

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2024] NZEmpC 101
EMPC 202/2024**

IN THE MATTER OF an application for injunction
AND IN THE MATTER OF an application for interim injunction
AND IN THE MATTER OF an application for urgency
BETWEEN AUCKLAND ONE RAIL LIMITED
 Plaintiff
AND RAIL AND MARITIME TRANSPORT
 UNION
 Defendant

Hearing: 11 June 2024
 (Heard at Auckland (via telephone))

Appearances: J Hardacre and B Simmonds, counsel for plaintiff
 G Davenport, counsel for the defendant

Judgment: 12 June 2024

**INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH
(Application for interim injunction)**

[1] On 7 June 2024, the plaintiff applied for an urgent interim injunction to restrain a strike then planned by its employees who are members of the Rail and Maritime Transport Union. The notice of the strike stated that it would start at 0001 hours on 8 June 2024.

[2] The plaintiff was granted urgency at a brief hearing on 7 June 2024. Its application for an interim injunction was not able to be heard then because the plaintiff accepted that the hearing should be on notice, having informed the union earlier of its

intention to apply to the Court. However, by the time of the hearing it had not served the proceeding on the defendant. Instead the application was sent to the defendant's counsel, Mr Davenport, but he did not have instructions to accept service.

[3] In those circumstances I decided to grant urgency to the application for an interim injunction and gave directions to enable it to be heard urgently yesterday.

[4] As directed the defendant filed a notice of opposition and two affidavits in response.

The strike notice

[5] What is in issue is the strike notice given by the defendant to the plaintiff. The strike notice was also provided to the Chief Executive of the Ministry of Business, Innovation and Employment.

[6] As required by s 93 of the Employment Relations Act 2000 (the Act) the notice gave not less than 24 hours notice of strike action. It read:

REFUSAL TO WORK OVERTIME AND REFUSAL TO WORK SHIFT ALTERATION

1. A refusal to work any overtime and a refusal to work any shift alteration that varies from the Master rosters by all current RMTU members employed by Auckland One Rail and who are covered by clause 4 of this notice, at any and all locations at which they may be required to work.
2. The strike will commence from 0001 hours on 8 June 2024 and will continue until such time as this refusal is withdrawn via written notice from the RMTU General Secretary to the Chief Executive of Auckland One Rail.
3. The strike will be continuous.
4. This notice is issued on behalf of all RMTU members employed by Auckland One Rail and who are covered by the bargaining with Auckland One Rail Limited for the intended collective agreement the RMTU is currently bargaining for with Auckland One Rail Limited.
5. The passenger rail service that will be [a]ffected by the strike is the passenger rail service operated by Auckland One Rail Limited in the Auckland rail passenger network.
6. The strike is in addition to any other strikes that may be notified, and shall continue until withdrawn as per clause 2 above.

[7] The notice was signed by the General Secretary of the union.

The reason for the strike notice

[8] The plaintiff and defendant are parties to a collective agreement that expired on 30 September 2023.

[9] In September 2023, the defendant initiated bargaining for a new agreement. It was common ground that the negotiations broke down in early May 2024.

[10] On 1 June 2024, the defendant informed the plaintiff of the outcome of a secret ballot it conducted of its members about possible strike action. The result of the ballot reflected an overwhelming majority in favour of the proposed industrial action, at slightly more than 87 per cent of the ballot papers returned. The plaintiff was advised that strike notices would be issued by the union negotiating team. That step was taken and the notice referred to in [6] was issued to the plaintiff on 6 June 2024.

[11] The plaintiff seeks to restrain the strike, challenging compliance by the defendant with the Act and alleging deficiencies in the notice. Before considering the company's claims it is necessary to set out the principles to apply.

