IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2024] NZEmpC 10
EMPC 23/2024

IN THE MATTER OF	an application for an injunction
AND IN THE MATTER OF	an interlocutory application for an interim injunction
AND IN THE MATTER OF	an application to strike out interlocutory application
BETWEEN	GATE GOURMET NEW ZEALAND LIMITED Plaintiff
AND	AVIATION WORKERS UNITED INC First Defendant
AND	MALIA TUAMOHELOA Second Defendant
AND	XIAODONG TANG Third Defendant

Hearing:	2 February 2024 (by telephone)
Appearances:	P Swarbrick and T Oldfield, counsel for plaintiff M O'Brien and J Plunket, counsel for defendants
Judgment:	5 February 2024

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL
(Interlocutory application for an interim injunction)
(Application to strike out an interlocutory application)

---

[1] This judgment discusses two related applications. The first in order of filing was an application brought by the plaintiff for an interim injunction. The second was

an application brought by the defendants, seeking an order that the plaintiff's application be struck out. Both applications were brought on an urgent basis.

[2] Because of the unusual combination of applications, it is necessary to detail the procedural history.

[3] Gate Gourmet New Zealand Ltd (Gate Gourmet) provides catering services to airlines. It does so in part via approximately 75 employees who are members of Aviation Workers United Inc (AWU), two of whom are the second and third defendants. There is a collective agreement governing the employment arrangements between Gate Gourmet and AWU.

[4] The interlocutory application for an interim injunction was brought by Gate Gourmet against AWU and the two named employees. At that stage, it concerned two notices relating to intended strikes on 4 and 8 February 2024. The strikes were said to be "on the basis of health and safety under s 84 of the Employment Relations Act 2000". This was a reference to a long-running dispute over health and safety issues, which included concerns as to overtime and fatigue issues.

[5] On 25 January 2024, the parties met in an attempt to resolve the health and safety issues. The meeting was unsuccessful; it was overshadowed by the intended strikes and the prospect that urgent injunctive relief would be sought.

[6] The application for an interim injunction was accompanied by an application for urgency. I heard counsel on this topic in the afternoon of 26 January 2024. Mr O'Brien, counsel for the defendants, accepted it was likely the Court would make an order for urgency. However, he suggested that the parties should attend mediation, which he said could occur on 1 February 2024. He said that if the matters could not be resolved at mediation, the Court should then hear the interlocutory application on 2 February 2024.

[7] Because that would have meant that the Court was required to receive submissions, consider them and issue a judgment on the last working day prior to the first strike on 4 February 2024, I was concerned that Mr O'Brien's proposal was not

realistic. I also noted that an attempt had already been made the previous day to resolve the issues at the meeting mentioned above, where each party was assisted by counsel.

[8] I concluded it was not appropriate to direct mediation because to do so would have resulted in a deferral of the hearing to the last possible moment. Such a process may have meant it would be necessary to indicate the outcome of the interim injunction application after the hearing on 2 February 2024, but with reasons not necessarily being available prior to the first strike on 4 February 2024.

[9] I indicated to counsel the preferable approach would be for submissions to be filed over the period 27–29 January 2024 (even although 29 January 2024 was a public holiday in Auckland), with the hearing taking place on 30 January 2024. This would have meant that the judgment could be issued well prior to the first strike and that the parties would know where they stood.

[10] Mr O'Brien then said he had instructions to withdraw the notice relating to the first strike on 4 February 2024. There would thus be one remaining strike on 8 February 2024.

[11] This meant the process would be able to proceed in a less pressured fashion, with the hearing proceeding on 2 February 2024, and a judgment being issued in good time before 8 February 2024. It would also allow the parties to discuss the issues prior to the hearing. I timetabled the matter accordingly.

[12] However, on 30 January 2024, the defendants filed an application for strike-out of the interlocutory application and the underlying proceeding. They also filed an application for urgency. I received submissions from counsel as to how this application should be dealt with. I concluded that the strike-out application should be heard ahead of the interlocutory application on 2 February 2024, with the parties having had the opportunity of filing evidence and submissions over the previous 48 hours.

[13] Accordingly, I timetabled the application for strike-out at 8.30 am on 2 February 2024. I indicated that, at the conclusion of the hearing, I would advise the parties of the outcome of the strike-out application. This would occur prior to 10 am, when the application for an interim injunction was scheduled for hearing. I noted that if the application for strike-out were to be granted, the interim injunction application would obviously not proceed; if the application for strike-out was dismissed, it could.

[14] Full affidavit evidence and submissions were then filed by the parties in relation to both applications prior to 2 February 2024.

Application for strike-out

[15] The essence of the defendants' application for strike-out was that the affidavits filed by the plaintiff in relation to the interim injunction application were void and inadmissible because they did not comply with the requirements of the Companies Act 1993 in that a written authorisation from the board to file this material had not been provided. It was also submitted that the plaintiff's undertaking as to damages was void because it was undated. Further, the financial information provided by the company was said to be insufficient to satisfy the Court that the plaintiff could satisfy its undertaking.

[16] Mr O'Brien relied on r 7.42A of the High Court Rules 2016 in support of his submission that the Court had jurisdiction to strike out an interlocutory application. That rule provides that if a Judge considering an interlocutory application is satisfied it is "plainly an abuse of the process of the court", the Judge may on his or her own initiative make suitable directions, including an order of strike-out under r 15.1.

[17] In the present case, the Court is not considering an order of strike-out on its own motion. I doubt that r 7.42A applies.

