IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2024] NZEmpC 104
EMPC 175/2023

IN THE MATTER OF	an application for an injunction
AND IN THE MATTER OF	an application for joinder
AND IN THE MATTER OF	an application to strike out proceedings
BETWEEN	TE WHATU ORA HEALTH NEW ZEALAND Plaintiff
AND	NEW ZEALAND NURSES ORGANISATION INCORPORATED Defendant

Hearing:	24 November 2023 (Heard at Wellington)
Appearances:	S Hornsby-Geluk, counsel for plaintiff P Cranney and K Gawe, counsel for defendant
Judgment:	13 June 2024

JUDGMENT OF JUDGE K G SMITH
(Application to strike out proceedings)
(Application for joinder)

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[1] On 9 May 2023, the defendant gave notice to the plaintiff of a strike to take place at Gisborne Hospital on safety and health grounds. The notice was given on behalf of 24 nurses and care assistants who intended to withdraw their labour between 1.30 pm and 2.30 pm on 24 May 2023. They all worked on Ward 5 at the hospital.

[2] On 16 May 2023, the plaintiff filed a proceeding against the defendant and applied for an urgent interim injunction to restrain the strike planned by its employees. The plaintiff's application was unsuccessful and the strike took place as planned.[1]

[3] The proceeding remains on foot and the plaintiff has indicated that it wants to continue to a substantive hearing.

[4] There are two applications that require resolution. The first in time was filed by the plaintiff during the hearing on 22 May 2023, seeking to join as defendants each of its employees on whose behalf the strike notice was given. The application was made under s 221 of the Employment Relations Act 2000 (the Act), in response to the union's defence that the claim was deficient where the relief sought was against it when the strike was to be by the plaintiff's employees.

[5] The second application was by the defendant in response to the plaintiff's stated ambition to continue to a substantive hearing. It was an application to strike out the proceeding.

[6] To provide context to both applications it is necessary to briefly review the plaintiff's claims.

The plaintiff's claims

[7] The plaintiff and defendant are parties to a collective agreement that expired on 31 October 2022, but which continued in force by operation of s 53 of the Act; the Nursing and Midwifery Multi-Employer Collective Agreement 1 August 2020–31 October 2022.

[8] On 31 October 2022, the defendant wrote to the plaintiff raising concerns about unsafe staffing and an unsafe working environment on Ward 5 leading to care rationing for patients. It recommended some improvements, to which the plaintiff responded. On 20 December 2022, the defendant issued a provisional improvement notice to the plaintiff relating to Ward 5. The notice recommended a reduction of bed numbers on

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1 *Te Whatu Ora Health New Zealand v New Zealand Nurses Org Inc* [2023] NZEmpC 75, [2023] ERNZ 293 at [73].

the ward from 25 to 20, repeating a recommendation the union made on 31 October 2022.

[9] The plaintiff had established certain processes to manage the risk of short staffing on Ward 5 on a day-to-day basis and therefore did not accept the provisional improvement notice which was referred to WorkSafe for review.

[10] With that background, the plaintiff pleaded one cause of action against the defendant: that the strike would breach s 84 of the Act and therefore be unlawful. Section 84 provides that participating in a strike is lawful if the employees concerned have reasonable grounds for believing that it is justified on the grounds of safety or health. The plaintiff claimed that the employees on whose behalf the strike notice was given did not have the required grounds to lawfully strike, so that participation in it would be unlawful.

[11] For completeness the cause of action pleaded that the strike was not lawful under s 83 of the Act; that section provides for a lawful strike if it relates to bargaining for a collective agreement.

[12] The relief sought by the plaintiff was:

(a) a declaration that the notified strike of 24 May 2023 was unlawful because the requirements of s 84 (and/or s 83) of the Act had not been met; and

(b) an injunction against the defendant restraining the notified strike.

[13] As previously mentioned, the plaintiff applied for an interim order to restrain the strike. The grounds of that application repeated elements of the statement of claim, and relied on ss 84 and 100 of the Act. Section 100 provides the Court's jurisdiction to prevent unlawful strikes or lockouts that are occurring or that are threatened.

[14] The union defended the plaintiff's claim and opposed an interim order being made. As well as denying that the anticipated strike would be unlawful, it pleaded as

affirmative defences that the Court lacked jurisdiction to make the declarations the plaintiff sought or to make an order against a non-party to the strike; a reference to the fact that the claim was against the union not the employees who were proposing to withdraw their labour.