Interim injunction principles

[12] There was no dispute about the principles to apply in considering the plaintiff's application. They were authoritatively stated in *NZ Tax Refunds Ltd v Brooks Homes Ltd* where the Court of Appeal said:¹

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

[13] In subsequently dealing with an application for leave to appeal that decision the Supreme Court stated that the merits of the case, insofar as they can be ascertained

¹ *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90, [2013] 13 TCLR 531 at [12] (footnote omitted).

at the interim injunction stage, have been seen as relevant to the balance of convenience and in the overall justice of the case.²

[14] The test expressed in *NZ Tax Refunds* was revisited by the Court of Appeal in *Intellihub Ltd v Genesis Energy Ltd*, in particular in relation to the phrase “not vexatious or frivolous”.³ After analysing the origin of that phrase the Court noted that for many years since the decision in *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd*,⁴ the approach required of Courts when considering applications for an interim injunction involved the three step analysis just described. The Court held that there is no merit in engaging in microscopic dissections of any theoretical differences between a claim being “not frivolous or vexatious” and there being a serious question to be tried; it concluded that the first limb of a test for an interim injunction requires the applicant to demonstrate there is a serious question to be tried.

[15] The full Court of this Court held in *Tasman Pulp and Paper Co Ltd v NZ (with exceptions) Shipwrights etc Union* that where the proposed action is incapable of being deferred without effectively being cancelled, so that granting interim relief is essentially a summary judgment, the relative strengths and weaknesses of the parties’ cases are more relevant to the overall justice of the case.⁵

[16] Ms Hardacre submitted that given the interim relief sought would effectively dispose of the defendant’s (or perhaps more accurately its members’) substantive rights to strike on the basis of the notice already issued, the Court must be satisfied there is a strongly arguable case.⁶

[17] I proceed on the basis of those principles.

² *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60 at [6].

³ *Intellihub Ltd v Genesis Energy Ltd* [2020] NZCA 344 at [24].

⁴ *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA) at 142.

⁵ *Tasman Pulp & Paper Co Ltd v NZ (with exceptions) Shipwrights etc Union & New Zealand Timber IUOW & New Zealand Electrical Union* [1991] 1 ERNZ 886 (LC) at 898.

⁶ Relying on *Golden Bay Cement v New Zealand Merchant Service Guild* [2002] 1 ERNZ 456 (EmpC); and *Chief Executive Officer of the Dept of Corrections v Corrections Association of New Zealand* [2006] ERNZ 235 (EmpC) at [53].

The plaintiff's claims

[18] The plaintiff pleaded four causes of action in its statement of claim.

[19] The first cause of action was that the strike would be unlawful under s 86(1)(aa) of the Act and challenged the secret ballot process undertaken by the defendant.

[20] The second cause of action claimed that the strike would be unlawful under s 86(1)(ba)(i), in that the strike notice did not comply with s 93(2)(b), alleging that it lacked sufficient clarity and specificity.

[21] The third cause of action was an alleged inducement to breach of contract by the defendant. In it the plaintiff claimed that the defendant "in instructing its members to strike" would result in the plaintiff breaching a contract it has to run the rail service with Auckland Transport.

[22] The fourth cause of action was a pleading of unlawful interference with trade, business or employment. The allegation is that the pleaded tort will have occurred if the strike continues and that the defendant's members will be in breach of their employment obligations.

[23] There are difficulties with the statement of claim touched on by Mr Davenport in his submissions mentioned at this juncture only for completeness. The pleadings do not seek relief for any of the causes of action and the plaintiff's employees are not cited as defendants, even though they are striking. I regard the pleading deficiency as not material at this stage given the conclusions reached later in this decision.

[24] The first cause of action, questioning the secret ballot, was withdrawn at the hearing during the opening of the plaintiff's case. At counsel's invitation it was struck out of the pleadings. The third and fourth causes of action are not relied on by the plaintiff in support of an interim order.

A serious question?

[25] Is there a serious question to be tried about the alleged deficiencies in the notice?

[26] The plaintiff provides passenger rail services. Under s 93(1) of the Act no employee in a passenger road service or passenger rail service may strike unless:

- (a) participation in the strike is lawful under ss 83 or 84; and
- (b) without the employee's union giving the employer notice in writing of the employee's intention to strike.

[27] Sections 83 and 84 provide for lawful strikes (and lockouts). Section 83 provides that participation in a strike is lawful provided it is not unlawful under s 86 and relates to bargaining for a collective agreement that will bind each of the employees concerned.⁷ Section 84 deals with the lawfulness of strikes and lockouts on safety and health grounds and is not relevant to this case.