[18] It is necessary to determine the present application in light of the strike-out rules in the High Court Rules. Rule 15.1 relevantly provides:

15.1 Dismissing or staying all or part of proceeding

(1) The court may strike out all or part of a pleading if it—

(a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or

(b) is likely to cause prejudice or delay; or

(c) is frivolous or vexatious; or

(d) is otherwise an abuse of the process of the court.

…

[19] A preliminary point is that the defendants' application is to strike out the interlocutory application, not "all or part of [the] pleading". This suggests that on this ground alone, the application for strike-out would have to be dismissed.

[20] Putting this jurisdictional problem to one side, I am not satisfied that the circumstances disclose an abuse of the process of the Court, as Mr O'Brien argued. I note that the threshold for such a conclusion under r 15.1 is high, as many authorities demonstrate.[1]

[21] Referring to the points advanced for the defendants, the first question is whether the deponents of the affidavits filed for the plaintiff have the requisite authority to do so.

[22] Rule 9.82 of the High Court Rules states that affidavits may be made on behalf of a corporation by a person if he or she knows the relevant facts and is authorised to make the affidavit.

[23] Mr O'Brien suggested that a combination of s 128 and sch 3 cl 6 of the Companies Act required written authorisation from a majority of directors before a person could be said to have the necessary authority.

[24] I do not accept this submission. I have been referred to no cases which state that under either the Companies Act or the High Court Rules, a written authorisation of the kind stipulated by Mr O'Brien is required for present purposes.

---

[1] Jessica Gorman and others *McGechan on Procedure* (online ed, Thomson Reuters) at [HR 15.1.02]–[HR15.1.05].

[25] Counsel referred to a case that pertained to rules as to the filing of affidavit evidence that preceded the current High Court Rules: *Hempseed v Durham Developments Ltd*.[2] There, the Court stated that the provisions of the applicable rule would be met "when the Judge hearing the application is satisfied that the person giving evidence has both the knowledge necessary to give the evidence and the authority of the person on whose behalf that evidence is given."[3] Counsel proceeded on the basis that this dicta still applies. I agree.[4]

[26] Detailed evidence from a board would seem only to be required where there is reason to believe that the individuals in question are not in fact authorised, such as a situation where another director indicates that the board has not authorised the first director to file affidavits or sign undertakings on behalf of the company.

[27] I am satisfied that the affidavits filed in support of the interim injunction application by Todd Steele, who is a director of the plaintiff and also a director of a relevant parent company, as well as those filed by Shaun Joils, general manager of the plaintiff, have satisfied both criteria of r 9.82. As to the issue of whether they were appropriately authorised, there is now confirmation from two directors, stating that the issuing of the proceeding has been discussed and approved by all directors.

[28] There is nothing in the evidence which suggests it is necessary for the Court to receive a formal board resolution as to the filing of affidavits or an undertaking as to damages. I am not persuaded there has been an abuse of process in the filing of documents for the company.

[29] Turning to the question concerning the form of the undertaking as to damages, the absence of a date is not fatal. Rule 7.54 of the High Court Rules stipulates that the undertaking must be signed. There is no express requirement for a date. Plainly, Mr Steele, a director of the plaintiff company, signed the undertaking prior to the filing of the interlocutory application, a fact which he has confirmed on oath. The form of the

---

2 *Hempseed v Durham Developments Ltd* [1998] 3 NZLR 265 (CA).
3 At 268.
4 The High Court has also accepted the case remains relevant: *Manawatu-Wanganui Regional Council v Easton Agriculture Ltd* [2013] NZHC 209.

undertaking which was filed does not support a conclusion that there has been an abuse of process.

[30] Neither am I satisfied that the evidence filed by the company as to its financial circumstances indicates abuse of the Court's process. Any issues as to the adequacy of that evidence could be raised in the context of the defendants' defence of the application for an interim injunction.

[31] A general concern raised by Mr O'Brien was that the issues he raised should lead to a conclusion that the proceedings were defective and that such a finding would preclude the necessity of costs being needlessly incurred in arguing the application for an interim injunction. I consider that such an issue could be dealt with at the costs stage.

[32] In summary, as I indicated to counsel at the conclusion of the hearing of the strike-out application, the grounds raised do not disclose any abuse of process, even if there was jurisdiction to strike out an interlocutory application. Accordingly, I dismissed the application to strike out.

Application for interim injunction

[33] At 10 am on 2 February 2024, the hearing in relation to the application for an interim injunction began. Soon after its commencement, I was advised that counsel had been in dialogue and required more time to discuss matters. I adjourned accordingly.

[34] Upon resuming, I was advised that AWU had sent a notice to the company and to the Ministry of Business, Innovation and Employment, withdrawing the second strike notice for 8 February 2024.

[35] That meant that there was nothing left to injunct.

Outcome

[36] Ms Swarbrick then sought leave to withdraw the interlocutory application for an interim injunction, subject to costs. There was no objection from Mr O'Brien to this course of action.

[37] I discussed the position as to costs briefly with counsel, and I record the understandings that were reached.

[38] Counsel will discuss the issue of costs with regard to the application for strike-out and the application for an interim injunction directly within the next 14 days.

[39] If that issue has not been resolved by then, the plaintiff may make an appropriate application, supported by any necessary information. The defendants are to have a further two weeks within which to respond. I will then deal with the issue on the papers. My provisional view is that costs should be considered on a 2B basis.

[40] At the same time, I request submissions as to whether the Court should direct the parties to attend mediation in light of the circumstances then applying. I would also appreciate advice as to whether the underlying proceeding can be discontinued, subject to resolution of these costs issues.

B A Corkill
Judge

Judgment signed at 11.30 am on 5 February 2024