IN THE EMPLOYMENT COURT
AUCKLAND

AC 17B/08
ARC 37/08

IN THE MATTER OF	an application for an injunction
BETWEEN	AIR NELSON LIMITED Plaintiff
AND	THE NEW ZEALAND AIR LINE PILOTS' ASSOCIATION INDUSTRIAL UNION OF WORKERS INC First Defendant
AND	SIMON PALMER Second Defendant

Hearing:	26 August 2008 (Heard at Auckland)
Court:	Chief Judge G L Colgan Judge C M Shaw Judge A A Couch
Appearances:	CH Toogood QC and Kevin Thompson, Counsel for Plaintiff Rodney Harrison QC and Richard McCabe, Counsel for Defendants
Judgment:	17 September 2008

JUDGMENT OF THE FULL COURT

Nature of proceeding

[1] This judgment addresses previously undecided issues about the form of notice which must be given of strike action in essential services, the service of such notices and the jurisdiction of the Court to validate informal notices. The first of these issues has been considered previously by the Court but only on an arguable case basis in the context of applications for interim relief. Such applications are usually dealt with urgently and without the benefit of considered submissions on the law and

opportunity for judicial reflection and reasoning that this case now provides. The other two issues appear to be novel.

[2] The first issue was raised in this case by the plaintiff when an interlocutory injunction was sought last May. The Court then held that, although the question was arguable, the employer was unlikely to have been misled by the content of the union's notice of intended strike action and the balance of convenience and overall justice of the case did not then favour prohibiting the strike.

[3] Bargaining for a collective agreement has continued between the parties since then and the union has continued to give notice of intended strike action in the same impugned form. The issue about compliance with the notice requirements is therefore live, important to these parties, and indeed important to all unions and employers in essential services in New Zealand.

The issues

[4] The first issue is how the period of notice which must be specified in the notice of intention to strike must be expressed in order to comply with s90(1) and s90(3) of the Employment Relations Act 2000 ("the Act"). In particular, the issue is whether the period must be specified in days or some other particular measure of time.

[5] Section 90 requires notice of intended strike action to be given to both the employer and the chief executive of the Department of Labour ("the chief executive"). The second issue is whether, in this case, the notice of intended strike action was given to the chief executive within the required time, which is no less than 14 days prior to the commencement of the strike. The notice was sent to the chief executive's office after normal business hours on a Friday. Had it been received by the chief executive that day, it would have been in time. If it is to be regarded as being received by the chief executive only on the following Monday morning, it would have been out of time.

[6] These first two issues are independent of each other in the sense that, even if the plaintiff is unsuccessful on the first issue, it may nevertheless be successful on the second.

[7] The third issue depends upon the plaintiff succeeding in either or both of the first and the second. Without conceding either issue, the defendants say that if the notice was defective and/or the notice was given to the chief executive out of time, the Court should validate their actions under s219(1) of the Act. This raises the question whether the Court's jurisdiction under s219 extends to the requirements of s90. If so, it raises the issue whether, on the facts of this case, that jurisdiction ought to be exercised in the defendants' favour in this case.

Strikes/lockouts in essential services – The statutory scheme

[8] Where they relate to essential services, the requirements for notice are effectively the same for strikes and lockouts. Although we will discuss the issues largely in terms of the provisions relating to strikes, our reasoning applies equally to lockouts.

[9] Part 8 of the Act recognises strikes and defines them. It then stipulates what constitutes lawful and unlawful strikes. Generally to be lawful a strike must relate to collective bargaining rather than to other matters such as personal grievances and disputes. The lawfulness of the proposed strike action in this case was not in issue. The categories of permissible strikes and lockouts are narrowed further where they affect what are described as "essential services". These are specified in Schedule 1 of the Act and are generally industries in which a strike or lockout will affect the public interest. In such cases, the statute requires that a strike or lockout will only be lawful if it has been preceded by a minimum period of notice to the employer or union concerned. This provides time in which the parties can attempt to settle the issues giving rise to the strike or lockout before it occurs. It also enables the recipient of the notice to make arrangements to mitigate the effects of the strike or lockout.