[28] Section 86 provides for when participation of a strike is unlawful. Under s 86(1)(ba) a strike is unlawful in the passenger rail service if there has been a failure to comply with s 93.

[29] Under s 93(2) a strike notice must specify:

- (a) the period of notice, being a period of not less than 24 hours;
- (b) the nature of the proposed strike, including whether or not the proposed action will be continuous;
- (c) the particular passenger road service or passenger rail service that will be affected by the strike;

⁷ Section 83(b)(ii) provides for a lawful right to strike with regard to an aspect of a collective agreement available pursuant to a declaration made by the Court under s 192 which is not relevant to this case.

- (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.

[30] Section 93(3) provides that the notice must be signed by a representative of the employees' union. The notice need not name everyone to whom it relates, if it applies to all employees who will be covered by the proposed collective agreement.

[31] The plaintiff's second cause of action, about an alleged lack of clarity in the defendant's notice, turns on a claim it does not comply with s 93(2)(b); that the notice lacked clarity as to the nature of the strike.⁸ Ms Hardacre submitted that there was a strongly arguable case that the notice had failed to satisfy that subsection.

[32] Ms Hardacre accepted that the interpretation of a strike notice must be done with reference to established case law, which she said prescribed that the strike notice must be clear, derived from *Secretary for Justice v New Zealand Public Service Inc*. In that case the Court referred to the protection of the public interest, as far as reasonably possible, while recognising that strike action is a legitimate industrial strategy. The Court commented that the right to strike must be subject to reasonable limits prescribed by law.⁹ Based on *Secretary for Justice* counsel submitted that clarity is essential.

[33] The alleged lack of clarity was not specifically pleaded, but these criticisms were directed to the second part of the strike notice, which refers to a refusal to work "any shift alteration that varies from the Master rosters". The lack of clarity initially relied on emerged because of discussions when Linda Hart, who is the plaintiff's General Manager People and Culture, spoke with two train managers in separate journeys she took from Britomart and Middlemore stations. In her affidavit she deposed to both of those train managers being uncertain about the extent of the strike, to one of them was attributed a remark that the strike affected only overtime and not

⁸ In turn cross-referencing to s 86(1)(ba)(i).

⁹ *Secretary for Justice v New Zealand Public Service Inc* [1990] 2 NZLR 36 (CA) at 41.

shifts. To the other manager she attributed a remark that she did not know what she was supposed to do during the strike.

[34] Exhibited to Ms Hart's affidavit was a copy of a letter sent by the plaintiff's lawyer to the union by email on 7 June 2024. That letter addressed what was claimed to be confusion arising from discussions between the plaintiff and the defendant's Branch Secretary about whether the strike affected variations to shifts other than those in the Master roster hours, which were said to be inconsistent with what was put forward by the General Secretary of the union.

[35] Some support for Ms Hart's evidence was provided by William Staniland, who is the plaintiff's Head of Operations Performance. He deposed to two employees refusing to work varied duties within their Master roster hours, to a number of union members working overtime hours after the strike started, some expressing concerns to him about comments that had been made to them by other union members and, it seems, some resultant confusion.

[36] Ms Hardacre did not refer, however, to any other correspondence from or on behalf of the defendant union either before the notice was given or afterwards from which it might be said that the word "any" in the notice was in some way reduced or lost its import.

[37] Ms Hardacre particularly drew on some alleged uncertainty over what shift variations might be affected and whether the strike notices addressed what happened in relation to them. It was said that after the strike notices were received, on 6 June 2024, there was uncertainty about whether the employees would work to rule for variations issued on the day for a network event.

[38] Reference was also made to an article published by Radio New Zealand attributed to the defendant's General Secretary, Todd Valster, in which he was reported to have said something to the effect that the rail workers were refusing to work overtime or changes to rostered hours. That report was argued to be inconsistent with the strike notice.

[39] The strike began on 8 June 2024 and the plaintiff was able to draw on screen shots posted on a Facebook post by a few members of the defendant. The submission was that those posts showed the defendant's members were uncertain about what was happening.

