr Best, did take temporary vacancies. The Fire Service says that the defendants brought pressure to bear on Mr Best and Mr Scott and that led to these men relinquishing their temporary postings. The plaintiff says that what the defendants did constituted the torts which are the subject of this proceeding.

[7] I note that in their statement of defence, the defendants raise a defence of justification. They make a very lengthy plea of it. Their pleading runs to some 31 sub-paragraphs, but what I gather from the pleading is that they are saying that there were good health and safety grounds for the acting up ban.

[8] The defendants have now applied to have the proceeding stayed, because they say that this is a matter within the exclusive jurisdiction of the Employment Court. The defendants rely on the exclusive jurisdiction provisions of the Employment Relations Act 2000, s 99(1) and s 187(1)(h). They say that the present proceedings are founded on tort that result from or are related to a strike. They say that the acting up ban is a strike under s 81 of the Employment Relations Act.

[9] The plaintiff opposes. It says that the ban on acting up was not a strike under the Employment Relations Act and it also says that the conduct by the defendants which led to the resignations by Mr Best and Mr Scott from their temporary positions did not result from or relate to a strike.

[10] Before I address these jurisdictional arguments, I need to say something about the procedure taken in this case.

[11] The defendants applied for a stay under r 15.1 of the High Court Rules. Under that rule, applications may be made for pleadings to be struck out or proceedings stayed when the pleading does not disclose a reasonable cause of action or the pleading is likely to cause prejudice or delay or it is frivolous or vexatious or is otherwise an abuse of the process of the Court. Applications under 15.1 are appropriate when the proceeding is otherwise within the jurisdiction of the Court. However, it is not the rule to use when it is claimed that the matter is not within this Court's jurisdiction.

[12] When it is a matter of considering this Court's jurisdiction to hear a proceeding, the better course is to file an appearance objecting to jurisdiction under r 5.49 of the High Court Rules. That appearance is entered instead of a statement of defence. It is normally then followed by an application under r 5.49 where the Court's jurisdiction is determined. The benefits of that procedure is that it allows jurisdiction to be determined at an early stage. In cases where the matter is not within this Court's jurisdiction, the parties can save themselves the expense and effort of attending to other interlocutory matters. Even if a defendant does not enter an appearance objecting to jurisdiction, the defendant can still raise the issue of jurisdiction in a later application. In those cases, the application is made to the Court

in its inherent jurisdiction. After all, this Court does have an inherent jurisdiction to determine whether any proceeding filed within it is within its jurisdiction or not. I will consider this application on that basis.

[13] I also want to make it clear that I am only determining a jurisdiction question. The merits of the plaintiff's claims and the matters of defence raised by the defendants are not matters I have to deal with today. If this matter is within this Court's jurisdiction, the merits will be considered by a justice after hearing evidence and the submissions of the parties. On the other hand, if the matter is within the Employment Court, that Court will decide the matter under the Employment Relations Act, with particular with reference to Part 8 of that Act. Nothing that I say today is intended to suggest that one party or the other is in the right or in the wrong.

[14] In this Court, when matters of jurisdiction are considered, the starting point is s 16 of the Judicature Act:

> The Court shall continue to have all the jurisdiction which it had on the coming into operation of this Act and all judicial jurisdiction which may be necessary to administer the laws of New Zealand. This is a general original jurisdiction.

[15] This is a general original jurisdiction. It allows this Court to administer the laws of New Zealand generally. This Court can receive any proceeding unless there is some other statutory provision conferring exclusive jurisdiction on some other court or tribunal.

[16] The exclusive jurisdiction provisions which the defendants rely on are ss 99(1) and 187(1)(h) of the Employment Relations Act:

> **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:
>
> …
>
> **187 Jurisdiction of court**

(1) The court has exclusive jurisdiction –

…

(h) to hear and determine proceedings founded on tort and resulting from or related to a strike or lockout:

…

[17] Both provide that the Employment Court has full and exclusive jurisdiction to hear and determine proceedings founded on tort resulting from or related to a strike or lock out and in these matters where the Employment Court has jurisdiction, there is an exclusion from any other court hearing the case, and that is under ss 99(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 lock out;
>
> b) in respect of any picketing related to a strike or lock out.

And s 187(3) says:

> Except as provided in this Act, no other court has jurisdiction in relation to any matter that, under subsection (1), is within the exclusive jurisdiction of the court.

[18] Whether the ban on acting up is a strike requires reference to the meaning of "strike" under s 81(1) of the Employment Relations Act:

> **81 Meaning of strike**
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> (1) In this Act, **strike** means an act that –
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> (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 –
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> (i) in discontinuing that employment, whether wholly or partially, or in reducing the normal performance of it; or
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> (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.