[15] It is convenient to consider the defendant's applications first.

Application to strike out proceedings

[16] The Court may strike out a proceeding by relying on r 15.1(1) of the High Court Rules 2016.[2] Under that rule, all or part of a pleading may be struck out 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.

[17] The following principles apply when assessing an application to strike out a pleading:[3]

(a) The pleaded facts are assumed to be true.

(b) The cause of action or defence must be clearly untenable; it is inappropriate to strike out a claim unless the Court can be certain it cannot succeed.

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2 Employment Court Regulations 2000, reg 6(2)(a)(ii). See *New Zealand Fire Service Commission v New Zealand Professional Firefighters' Union Inc* [2005] ERNZ 1053 (CA) at [13].

3 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267; and *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [31]–[33].

(c) The jurisdiction is to be exercised sparingly and only in clear cases, reflecting the Court's reluctance to terminate the claim or defence short of trial.

(d) The jurisdiction is not excluded by the need to decide difficult questions of law requiring extensive argument.

(e) The Court should be slow to strike out a claim in a developing area of the law.

[18] The last principle was considered recently by the Supreme Court in *Smith v Fonterra Co-operative Group Ltd* where, having reviewed *Attorney-General v Prince* and *Couch v Attorney-General*, the Supreme Court expressed its approach in the following way:[4]

> These authorities articulate what are long-established principles: a measured approach to strike out is appropriate where a claim—whether in negligence, nuisance or otherwise—is novel, but at least founded on seriously arguable non-trivial harm. That is so even if attribution to individual respondents remains difficult. In such a case the common law should lean towards receipt of the claim, and full evaluation based on evidence and argument at trial, over pre-emptive elimination.

[19] The Supreme Court concluded:[5]

> Pre-emptive elimination is only appropriate where it can be said that whatever the facts proved, or arguments and policy considerations advanced at trial, a case is bound to fail.

The defendant's grounds for striking out the proceeding

[20] The defendant's application was advanced on three grounds:

(a) The Court has no jurisdiction to grant a declaration that the strike was unlawful.

(b) The Court has no jurisdiction to grant an injunction against the defendant.

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4 *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5 at [83].
5 At [85].

(c) Any issue under s 100 of the Act is moot.

[21] I intend to first consider the defendant's submission that the proceeding should be struck out because there is no live issue and it is therefore moot.

[22] The defendant's application was made on the self-evident basis that the strike took place on 24 May 2023 and industrial action is no longer occurring or threatened.

[23] Conversely, the plaintiff maintained that there is a live issue because, while it was unsuccessful in seeking interim relief, that decision did not resolve the underlying dispute about whether there were safety and health related grounds entitling the employees to strike.

Submissions

[24] Mr Cranney, for the defendant, concentrated his submissions on questioning the jurisdiction of the Court to continue to entertain the proceeding and, in part at least, linked those arguments to mootness. In relation to mootness, he submitted that:

(a) the relevant principles are discussed in *Auckland Council v Drought* and *The Chief Executive of the Department of Corrections v JCE*;[6]

(b) those principles are:

(i) the Court has jurisdiction to strike out a moot proceeding;

(ii) the Court will not hear a proceeding where there is no matter remaining in actual controversy requiring a decision; and

(iii) a case that is moot may be allowed to continue if the Court exercises its discretion to allow that.

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6 *Auckland Council v Drought* [2019] NZEmpC 63, [2019] ERNZ 135; and *The Chief Executive of the Department of Corrections v JCE* [2019] NZEmpC 195.

[25] The Court was urged not to exercise the discretion in favour of allowing the plaintiff's claim to continue because the strike has been and gone so there was nothing left to resolve. Mr Cranney relied on the Supreme Court's decision in *Baker v Hodder* to support the submission that the Court should hear a moot case only in "exceptional circumstances".[7] He submitted that a restrictive approach should be applied especially where the wrong party was sued.

[26] Mx Hornsby-Geluk, counsel for the plaintiff, submitted that although the strike ended in May last year the question of its lawfulness remained a live issue for resolution. Counsel referred to the interim application being dealt with against the principles for injunctive relief, which is different from making findings that would be required to resolve the dispute at a substantive hearing.