[10] Schedule 1 of the Act divides essential services into two categories. Those in Part A include an air transport service such as that operated by Air Nelson Limited. Where these services are involved, notice of intended strike action must be given to the employer no later than 14 days before the commencement of the strike. Part B of Schedule 1 relates to the operation of slaughterhouses and abattoirs. In those industries, the period of notice required is 3 days. In both cases, notice of the intended strike action must be given to both the employer and the chief executive. The principal reason for the latter is to enable the chief executive to offer mediation services to the parties with a view to resolving the bargaining issue which is the reason for the proposed strike. There is also a provision in s90(1)(b)(i) which requires that notice be given in all cases no more than 28 days before the commencement of the strike.

[11] Although not defined as "essential services", passenger road or rail services are also subject to a requirement for notice of a strike or lockout but the period of notice required is only 24 hours – see s93 and s94. In such cases, notice need not be given to the chief executive. Presumably this is because, in such a short time frame, it will not be practical for mediation services to be provided. Instead, employers in such cases are required to make the travelling public aware of the impending action.

[12] The general and particular provisions of the Act relevant to questions in this case include the following. One of the two key objects of the Act set out in s3 is:

> *(a)* *to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship—*

[13] The means by which this object is to be achieved include:

> *(v)* *by promoting mediation as the primary problem-solving mechanism; and*
>
> *(vi)* *by reducing the need for judicial intervention; ...*

[14] The first of these objectives is important because one aspect of the present case is the opportunity for the chief executive to offer mediation services to the parties. This objective is reinforced by s80 which sets out the objects of Part 8 of the Act which deals with strikes and lockouts. One of these is:

(c) to ensure that where a strike or lockout is threatened in an essential service, there is an opportunity for a mediated solution to the problem.

[15] The second broad objective of reducing the need for judicial intervention is also important. The provisions of the Act relating to strikes and lockouts are detailed and prescriptive. Interpreting them in a manner which is both clear and practical is likely to reduce the extent to which the parties seek relief from the Court.

[16] Under the heading *"Essential services"* ss90 to 92 are relevant. The emphasis, by underlining of the words on which this case turns, is ours.

> ***90. Strikes in essential services***
>
> *(1) No employee employed in an essential service may strike—*
> - *(a) unless participation in the strike is lawful under section 83 or section 84; and*
> - *(b) if subsection (2) applies,—*
>   - *(i) without having given to his or her employer and to the chief executive, within 28 days before the date of the commencement of the strike, notice in writing of his or her intention to strike; and*
>   - *(ii) before the date specified in the notice as the date on which the strike will begin.*
>
> *(2) The requirements specified in subsection (1)(b) apply if—*
> - *(a) the proposed strike will affect the public interest, including (without limitation) public safety or health; and*
> - *(b) the proposed strike relates to bargaining of the type specified in section 83(b).*
>
> *(3) The notice required by subsection (1)(b)(i) must specify—*
> - *(a) the period of notice, being a period that is—*
>   - *(i) no less than 14 days in the case of an essential service described in Part A of Schedule 1; and*
>   - *(ii) no less than 3 days in the case of an essential service described in Part B of Schedule 1; and*
> - *(b) the nature of the proposed strike, including whether or not the proposed action will be continuous; and*
> - *(c) the place or places where the proposed strike will occur; and*
> - *(d) the date on which the strike will begin.*
>
> *(4) The notice—*
> - *(a) must be signed by a representative of the employee's union on the employee's behalf:*
> - *(b) need not specify the names of the employees on whose behalf it is given if it is expressed to be given on behalf of all employees who—*
>   - *(i) are members of a union that is a party to the bargaining; and*
>   - *(ii) are covered by the bargaining; and*

(iii) are employed in the relevant part of the essential service or at any particular place or places where the essential service is carried on.

...

92 Chief executive to ensure mediation services provided

Where the chief executive receives a notice of intention to strike or lock out under section 90(1)(b)(i) or section 91(1)(b)(i), the chief executive must ensure that mediation services are provided as soon as possible to the parties to the proposed strike or lockout for the purpose of assisting the parties to avoid the need for the strike or lockout.

[17] What is required to comply with s90(3)(a)(i) is in dispute and is not entirely clear from the words alone. In such circumstances it can be useful to have regard to both legislative background materials and international instruments. Counsel advised us, however, that neither of these sources could throw any useful light on what is meant by the phrase *"must specify ... the period of notice, being a period that is ... no less than 14 days ..."*. So, our search for meaning is confined necessarily to the scheme of the Act, our knowledge and experience of the practice of employment relations and of strikes and lockouts in essential services, and the principles established in previous cases.