[19] This definition of "strike" has been around for a long time. It is the same definition as appeared in the Employment Contracts Act 1991 and it is also the same definition in s 231 of the Labour Relations Act 1987. In *New Zealand Labourers Union v Fletcher Challenge Ltd* [1988] 1 NZLR 520 the Court of Appeal considered the definition of "strike" in s 231 of the Labour Relations Act. Cooke P, giving the Court's decision, showed that the first three parts of the definition, that is subclauses (1), (2) and (3) of s 81(1)(a), went back to the Industrial Conciliation and Arbitration Amendment Act 1908 and the remainder of the definition was derived from the Strike and Lock out Emergency Regulations 1939. The *New Zealand Labourers Union* case involved union members blacking Fletcher Challenge Ltd products, materials and services. The Court of Appeal had to decide whether this amounted to a strike. As the definition of "strike" in that case is the same as it is in this case, that case gives useful guidance in considering the matter of a strike in this case. The Court of Appeal referred to the speech of Lord Wilberforce in *Heaton's Transport (St Helens) Ltd v Transport & General Workers Union* [1973] AC 15 at 101:

> The classic form of industrial action is a strike or withdrawal of labour, and its converse a lock out. This involves financial loss to the workers. They cease to draw their wages. But there are other forms of industrial action by workers which have been increasingly used in recent times. These have the advantage of involving little or no financial loss to members who take part in them. The TUC handbook already quoted refers to such industrial action as a "go slow", a "work to rule", and an overtime ban. To these may be added blacking, a particularly effective sanction when used in the transport industry.

[20] In the *New Zealand Labourers Union* case, the Court of Appeal went on to say:

> Clearly the New Zealand section has been drawn to bring within the wide statutory definition of strike various forms of industrial action which may not fall within the common law meaning of the term. It is also clear that concerted action which does not amount to breaches of contracts of service may nevertheless be a strike within the meaning of the statute. See for instance *Ross v Moston* (1917) GLR 87.

[21] In a similar vein, I note the decision of the Court of Appeal in *New Zealand Airline Pilots Association v Air New Zealand Ltd* [1992] 2 NZLR 656 at 662 where the Court of Appeal noted this:

> There is no doubt that the legislature had primarily in mind strikes in the traditional sense, which do involve the withdrawal of labour. But the net has been cast wider in recognition as Goddard CJ put it, "of the almost infinite capacity for ingenuity that has been exhibited by those engaged in strikes and lock outs".

[22] So these decisions of the Court of Appeal tell us that the definition of strike is not to be read down in a narrow way. The definition has to be applied in such a way as to deal with the different forms of industrial action that may be taken by employees and employers. A purposive approach is called for. Relevant provisions of the Employment Relations Act under consideration come under Part 8 of the Act. Here I refer to s 80 of the Act which says:

> The object of this Part is:
>
> a) to recognise that the requirement by the Union and an employer must deal with each other in good faith does not preclude certain strikes and lock outs being lawful as defined in this part; and
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> b) to define lawful and unlawful strikes and lock outs; and
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> c) to ensure that where a strike or lock out is threatened in an essential service, there is an opportunity for a mediator's solution to the problem.

[23] I also note that the relationship of a union and an employer is an employment relationship under s 4(2)(b) of the Act. Accordingly, disputes between a union and an employer can give rise to employment relationship problems under the Employment Relations Act. Strikes and lock outs may be the less desirable aspects of employment relationship problems but they are a fact of life of some employment relationships. Part 8 provides definitions of lawful and unlawful strikes and if a strike is lawful, then there can be no tort proceedings under s 99. If a strike is unlawful, there can be remedies such as applications for compliance orders under s 139. The important point about Part 8 of the Act is that it sets out clear statutory provisions telling unions, employees and employers what strikes are and whether strikes are lawful or unlawful. On the other hand, if the matter has to be governed by the common law, that is, if the actions of the defendants in this case are held not to

be a strike, then the common law will have to decide the lawfulness of the defendants' acts. That will be matter of some difficulty for all the parties involved in this case because matters of justification are matters of some uncertainty for the particular torts that have been pleaded in this case.[1]

[24] Fundamental to any strike is the element of collective action. That is apparent in s 81(1)(b):

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

[25] The plaintiff in this case says that the ban on acting up is not a strike. It says that from time to time the Fire Service employees do act up in other positions but when an officer in the Fire Service does take up another role, he is not doing the work he is usually engaged in under s 81(1)(a)(iv). Similarly, the Fire Service says that if a member of the Fire Service does not apply for a position which becomes available, there is no breach of that employee's employment agreement under s 81(1)(a)(iii). It says that there is no compulsion on fire workers to take on vacancies and therefore not taking up a temporary vacancy cannot be a strike.

[26] In argument, the Fire Service contrasts the present case with a ban on voluntary overtime. It is apparently accepts that if there were a ban on voluntary overtime, that could amount to a strike, for example, because it involved a reduction in the normal performance of work. But the Fire Service says that a ban on voluntarily overtime is contractually based. It says that acting up derives from the statutory provision, s 66, and it argues that the defendants cannot strike in relation to such a statutory step.