[27] As an example of the Court deciding to hear a moot case, Mx Hornsby-Geluk referred to the recent judgment in *Te Whatu Ora – Health New Zealand v Public Service Assoc, Te Pūkenga Here Tikanga Mahi*.[8] Additionally, the case was used to show that the test to apply does not require exceptional circumstances.

[28] In that case, following an urgent interlocutory hearing granting an injunction to prevent a threatened strike, the Court subsequently considered at a substantive hearing concerns over collective bargaining incorporating pay equity claims. In the substantive decision the Court commented that while the strike did not take place, and there were now no outstanding claims, the issue about the relationship between collective bargaining and pay equity claims could be important in future. Consequently, the Court was satisfied that it was appropriate to consider the issues at a substantive hearing despite them being moot.[9] The Court of Appeal indicated that it would have declined to hear the appeal because the matter was moot but Mx Hornsby-Geluk submitted that had no bearing on the present case because the test for hearing moot appeals differs from the test this Court should apply.[10]

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7 *Baker v Hodder* [2018] NZSC 78, [2019] 1 NZLR 94 at [33].
8 *Te Whatu Ora – Health New Zealand v Public Service Assoc, Te Pūkenga Here Tikanga Mahi* [2023] NZEmpC 56, [2023] ERNZ 187.
9 At [5].
10 At [26].

[29] Mx Hornsby-Geluk submitted that resolution of the matters in issue would be important to guide the parties' future conduct because this case is the first occasion where the Court has been asked to consider the lawfulness of a strike taken on safety or health grounds involving only a temporary or short-term withdrawal of labour and immediate resumption of work. Counsel relied on a comment in the judgment that, after striking, the strikers would return to the same work environment they considered to be unsafe and unhealthy for themselves and patients.[11] The judgment also referred to an element of symbolism in the employees' withdrawal of labour.[12]

[30] Using those comments, Mx Hornsby-Geluk submitted that the issue of the lawfulness of the strike in the present circumstances is important, and should be considered at a substantive hearing. Counsel argued there was a risk of a precedent being set; supplemented by an observation that the decision to decline the interim injunction lowered the previous threshold for assessing the lawfulness of a safety or health related strike.

[31] Mx Hornsby-Geluk did not accept Mr Cranney's proposition that, if the claim is moot, exceptional circumstances must be established before the substantive claim could continue to a hearing. Counsel submitted that all the plaintiff is required to establish is that it is a case of general or public importance. It was said that this case demonstrates those features. An alternative submission was that exceptional circumstances exist so that the Court should exercise its discretion to continue to hear the plaintiff's claim, because of the paucity of case law on safety or health related strikes and the potentially significant consequences for employers flowing from them.

Analysis

[32] This Court considered mootness in *Drought* and *JCE*.[13] In light of counsel's competing submissions it is important to consider the genesis of those judgments.

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11 *Te Whatu Ora Health New Zealand*, above n 1, at [58].
12 At [71].
13 *Auckland Council v Drought*, above n 6; and *The Chief Executive of the Department of Corrections v JCE*, above n 6.

[33] Both *Drought* and *JCE* trace their origins to *Gordon-Smith v R*, where the Supreme Court granted leave to appeal a decision about the police practice of jury vetting.[14] In that case there was agreement between counsel that the subject met the statutory requirement for granting leave to appeal. The Court agreed.[15] The issue then became whether there was a live controversy to resolve. The appellant, Ms Gordon-Smith, was convicted at the trial in which the subject of jury vetting arose. She had a right to seek leave to appeal but, because she had benefited from a ruling in the High Court that had subsequently been reversed, any decision of the Supreme Court could not have been of any practical significance to her.[16]

[34] The absence of a live controversy led to an analysis about when it is appropriate to hear an appeal that is moot. The Supreme Court said that the traditional approach in New Zealand is that Courts will not hear an appeal "where the substratum of the…litigation between the parties has gone and there is no matter remaining in actual controversy and requiring decision".[17]

[35] The Supreme Court then considered *R v Secretary of State for the Home Department ex Salem* where the House of Lords departed from the view that it would invariably be an improper exercise of appellate authority to hear appeals in relation to questions that have become moot.[18] That case held that there is a discretion to hear an appeal even if by the time it reached the Court there was nothing left to decide which will directly affect the rights and obligations of the parties. The discretion, however, must be exercised with caution; appeals that are academic between the parties should not be heard unless there is a good reason in the public interest to take that course of action.