Relevant facts

[18] On 9 May 2008 the first defendant prepared a notice of strike action to be given to the plaintiff and to the chief executive. In purported compliance with s90(3)(a)(i), the notice stated that relevant employees *"... intend to strike after the expiry of fourteen (14) days and before the expiry of twenty eight (28) days of the date of receipt of this notice by the Employer"*.

[19] There is no challenge to other constituents of the notice, so we do not set these out. Under a heading ***"THE DATE AND DURATION OF THE PROPOSED STRIKE SHALL BE:"*** the notice stated:

> *Commencing on MONDAY the 26th day of MAY 2008 at 00.01 hours (00.01 a.m.) and continuing until 23.59 hours (11.59 p.m.) on MONDAY the 26TH day of MAY 2008.*

[20] This notice of intended strike action was given to and received by Air Nelson Limited on 9 May 2008, that is more than 14 days before the intended commencement of the strike action.

[21] However, the notice was not sent to the chief executive until 5.41 pm on that same day, Friday 9 May, by fax to a machine adjacent to the reception desk at the head office of the Department of Labour in Wellington where the chief executive's office is also located. The office is open from 8 am to 5.30 pm from Monday to Friday. By the time the fax was sent by the union to the chief executive, the office had been closed for about 11 minutes. It seems common ground that the faxed strike notice would not have come to the attention of the chief executive until at least 8 am on Monday 12 May 2008. That was less than 14 days before the strike action was due to start.

Issue 1: Compliance with section 90(3)(a)(i)

[22] In *R v Secretary of State for the Home Department, ex parte Daly* [2001] 3 All ER 443, 447, Lord Steyn observed: *"In law context is everything"*. In this country, Hammond J foreshadowed that pithy statement when, in *Hawkins v District Prisons Board* [1995] NZAR 129, 140 he said:

> *Consideration of the context and the setting is absolutely vital to the proper ascertainment of meaning. ... Thus when a Court says that something is plain, it is asserting that in a given context, the meaning ascribed is rational and "makes sense".*

[23] Context is important to the interpretation of s90(3)(a) because the same words are used in relation to periods of 14 days and 3 days in ss90 and 91 and 24 hours in ss93 and 94. The construction we place on the words in one context must be consistent with the same construction being applied in the other contexts. It is also important that the statutory provisions are construed in the context of the Act as a whole and of current employment relations practice.

[24] The case for the plaintiff on the first issue is essentially as follows. It says that the union failed to specify the period of notice because it did not set out the relevant whole number of days before the scheduled commencement of strike action. It says

that, in order to comply with s90, a strike notice must contain a statement such as "You are hereby given 16 days' notice of intended strike action".

[25] The plaintiff says substantial compliance with the statutory requirements is not sufficient when strict compliance is stipulated for in the Act. Colloquially, a "near enough is good enough" approach should not be permitted. Mr Toogood submits that the formula used by the union in the notice gave the chief executive no indication of the notice period because the chief executive did not know and could not have known of the date of receipt of the notice by the employer. The plaintiff says that it is as important for the chief executive to be aware of the period of notice as it is for the employer, albeit for different reasons.

[26] In reliance on cases dealing with strike and lockout notices including *NZ Rail Ltd v NZ Combined Union of Railway Employees* [1995] 1 ERNZ 84 and *Eagle Airways v NZALPA IUOW Inc* [1998] 2 ERNZ 649, the plaintiff says that strict compliance with the notice requirements is necessary because the intentions of the union about strike action must be made clear.

[27] Mr Toogood makes the point that the notice does not record when it was received and that, as a result, the employer must ascertain and consider external information, being the date on which it received the notice. He submits that a notice must state explicitly the actual period of notice rather than leave the recipient to infer this by calculating the period from the date of receipt of the notice to the date on which the strike is to start.

[28] In short, the plaintiff says that the requirement to *"specify"* the period ought not require the recipient of the notice to calculate the period.

[29] Mr Toogood traced the history of comparative sections in earlier legislation. Section 125(1) of the Industrial Relations Act 1973 required only that 14 days' notice of a strike be given within one month before its commencement. There was then no legislative requirement to specify the period of notice. This was changed by s235(2) of the Labour Relations Act 1987 which introduced for the first time the notion of specifying the period of notice within the written notice. This was

essentially continued by s69(2) of the Employment Contracts Act 1991. When enacting s90 of the Employment Relations Act 2000 this requirement to specify the period of notice was again continued and there was an additional requirement that notice also be given to the chief executive.