[40] Mr Davenport was critical of the plaintiff's candour in addressing the issues of the notice's clarity, especially in evidence from Ms Hart. That subject will be returned to later. So far as the arguable case assessment is concerned, the submission was that this ground of the application is untenable.

[41] Mr Davenport relied on the unambiguous words of the notice. The submission was that any reasonable person reading the word "any" would understand that the intention was to not work any shift alteration that varied from the Master rosters. It was said there could be nothing unclear about the words used.

[42] While the plaintiff did not explain Master rosters and shift variations, the defendant did. Leighton Mosese who is the Branch Secretary of the defendant, has worked in the rail industry for over ten years and is a certified locomotive engineer. He works shifts as set out in rosters. He explained that the plaintiff issues Master rosters weeks in advance to its employees so that they know what shifts will be worked.

[43] Mr Mosese said, without contradiction, that the current Master roster for the department where he works has been in place from 28 April 2024. It appears that the roster is divided into fortnightly blocks. He is currently working something described as "Roster Link 81". After that roster is finished he will move to Roster Link 82 for a fortnight, and so on, until the end of the interval to which the Master roster relates.

[44] The variations, referred to by the plaintiff's witnesses, are adjustments made to the Master roster as it is worked.

[45] The point of this evidence was to illustrate that the way the plaintiff arranges its work is to schedule its employees a considerable time ahead and to make changes to accommodate new developments.

Analysis

[46] In support of an argument about the notice having to be clear, Ms Hardacre referred to *Secretary for Justice v New Zealand Public Service Association Inc.*¹⁰ While that case is about an essential service, which does not apply to the rail service, it was said that the observations with the Court of Appeal remained relevant. In particular, she referred to comments by Cooke P which emphasised that the purpose of the notice requirement is to protect the public interest as far as is reasonably possible. The Court held that it was in accordance with the spirit of the Labour Relations Act 1987 (now repealed) if the notice requirements were interpreted to mean that the organisers of the strike must make their intentions clear.¹¹

[47] Although that proposition came from a discussion about essential services, and in a different statutory environment, the observations remain relevant; at least one purpose of giving notice under s 93 must be to enable the employer to respond as best it can to the industrial action. It is also required to provide advice of the strike to the travelling public.¹²

[48] However, while I agree notices must be clear, there is no uncertainty on the face of the strike notice. It unequivocally says that the employees will refuse to work “any” variations to the shifts. That is, anything different from the Master rosters.

[49] I do not accept the contention that some uncertainty or lack of clarity in the notice was apparent because of the conversations Ms Hart reported with the train managers (even putting aside for a moment their hearsay nature) or in the discussions she indirectly referred to by exhibiting copies of correspondence between the lawyers dated 7 June 2024.

[50] The *Secretary for Justice* case is illustrative in another way, because it was clear from that decision that the uncertainty or lack of clarity that arose was due to subsequent communications from the union itself; a multiplicity of ‘summary’

¹⁰ *Secretary for Justice v New Zealand Public Service Association Inc.*, above n 9.

¹¹ At 41.

¹² Employment Relations Act 2000, s 93(4).

documents issued by branches of the union. In this case the plaintiff cannot point to any inconsistency in official communications from the union to it about the notice.

[51] Later in this decision I will return to the conversation between Ms Hart and Mr Valster. As to the arguable case assessment, however, the following chronology is instructive.

[52] The strike notice was served at 9.06 am on Thursday 6 June 2024. That is considerably more than the 24 hours advanced notice required by s 93. Later in the day Ms Hart spoke to Mr Valster by telephone and obtained confirmation from him that the union's notice in its reference to "any" shift variations not being worked meant plainly what it said.

[53] It was only later in the day, after there had been a further discussion amongst the plaintiff's bargaining team, that she had the fortuitous opportunity to talk to Mr Mosese when the conversation was about an entirely unrelated matter. I am not persuaded that, even on this interim basis where the affidavits are untested, it could reasonably be said the outcome of the conversation with Mr Mosese gave rise to any indication of lack of certainty or clarity on the part of the union; he specifically referred to needing to make some inquiries before taking the matter further.