[36] Relying on *Salem*, the Supreme Court in *Gordon-Smith* said that mootness does not deprive a court of jurisdiction to hear an appeal.[19] The Court was satisfied that, in general, appellate courts do not decide appeals where the decision will have no

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14 *Gordon-Smith v R* [2008] NZSC 56, [2009] 1 NZLR 721.
15 At [7].
16 At [13]. The outcome of any appeal would not have affected her conviction and sentence.
17 At [14] relying on *Finnigan v New Zealand Rugby Football Union Inc (No 3)* [1985] 2 NZLR 190.
18 *Gordon-Smith*, above n 14, at [15]; citing *R v Secretary of State for the Home Department ex Salem* [1999] 1 AC 450 (HL).
19 *Gordon-Smith*, above n 14, at [16].

practical effect on the rights of the parties in relation to what was in issue between them in lower courts. However, circumstances may warrant an exception to that policy. Provided the Court has jurisdiction, it may exercise its discretion to hear an appeal on a moot question.[20]

[37] In *Gordon-Smith*, the Supreme Court referred favourably to the discussion about policy restraints discussed in a Canadian decision, *Borowski v Attorney-General*.[21]

[38] The reasons for those policy restraints were summarised by the Supreme Court as:[22]

> [T]he importance of the adversarial nature of the appellate process in the determination of appeals, secondly, the need for economy in the use of limited resources of the appellate courts and, thirdly, the responsibility of the courts to show proper sensitivity to their role in our system of government. In general advisory opinions are not appropriate.

[39] Mr Cranney and Mx Hornsby-Geluk disagreed about applying the approach in *Gordon-Smith*, as both *Drought* and *JCE* did, given that it was an appeal decision. They also disagreed about whether the test to apply, once it was clear that there was no live controversy to resolve, was a discretion or required establishing the existence of exceptional circumstances.

[40] As to the first of those points, while *Gordon-Smith* was an appeal its principles have been applied in first-instance cases.[23] In *Borowski*, the principles of mootness were discussed as applying to courts generally, although the analysis that followed was specifically about the appeal before the Court. Nothing, therefore, turns on this proceeding not being a challenge from the Authority.

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20 At [16].

21 *Borowski v The Attorney-General of Canada* [1989] 1 SCR 342 at 353. *Gordon-Smith* also approved of an earlier appellate decision: *Attorney-General v David* [2002] 1 NZLR 501 (CA) where the Court of Appeal continued to hear an appeal from this Court at the request of interveners when the parties had settled; the question of law of public importance in that case was the ability to cross-examine witnesses in an Employment Relations Authority investigation.

22 *Gordon-Smith*, above n 14, at [18].

23 See, for example, *Criffel Deer Ltd v Chief Executive of the Ministry of Primary Industries* [2024] NZHC 862; and *Harvey v New Zealand Assoc of Credit Unions* [2019] NZHC 1174 at [30]–[32].

[41] The second point is about the nature of the test to apply if the proceeding is moot. The disagreement that emerged is possibly because of an observation in *Baker v Hodder* in Mr Cranney's submissions. In *Baker*, while discussing what governs the exercise of a discretion to hear a moot case the Supreme Court noted that in light of considerations underlying the policy of restraint, "a decision to hear a moot appeal should be made only in exceptional circumstances".[24] There was no indication in *Baker* that the Supreme Court sought to refine or alter the approach from *Gordon-Smith*. I consider the expression "exceptional circumstances" used in that case was only a shorthand way of describing how the discretion is to be exercised and does not create a higher threshold than the one in *Gordon-Smith*.

[42] There are two issues:

(a) Is there a live controversy for resolution?

(b) If not, should the discretion be exercised in favour of continuing with the proceeding?

[43] Potentially, there is a third issue, about the Court's jurisdiction. Before a case that is otherwise moot can be heard the Court must have jurisdiction to consider it. For the purposes of the analysis that follows the issue of jurisdiction is put aside and is subsumed into the subsequent discussion.

A live controversy?