[27] The Fire Service approaches the matter too narrowly. It looks at the matter only from the perspective of individual employees. But what has happened here is concerted action by the workforce not to apply for or take up temporary postings. While an individual employee might decide that he is not interested in taking an acting position at a higher level, the matter changes when the same stance is taken by

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[1] See *Law of Torts in New Zealand*, 5th ed. Todd & Ors: s 13.2.05, pp 612-616 – inducing breach of contract; s 13.3.03, p 69 – intentionally causing loss by unlawful means. And s 13.4.02(3), p 642 – conspiracy by unlawful means.

the collective workforce. In that situation, something has gone missing from the employment relationship. In the normal course of events, some employees may not be interested in acting up, but others may be. But when the workforce acts collectively so as to prevent the employer filling temporary vacancies, then a normal incident of the employment has disappeared. From the employer's point of view, there is a normal expectation that if vacancies arise, it can look to its existing workforce to fill them. And from an employee's point of view, there is an expectation that if vacancies should arise and he or she is qualified, he or she will have the opportunity to put himself forward to fill that vacancy. Once the workforce collectively decide that they will not apply to fill vacancies, then there is a discontinuance of part of the employment or a reduction in the normal performance of the employment by the workforce as a whole.

[28] I find that the ban on acting up does amount to a strike within s 81(1)(a)(i).

[29] Similarly, when the workforce collectively say that they will not act up, they are doing something that the workforce collectively would otherwise do, in the sense that at least some members would offer to act up. When there is a concerted refusal from the entire workforce to act up, the workforce is refusing to do something which which is a usual incident of the employment of the workforce as a whole. That brings the matter within s 81(1)(a)(iv) of the definition.

[30] In a similar way, when the workforce refuses to act up, it is reducing the workforce's normal output and rate of work for the purpose of s 81(1)(a)(v).

[31] Accordingly, the ban on acting up is a strike under s 81 of the Employment Relations Act.

[32] The Fire Service also says that even if the ban on acting up is a strike, the defendants' actions against Mr Scott and Mr Best do not result from or relate to the strike and those matters are outside the jurisdiction of the Employment Court.

[33] Looking at this, we need to bear in mind the dynamics of industrial action by employees and unions in disputes with employers. Industrial action is effective if

employees act collectively. Action taken by workers to put pressure on an employer loses effectiveness if some of the employees do not join in and they continue working without taking. So unions and employees that engage in collective industrial action also take steps to ensure that all employees join in and observe any strike or work bans. The tactics used on these occasion can include heavy means of persuasion. Invective, using expressions such as "scab", have been used. Sometimes the method of persuasion used on the picket line can be forceful.

[34] In this case, Mr Best and Mr Scott did take acting up positions and the union then brought pressure to bear on them, pressure which the Fire Service describes as "intimidation, coercion and threats".

[35] In my judgment, action which unions and the workforce take against employees who will not join in the industrial action is so connected with the industrial action or strike that it results from the strike and is related to the strike. Unions and the striking employees will see this action as necessary to ensure the overall effectiveness of the ban or strike. It cannot be separated from the strike itself.

[36] In coming to this view, I am supported by s 99(1)(b) and (2)(b) which provides for proceedings in respect of picketing. Picketing is part and parcel of the means unions and workers use to dissuade other employees from working and that clearly falls in as part of the activities under Part 8. In a similar way, the actions alleged against the defendants in this case are similarly directly associated with ensuring the effectiveness of the acting up ban. Those matters, as well as the acting up ban itself, fall within Part 8 of the Employment Relations Act. The lawfulness of those activities will be determined under Part 8 of the Employment Relations Act. It will be for the Employment Court to determine the lawfulness of those actions.

[37] In the *Labourer's Union* case, the Court of Appeal took a cautious approach to the question of jurisdiction. It granted a stay of the proceeding on conditions that the defendants in that case – the union – begin proceedings in the Labour Court to have the Labour Court determine whether there had been a strike. At p 528, Cooke P said:

> The case law must evolve step by step in the light of experience and the working of the legislation. We have indicated a general approach but we do not in this judgment profess to answer questions not before this Court in a practical form. It seems better to proceed with caution, recognising that industrial litigation has a character of its own.

[38] In 1988, that caution may have been understandable. There may still be cases today where it is appropriate to take a gradual approach where the jurisdiction of the Employment Court to hear a claim in tort about industrial action may not be clear-cut. That will be in cases where there are factual disputes and the respective jurisdictions of the High Court and the Employment Court may turn on findings of fact. In this case, there is common ground as to the union ban on acting up. For the purpose of the jurisdiction decision, I am not required to determine disputes questions of fact. I can make a legal determination that there has been a strike and that the activities of the defendants said to give rise to this proceeding do result from and are related to that strike.

[39] Accordingly, I do not see the need to grant a stay with conditions attached. This case is clearly within the exclusive jurisdiction of the Employment Court. Accordingly, I order that this proceeding be struck out.

Costs

[40] The defendants are entitled to costs. The parties have conferred and are agreed that any costs order is to be in favour of the third defendant. They have also agreed that the amount of any costs award is $8,500, including disbursements. Accordingly, there is an order for costs for the third defendant against the plaintiff for $8,500. There is no order for costs for or against the other defendants.

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R M Bell
Associate Judge