[54] It is also instructive, I consider, that after Ms Hart spoke to Mr Valster they exchanged text messages, the tenor of which did not disclose any lingering uncertainty about the industrial action.

[55] Ms Hart did not refer to her conversation with Mr Valster in her first affidavit filed on 7 June 2024 although did address it in a subsequent one filed first in draft, and then in sworn form during the hearing.

[56] The plaintiff has not established any lack of clarity arising from the notice, subsequent conversations between Ms Hart and Mr Mosese or because of the evidence Ms Hart and Mr Staniland gave over their discussions with union members. Nor do the Facebook posts help.

[57] It is difficult to see how the notice is deficient. It begins with a bold heading clearly stating “overtime” and “work shift alteration[s]” will be refused and goes on to clarify that “any shift alteration that varies from the Master rosters” will be refused. Those words are entirely clear.

[58] This ground of the application is not arguable.

The “event”

[59] The second cause of action includes a claim that the notice does not comply with s 93(2)(e). Under that section the notice must specify the date and time on which, or an event on the occurrence of which, the strike will end. The claim is that the notice was deficient because it failed to either give a date and time when the strike will end or specify an appropriate event that will end it. The claim is that because the notice specifies that the strike will end when it is withdrawn by the defendant, that fails to satisfy the section.

[60] Ms Hardacre submitted the “event” required by s 93(2)(e) cannot be a union withdrawing the strike notice under s 95AA. She relied by analogy on *Lyttelton Port Co Ltd v Maritime Union of New Zealand Inc.*¹³ She also drew on Parliamentary materials when the Employment Relations Amendment Bill 2014, which introduced the provision, was considered by the Select Committee.

[61] As to the *Lyttelton Port* case, Ms Hardacre acknowledged that it is about a strike in an essential service but argued that since the notice requirements under s 90, which apply to essential services, are in identical terms to s 93(2)(e) the decision is helpful.

[62] In *Lyttelton Port* members of the defendant union gave notice of a strike. The notice said that the strike would comprise continuous and total withdrawal of labour over each weekend, which was challenged as inconsistent with the legislative

¹³ *Lyttelton Port Co Ltd v Maritime Union of New Zealand Inc* [2016] NZEmpC 173.

requirement to specify a date, time or event.¹⁴ The case was that the effect of the notice was for a continuous strike.

[63] The plaintiff's reliance on *Lyttelton Port* was because of comments in the decision comparing s 90(3)(e), and s 95AA.¹⁵ In that case the Court held that Parliament must have intended the two sections to operate in harmony giving as an example where the strike notice was withdrawn prior to a specified end point. Particular reliance was placed on the failure to specify the end point of the proposed strike was a significant defect.¹⁶

[64] As to the Parliamentary papers, Ms Hardacre referred to the Select Committee Report which recommended amendments to the Bill, including to what became s 93(2)(e) and s 95AA. Her submission was that the Select Committee intended to provide that all notices, whether for a strike or lockout, must include an end date or specify an event. She quoted from the report, that an event "such as the reaching of agreement", would have marked the end of industrial action.¹⁷

[65] The submission was that the policy intent of the Bill, carried through into the statute, was to improve certainty for parties so that they are aware of the nature of the action and can decide how to respond to it. The argument therefore became that the end event being referred to in s 93(2)(e) is something more or different from the withdrawal of the strike notice under s 95AA. Ms Hardacre noted that s 95AA was introduced at the same time as ss 90(3)(e) and 93(2)(b) were introduced.

[66] The essence of the submissions is that since the notice can be withdrawn at any time, and the Act otherwise prescribes that an event is required, they must be talking about different things. An example offered to support this distinction was settling the terms of a collective agreement which would be an event.

[67] Mr Davenport did not accept the analysis or conclusions proposed for the plaintiff. He submitted that what was put forward creates a gloss or limitation on

¹⁴ At [9].

¹⁵ At [68].

¹⁶ At [70].