[44] Mr Cranney's submissions were straightforward: because the strike has concluded there is no live controversy to consider relating to it. Once the strike ended the plaintiff's employees returned to work, but the fact that they did so is not enough in itself to qualify as a live controversy as to whether the strike was lawful, or unlawful, on the day it happened. He supplemented that submission by observing the absence of any evidence of an intention to repeat the industrial action.

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[24] *Baker v Hodder*, above n 7, at [33].

[45] Conversely, Mx Hornsby-Geluk asserted that there is a live controversy and it is whether the grounds existed to make the strike lawful under s 84.

[46] I do not accept that there is a live controversy to resolve. At the time the plaintiff's employees withdrew their labour, they justified that action by raising concerns they had about the working conditions on Ward 5. They claimed that those conditions were unsafe or unhealthy for them, and the patients they cared for, to a sufficient degree to warrant the withdrawal of labour. There has been no indication that the employees who went on strike intend to do so again by relying on s 84.

[47] The strike occurred over a year ago. In a real sense the strike is historic and it is difficult to see how attempting to now establish whether the grounds existed for it would have any practical effect on the rights of the parties.

[48] I am satisfied that the proceeding is moot.

The discretion

[49] Having concluded the proceeding is moot the next assessment is whether the Court should exercise a discretion to continue to hear the case.

[50] No adequate reason has been provided for exercising the discretion in favour of the plaintiff being able to continue with this litigation. Essentially, the plaintiff's position comes down to wanting to establish that, in May 2023, the working environment on Ward 5 was not unsafe or unhealthy. Since strikes based on allegations about the safety or health of the working environment are likely to be highly fact specific, it is difficult to see how examining the circumstances on Ward 5 at that time would assist the plaintiff and defendant in their future employment relationship. For that matter, examining the working environment on Ward 5 in May 2023 would not provide any guidance of a more general nature for other employers and employees.

[51] The plaintiff referred to the withdrawal of the provisional improvement notice as if that may assist in reviewing the basis for the strike and the decision as to whether

or not it was lawful. The withdrawal of that notice does not advance matters very much further.

[52] An allied submission advanced by Mx Hornsby-Geluk was that the judgment on the interim injunction application altered the test to apply under s 84, because I did not apply a test of immediate and significant risk to safety or health. It is true that the decision did not accept that the test had reached such an onerous level, preferring instead the plain words of s 84. That said, while I do not accept that the test was altered, even if that is what happened, such a situation would not justify continuing the litigation. The decision to refuse the plaintiff's application for interim relief turn on assessments of the balance of convenience and interests of justice. The evidence supporting that analysis was provided by the plaintiff's employees on Ward 5 and they fell squarely within s 84. Additionally, as Mr Cranney submitted, there is no evidence indicating that the strike by those employees will be repeated.

[53] Mx Hornsby-Geluk's submissions were unable to identify any area of public importance that it could be said would be advanced by continuing to hear the proceeding in what is a highly fact specific situation. While the Court is likely to consider in future other claims under s 84 it is difficult to see how reviewing the working environment on Ward 5 as it was in May 2023 would provide any guidance either specifically or more generally.

[54] I would not exercise a discretion in favour of continuing with the proceeding. This proceeding is moot and on that basis is to be struck out.

Jurisdiction

[55] The conclusion on mootness means it is not necessary to review in detail whether the Court has jurisdiction to consider the plaintiff's substantive claim, but in deference to counsel's submissions some comments will be made.

[56] At the heart of the jurisdictional issues was s 100 of the Act which reads:

> **100 Jurisdiction of court in relation to injunctions**
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> (1) The court has full and exclusive jurisdiction to hear and determine any proceedings issued for the grant of an injunction—

(a) to stop a strike or lockout that is occurring or to prevent a threatened strike or lockout; or

(b) to stop any picketing related to a strike or lockout or to prevent any threatened picketing related to a strike or lockout; or

(c) *[Repealed]*

(2) No other court has jurisdiction to hear and determine any action or proceedings seeking the grant of an injunction—

(a) to stop a strike or lockout that is occurring or to prevent a threatened strike or lockout; or

(b) to stop any picketing related to a strike or lockout or to prevent any threatened picketing related to a strike or lockout; or

(c) *[Repealed]*

(3) Where any action or proceedings seeking the grant of an injunction to stop a strike or lockout or to prevent a threatened strike or lockout are commenced in the court, and the court is satisfied that participation in the strike or lockout is lawful under section 83 or section 84,—

(a) the court must dismiss that action or those proceedings; and

(b) no proceedings seeking the grant of an injunction to stop that strike or lockout or to prevent that threatened strike or lockout may be commenced in the District Court or the High Court.