¹⁷ See too *Lyttelton*, above n 13, at [64].

s 93(2)(e) which Parliament had not added and ought not to be grafted on to it. He began by referring to the word “event” itself, described as a noun simply meaning “a thing that happens or takes place, especially one of importance”, on which basis stating the strike would end when the union gave notice was an “event”.

[68] That submission was made as a way of introducing a plain language interpretation of the statute. Mr Davenport rejected the suggestion that an event must be something other than the withdrawal of the notice by the union, for example at the conclusion of a collective agreement. First and foremost, because the section does not say that. More importantly, if the underlying premise of the plaintiff’s argument was accepted, and certainty about the strike was required so that the employer might prepare a response, hanging the argument on the triggering event being something like the potential settlement of a collective agreement did not actually provide certainty. That was a reference to the phases in bargaining for and settling an agreement which necessitates reaching agreement in principle, ratification and signing, all of which may not happen immediately.

[69] More or less on the same basis the assertion that the end event requires an ability to plan for contingencies, such as health and safety, were rejected.

[70] As to reliance on the *Lyttelton Port* case, Mr Davenport argued that it had been misconstrued. That was because in that case the wording of the strike notice was continuous and contained no reference at all to any step that might end it. The strike referred to every weekend of available work into an indefinite future which is different from the present situation. Attention was also directed to an issue touched on in the decision that is similar to the present situation. In analysing the competing arguments, the Court commented that a union official’s evidence was that the strike action would continue until the notice was withdrawn; in other words, withdrawn under s 95AA. In commenting about that evidence, the Court noted particularly that it was a possibility “not referred to”. Effectively, Mr Davenport was opening the door to an argument that the Court in that case may have been able to construe the strike notice differently had it contained the information the union’s witness mentioned.¹⁸

¹⁸ At [65].

[71] Mr Davenport preferred to see the withdrawal of a notice under s 95AA as merely mechanical; it specifies who may give a notice on behalf of the employees when that situation had not been provided for prior to the introduction of the section, and clarified that it may be given at any time. He noted that there is no time period for withdrawal under s 95AA for perhaps obvious reasons. Viewed in that way, s 93(2)(e) does not provide for something different in quality or nature from the withdrawal under s 95AA. Specifically, he argued that the scope of s 93(2)(e) is not narrowed or limited by s 95AA.

Analysis

[72] The meaning of legislation must be ascertained from its text and in light of its purpose and context.¹⁹ Even if the meaning of the text is plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the requirements of s 10.²⁰

[73] Ms Hardacre's submissions were a combination of arguing that the textual and purposive interpretation of the word "event" must be distinguished from the withdrawal under s 95AA. At its most direct the argument was that both sections exist for a purpose, in the way referred to in the *Lyttleton Port* case, and that can only mean something more is required beyond simple withdrawal of the notice.

[74] I consider there is some force in Mr Davenport's argument that the word "event" refers simply to any occurrence, and on the face of the legislation is not restricted in any way. In a sense, a broad meaning to the word "event" contemplates not only the resolution of the industrial action by for example, agreement, or perhaps intermediate steps such as attending mediation, but any other step the union considers to be appropriate to advance its member's interests. Parliament did not enact, as it could have done, any definition of "event" or some limitations such as specifying that the withdrawal of a notice under s 95AA was not an event of a sort referred to in s 93(2)(e). It is difficult to see that the word "event" needs to be given a narrow meaning in the way argued for by Ms Hardacre.

¹⁹ Legislation Act 2019, s 10.

²⁰ *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, decided under the Interpretation Act 1999 but subsequently applied.

[75] Ms Hardacre referenced Parliamentary materials relating to the legislative history and background of section 93(2)(e) to establish the purpose of the legislation as part of the interpretative exercise. Her submission was that Parliament's intention was for the parties, but in particular the employer, to have some clarity about when the strike would end.

[76] The addition of s 93(2)(e) to the Act was in the context of a suite of amendments enabling an employer to deduct pay when employees were undertaking a partial strike. The ability to do so has now been repealed.²¹ It is arguable that the explanation for the notice requirements relating to the end of a strike were tied to the ability for an employer to know when the strike would end and when to resume normal pay, ensuring pay deductions were made accurately.