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[57] Mr Cranney's submission was that the Court had jurisdiction to deal with the proceeding while the strike was threatened, or happening, but once it ended that jurisdiction ceased. The submission turns on the plain words of ss 100(1)(a) and 100(2) where it refers to jurisdiction "to stop a strike or lockout that is occurring or to prevent a threatened strike or lockout". Anticipating the plaintiff's submission that this approach, if correct, would leave it without an avenue to obtain a remedy, he submitted it could seek a declaration in the Authority under s 161(1)(l). Under that section the Authority has exclusive jurisdiction to make determinations about employment relationships generally including any proceedings relating to a strike or lockout other than those founded on tort or seeking an injunction.

[58] This submission distinguished between the present case, with pleadings limited to an injunction and declaration and other claims where, for example, relief arising

from a strike or lockout is sought that is within the Court's jurisdiction. The obvious example is a claim for damages for an alleged tort.[25]

[59] Mr Cranney said support for the defendant's argument came from *Shipping Corp of New Zealand Ltd v NZ Seamen's Union IUOW*.[26] In that case, the Court was considering an application for an injunction, compliance order and damages. A preliminary question was resolved about injunctive relief to prevent the strike by referring to s 243 of the (now repealed) Labour Relations Act 1987, which is similar to s 100 of the Act.

[60] In *Shipping Corp*, the Court referred to a fundamental ingredient of the strike, as defined by the Labour Relations Act, being an action or threatened action by employees. By the time the Court was considering the dispute the strike had ceased, leading a conclusion that there was no jurisdiction to entertain the action.

[61] Mx Hornsby-Geluk did not accept that the plaintiff faced any jurisdictional difficulty, taking the position that the Court has jurisdiction pursuant to s 187(1)(i) of the Act. The submission was that, while the strike had ended, the question of its lawfulness remained. Initially, counsel submitted that jurisdiction existed under s 187(1)(h) and/or (i) of the Act. Section 187(1)(h) applies where there are claims in tort. The basis for that submission was that participating in an unlawful strike interferes by unlawful means in trade or employment and is a tort. It was said that by providing the strike notice the union may have induced a breach of contract by its members who then withdrew their labour.

[62] The statement of claim did not plead that the defendant (or anyone else) engaged in tortious activity and no proposed amended statement of claim was provided to indicate that such a claim would be made. In any event, this potential claim was withdrawn by Mx Hornsby-Geluk during submissions to concentrate on s 187(1)(i) of the Act.

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[25] Under Employment Relations Act 2000, s 99.

[26] *Shipping Corp of New Zealand Ltd v New Zealand Seamen's Union IUOW* [1989] 1 NZILR 112.

[63] Counsel said that s 187(1)(i) confers jurisdiction on the Court to hear and determine proceedings under s 100. An invitation was extended to conclude that, because jurisdiction existed when the claim was filed it could not have been lost or removed part-way through, especially since that could leave unresolved the substantive issues at the heart of the proceeding. The submission was that it made sense to conclude that the Court retained jurisdiction because that outcome was within the scheme of the Act, rather than to fall back to making a new claim in the Authority.

[64] In this analysis counsel compared s 99(3) with s 100(3), to suggest that both of them contemplated a decision about lawfulness being made about a strike that has already occurred. Lastly, cl 1 of sch 3 was said to support the conclusion that once a proceeding was properly before the Court it could continue to resolution.

[65] Mx Hornsby-Geluk made the point that the Court has previously indicated that dealing with interlocutory relief does not address the substantive merits of a claim which could only be achieved at a hearing, referring to *Port of Napier v Rail and Maritime Transport Union Inc.*[27] The Court's reasons in that case for refusing interlocutory relief were used to demonstrate that the merits could be determined subsequently.[28] Counsel also referred to *Service and Food Workers Union Nga Ringa Tota Inc v Spotless Services (NZ) Ltd* which similarly referred to the purpose of an application for interim relief being to preserve matters until the case could be heard substantively.[29] The submission was that considerations at an urgent and interlocutory stage differ from those engaged by the substantive consideration of lawfulness.

[66] Additionally, Mx Hornsby-Geluk relied on s 187(1) and sch 3 cl 1 of the Act to support the plaintiff's submissions that having properly begun the case in the Court jurisdiction existed to continue it to a conclusion.

[67] Mx Hornsby-Geluk mentioned several cases where the Court dealt with the substantive claim after a strike or lockout had either occurred or been restrained from

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27 *Port of Napier Ltd v Rail and Maritime Transport Union Inc* [2007] ERNZ 826 (EmpC).

28 See, for example, at [2]: "The questions to be determined on an interlocutory basis until the merits of the parties' positions can be determined substantially, include…".

29 *Service and Food Workers Union v Spotless Services Ltd* [2007] ERNZ 539 (EmpC) at [3].

occurring.[30] Particular reliance was placed on the recent full Court judgment where a declaration was made at a substantive hearing following an interlocutory judgment granting an injunction (so the anticipated strike did not proceed).[31]

[68] Mr Cranney did not accept that those cases established that s 100 applied whatever may have happened in the time between the interlocutory decision and any subsequent hearing. In his analysis, the cases referred to either did not address jurisdiction, the subject was not raised or, in a sense the parties consented to that course of action.

[69] Plainly, the parties cannot confer jurisdiction where it is absent, but there is some force in Mr Cranney's argument that jurisdiction does not appear to have been raised in those decisions.

Analysis

[70] The difference between the plaintiff and defendant over this jurisdictional issue is whether the plain language of s 100(1) applies to deprive the Court of the jurisdiction to consider the substantive claim, or, instead, if there is some broader scope to that language enabling the plaintiff to proceed.

[71] The clear words of s 100(1) are contrary to Mx Hornsby-Geluk's submissions and counsel did not refer to any background materials or other aids to interpretation that might explain or provide support for these arguments.

[72] Mx Hornsby-Geluk attempted to support a broader reading of s 100(1) by drawing on s 187(1)(i) of the Act and cl 1 of sch 3. The section and clause do not assist. Section 187(1)(i) confers exclusive jurisdiction on the Court to hear and determine any application of the sort to which s 100 applies, but of itself that does not

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30 *Service and Food Workers Union v Spotless Services Ltd* [2007] ERNZ 539 (EmpC); *Spotless Services (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2008] NZCA 580; *Service and Food Workers Union Nga Ringa Tota Inc v Pact Group Charitable Trust* [2011] NZEmpC 148; *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission* [2011] NZCA 595; and *Te Whatu Ora – Health New Zealand v Public Service Assoc Te Pūkenga Here Tikanga Mahi* [2023] NZEmpC 56.

31 *Te Whatu Ora – Health New Zealand v Public Service Assoc Te Pūkenga Here Tikanga Mahi* [2023] NZEmpC 56 at [184].

assist in determining the scope of the Court's jurisdiction under s 100. Clause 1 of sch 3 provides that the Court may hear and determine any question relating to an employment relationship, which is clearly relevant to the scope of the jurisdiction but is insufficient to create jurisdiction where it does not otherwise exist.[32]

[73] For completeness, there is nothing in the relationship between ss 100(1) and 100(3) that might assist a broader interpretive approach. Subsection (3) does not go so far as to confer jurisdiction to continue hearing an application when there is no longer a strike or lockout. Instead, it contemplates circumstances in which the Court is to have a substantive hearing to determine lawfulness, the subject of which is ongoing or threatened industrial action.

[74] All of that can be contrasted with the jurisdiction conferred by s 99 which deals with tortious actions. The language of that section expressly extends to a strike that has occurred.