[77] The Parliamentary materials available do not contain any mention of a requirement for clarity so an employer may plan for contingencies.

[78] Having made that observation, however, s 93(2)(e) was not repealed at the time when the employer's ability to make pay deductions was repealed. The continued existence of s 93(2)(e) in that environment lends some support to the plaintiff's contention that there is a residual purpose to s 93(2)(e). The argument is, however, slight. That is because there is force in Mr Davenport's submission that the purpose of s 95AA was to clarify that the union enjoyed the right to withdraw the strike notice and it did not have to be undertaken by individual employees.

[79] This analysis is not assisted by the *Lyttelton Port* decision which was made before the repeal of the pay deduction provisions, and further, there is an inference available from the decision that a different result might have been available had the strike notice referred to the possibility of it being withdrawn by the union.

[80] My conclusion is that this cause of action is arguable, but the case for it is very weak.

²¹ Employment Relations Amendment Act 2018.

Balance of convenience

[81] Ms Hardacre submitted that the balance of convenience favours the granting of an order because:

- (a) The strike would cause significant cost and disruption to the plaintiff's business, potentially putting it in breach of a contract with Auckland Transport.
- (b) The strike has caused significant confusion amongst the plaintiff's employees about what hours are to be worked, what rosters they are to follow and what duties they are to undertake.
- (c) The strike prevents the plaintiff from operating the Auckland Train network and may materially impact the safety of passengers on the rail network.
- (d) The serious defects in the strike notice, failing to refer to a valid end date, and the indefinite and uncertain nature of the strike as it stands will materially affect the ability to manage the consequences of the strike.
- (e) The defendant, if an order was made, could remedy the defects and issue a new notice.
- (f) An award of damages would fall short of compensating the plaintiff.

[82] Mr Davenport submitted that the balance of convenience favoured the employees and their right to withdraw their labour in bargaining for a collective agreement. In particular, he relied on the International Labour Organisation Convention 98 on the Right to Organise and Bargain Collectively and the International Covenant on Economic, Social and Cultural Rights. It was said that making an order, even on an interim basis, therefore removed that right and the decision needed to be something weighed carefully before that action is taken.

[83] The most spirited submission on the balance of convenience was strong criticism of the plaintiff's application as seriously deficient when it first sought urgency last Friday. In detail Mr Davenport went through several omissions in the plaintiff's case to cast the application into a questionable light where an equitable remedy is sought. The point was to show why a remedy should not be granted to the plaintiff because it had not sought an equitable remedy with "clean hands".

[84] Mr Davenport was critical of the fact that Ms Hart, in her first affidavit, put forward evidence to suggest that there was uncertainty about what the strike involved. In doing so she did not depose to a conversation she had with Mr Valster on the day the strike notice was sent to her by him in which the union's position was emphatically stated and was no different from the notice. Nor did she mention in that affidavit a text message exchange between them after their conversation in which nothing further was said by her about any possible lack of clarity in the strike notice. The point being that if Ms Hart still considered that the notice was deficient after the conversation, it might have been reasonable to see something of that concern expressed in the messages, leaving open the prospect that she in fact knew clearly what was intended.

[85] Nevertheless, the evidence that was presented did not mention the conversation with Mr Valster and the text messages, but instead said there was uncertainty amongst the workforce based on conversations she had with Mr Mosese and two train managers. The omission was criticised as giving a misleading impression at a time when the Court might have been prepared to grant interim orders urgently.

[86] An allied complaint about the adequacy of the plaintiff's application was that it did not disclose, at the time urgency was granted, that the parties had been granted urgent mediation by the Mediation Service. Ms Hart knew that because she was the person who corresponded with the Mediation Service on behalf of the plaintiff so that, when the application was made last Friday, the plaintiff already knew, but did not inform the Court, that it was scheduled to attend mediation with the defendant on Tuesday 11 June 2024.

[87] In fact, the mediation was ongoing during the course of the hearing. Mr Davenport submitted that when he participated in the conference as a courtesy,

essentially at the Court's direction, and he not know about the mediation while the plaintiff did.

[88] Underscoring that submission was that there remained a possibility that in the absence of disclosure of the full extent of Ms Hart's communication with the defendant, and the existence of the mediation, the Court may have been minded to make an order last week. Mr Davenport argued that those deficiencies were not cured by the plaintiff until after Mr Valster in his affidavit in response disclosed the discussion, text messages and mediation at which point the plaintiff belatedly corrected the position via a further updating affidavit from Ms Hart.

Analysis

[89] The balance of convenience is finely poised. I accept that the plaintiff's employees have the right to withdraw their labour in support of bargaining for a collective agreement, it is one of only a few tools available to them to compel bargaining.

[90] However, I am not persuaded that the balance of convenience favours the plaintiff. It pointed to disruption for its business, but that is a consequence of any industrial action. It pointed to potential inconvenience to the travelling public, arising from possible uncertainty as its schedule of services changes and whether it could be guaranteed that a train will reach its destination if there is an unscheduled variation. Again, that is an aspect of the disruption which is an integral part of withdrawing labour. In any event it seems there has been little disruption in fact, with the plaintiff having implemented contingency plans through reduced frequency of services and, on occasion, bus services. Mr Mosese also deposed that the fears that a service disruption would leave passengers stranded between destinations, had not eventuated.

[91] I am not persuaded that the potential for adverse financial consequences for the plaintiff if the industrial action continues sways this assessment in its favour. The plaintiff has begun an action for damages alleging two causes of action attributed to the union's conduct. If it transpires that there was a breach by the defendant then damages might be pursued.

[92] Finally, I have to consider whether an equitable remedy ought to be available in circumstances where the disclosures by the plaintiff were less than ideal. Ms Hardacre's response to Mr Davenport's criticisms about the quality and completeness of the evidence was to refer to a letter written by her firm on 7 June 2024, after the strike notice was served inviting the union to withdraw it. In that letter there were references to a discussion between Ms Hart and Mr Valster and by her with Mr Mosese. They were referred to by their offices in the union rather than by name and the context of the correspondence is an assertion that the strike notice lacked clarity under s 93(2)(b). An inconsistency in the positions as advised by them was relied on.

[93] I accept Ms Hardacre's assurance that the omission to directly refer to the discussion between Ms Hart and Mr Valster was inadvertent and that there was some reference in correspondence to the discussions, but that does not adequately respond to the criticisms that were made. Ms Hart's affidavit exhibited the letter without comment or further explanation. She did not mention in discussing what happened, or why the plaintiff sought interim orders, the discussions she had with either Mr Valster or Mr Mosese and should have because that was material.

[94] There is also considerable weight in the criticism that the Court should have been informed that the parties had agreed to attend mediation. In any proceeding before it the Court is required to consider whether the parties ought to be directed to mediation.²² If that disclosure had been made it is possible that urgency would not have been granted, or, if it had been, that the hearing would have been delayed slightly to enable the parties to have the best opportunity to attend mediation.

[95] In combination, therefore, I take into account the employees' rights to strike,²³ the weakness of the plaintiff's argument and the other factors which support the union's position, including the incompleteness of the information provided by the plaintiff and the lack of alternative remedies available to the union's members if they

²² Employment Relations Act 2000, s 188.

²³ As provided for in the Employment Relations Act 2000, see *Te Whatu Ora – Health New Zealand v Public Service Association, Te Pūkenga Here Tikanga Mahi* [2023] NZEmpC 56 at [176].

were to be restrained from striking, to conclude that the balance of convenience favours the defendant.

Overall interests of justice

[96] Stepping back to look at this matter, I am not satisfied that an order ought to be made. At best the only argument available to the plaintiff is an extremely weak one and it is offset by the balance of convenience factors just described.

[97] The application is dismissed.

[98] The defendant is entitled to costs. If they cannot be agreed, memoranda may be filed.

[99] The Registrar is to arrange a telephone directions conference to enable directions for a substantive hearing to be made.

K G Smith
Judge

Judgment signed at 5.50 pm on 12 June 2024