[75] The *Spotless Services (NZ)* line of cases does not assist the plaintiff in establishing jurisdiction. As Mr Cranney submitted, this Court's judgment addressing the lawfulness of the lockouts and granting a permanent injunction was in the context of ongoing industrial action which remained in effect until the hearing.[33] The Court of Appeal held it was not in a position to decide if the lockout was justified under s 84, and remitted the matter to this Court.[34] While that result could suggest the Employment Court has jurisdiction to consider lawfulness once industrial action has ceased, in that case there were outstanding claims for wages linked to the lawfulness of the lockout.[35]

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32 See, in respect of materially similar s 104(1)(l) and (m) of the Employment Contracts Act 1991, *Conference of the Methodist Church of New Zealand v Gray* [1996] 2 NZLR 554, [1996] 1 ERNZ 48 (CA) at 56. See, under s 104(1)(f) of the Employment Contracts Act 1991, *Conference of the Methodist Church of New Zealand v Gray* [1996] 2 NZLR 554, [1996] 1 ERNZ 48 (CA) at 56. While that provision conferred jurisdiction to "hear and determine any question connected with any employment contract" the Court of Appeal's dicta as to jurisdiction is still relevant.

33 *Service and Food Workers Union Nga Ringa Tota Inc v Spotless Services (NZ) Ltd*, above n 29, at [15].

34 *Spotless Services (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2008] NZCA 580 at [48] and [52].

35 See the one subsequent judgment with the parties' names relating to hearing preliminary questions: *Service and Food Workers Union Nga Ringa Tota Inc v Spotless Services (NZ) Ltd* EMC Auckland AC12/09, 1 April 2009 (EmpC).

[76] There have been two other cases in which the Court considered substantive issues following an interim injunction hearing: *Service and Food Workers Union Nga Ringa Tota v Pact Group Charitable Trust* and *Te Whatu Ora – Health New Zealand v Public Service Assoc Te Pūkenga Here Tikanga Mahi*. In the former case the Court had previously granted an interim injunction to restrain a lockout.[36] In the latter, an interim injunction was granted to restrain proposed strikes relating to a pay equity claim.[37] In the substantive cases a jurisdictional point was not taken and, presumably, there was some aspect of the proceeding which enabled the Court to proceed to hear the substantive claim.[38] In the absence of the subject being addressed one way or the other those decisions do not offer guidance in resolving the jurisdictional issue.

[77] While all of this analysis points towards a conclusion that the cessation of the industrial action also acts to deprive the Court of jurisdiction, I am not satisfied that it is appropriate to regard s 100 in such absolute terms.

[78] Mr Cranney and Mx Hornsby-Geluk did not consider in their submissions whether there might be any aspect of the Court's implied statutory jurisdiction or powers that meant it might still be appropriate to consider the lawfulness of the strike.[39]

[79] The submissions did not address situations where the Court is asked, after industrial action has concluded, to revisit an order because it adversely affected the rights of one or other party, perhaps inappropriately, and where it is just to do that. It is unlikely Parliament intended the Court's jurisdiction or powers to be abruptly truncated on the cessation of industrial action so that it would not be able to revisit matters in such a situation. It is not an adequate answer, in my view, to point to the

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36 *Service and Food Workers Union Nga Ringa Tota Inc v Pact Group Charitable Trust* [2011] NZEmpC 137.

37 *Capital and Coast District Health Board v Public Service Assoc, Te Pūkenga Here Tikanga Mahi* [2022] NZEmpC 32.

38 For example, in the latter case the union made a claim for damages relating to the cancelled strikes, which was only withdrawn at the substantive hearing: see *Te Whatu Ora – Health New Zealand v Public Service Assoc Te Pūkenga Here Tikanga Mahi*, above n 8, at [8].

39 See for example the discussions about inherent jurisdiction and powers in *Axiom Rolle PRP Valuations Services Ltd v Kapadia* [2006] ERNZ 639 (EmpC); and in *Hynds Pipes Systems Ltd v Forsyth* [2017] ERNZ 484, [2017] NZEmpC 89.

Authority's jurisdiction as a means to obtaining some sort of relief, especially where revisiting the lawfulness, or unlawfulness, of the industrial action is almost inevitable.

[80] Given that this proceeding is moot and the discretion will not be exercised to continue to hear it, it is preferable not to express any concluded views on the jurisdiction of the Court where the subject would obviously bear further analysis.

Application for joinder

[81] That leaves for consideration the application for joinder. It follows, that since the proceeding is to be struck out, the prospect of potentially joining other defendants falls away.

Outcome

[82] The defendant's application is successful, the proceeding is struck out.

[83] Costs are reserved. If the parties cannot reach agreement on costs, memoranda may be filed.

K G Smith
Judge

Judgment signed at 3.15 pm on 13 June 2024