[30] Counsel submitted that, as other cases have confirmed, the enactment of the Labour Relations Act 1987 was the most significant change to these requirements.

[31] By reference to a number of dictionary definitions, counsel submitted that to *"specify"* means to particularise, to state explicitly, or to state in detail. Mr Toogood emphasised not only that there must be a specification but that this must be of *"the"* period of notice. Here, counsel submitted, the notice does not *"specify" "the period of notice"* but, rather, a number of possible periods beyond 14 days.

[32] For the defendant, Mr Harrison submitted that s90(3) requires two elements: first, the commencement date of the strike and, second, the period of advance notice of that commencement date being no less than one or other of the two requisite periods of 14 or 3 days. Counsel submitted that, together, these details will enable an employer to identify the length of the intervening period before the strike begins. Contrary to the case for the plaintiff, he said this did not require the drawing of an inference but, rather, a calculation by simple arithmetic that could be easily made by any employer. It was said that this will enable the working out of both whether the period of notice required by the Act has been given and how much time is left to plan for or to resolve the dispute. This, the defendants submit, would satisfy the statutory purpose of giving clear and sufficient notice of a strike in an essential service.

[33] Mr Harrison emphasised the importance of notice under the current Act where elements of the effect of the strike or lockout action on the public interest are now required to be considered and established. The giver of a notice must ensure that its recipient is aware whether the notice is either of 14 or 3 days, or, now, 24 hours. Counsel submitted that it is not correct that the period of notice can only be *"specified"* by a finite and precise number of days and not by any other form of words. Mr Harrison submitted that the Court should not require an overly rigid

approach to the content of a notice. Accepting that intentions to strike must be made clear, counsel relied on the emphasis on this objective set out in such cases as *Secretary for Justice v NZ PSA* [1990] 2 NZLR 36 (CA) and *Service and Food Workers Union Inc v OCS Ltd* [2005] 1 ERNZ 717.

[34] Counsel submitted that to uphold the plaintiff's argument would require the time at which notice was given to be known when it was written. Any difficulty or delay in giving notice could then result in notices being invalid even though no less than 14 days' notice had been given. Mr Harrison submitted that the approach advanced for the plaintiff would limit flexibility and penalise accidental or genuine errors in the giving of notices.

[35] The defendants say in conclusion that the formula used by them in the relevant and many other notices meets the statutory requirement to specify the period of notice.

[36] In our view, the proper construction of s90(3)(a)(i) is neither that proposed by the plaintiff nor that urged on us by the defendants. The statutory requirement is to specify "the" period of notice. What is specified must therefore be particular and accurate.

[37] The difficulty with the formula used by the union is that it does not specify any particular period of notice. Rather it tells the employer and the chief executive only that the period of notice is greater than 14 days. It is only a parroting of the statutory formula that is well-known in all cases and does not itself specify the period of notice.

[38] The plaintiff's proposition that the only way to comply with the statute is to specify the period of notice in whole days is too rigid. There is more than one way in which a period of time can be described or defined. An acceptable way of doing so is to specify the points in time at which the period of notice is to start and end.

[39] For example, a strike notice might record that the period of notice will begin when the written notice is received by the employer and end when the strike action

described in the notice is scheduled to commence. If an employer wishes to know how much time will elapse between those two points in time, it requires only a simple arithmetic calculation. As counsel accepted in the course of argument, every employer who receives a strike notice in an essential industry will carry out that calculation in order to see whether the statutory period of notice has in fact been given. It therefore imposes no burden on the employer to do the same calculation if it wishes to know the precise period of notice being given.

[40] In our view, this approach meets the requirements of the statute and does so in a way which provides certainty to the employer yet avoids unnecessary technicality which may lead otherwise clear notices to be rendered invalid by unforeseen circumstances. It also seems to us to be the approach most likely to promote the objective of the Act to minimise judicial intervention.

Issue 2: Was notice given to the chief executive in time?

[41] This issue turns on whether notice is "given" for the purposes of s90 when the document is sent or when it is brought to the notice of the intended recipient. In our view, it must generally be the latter.

[42] The purpose of requiring that notice be given is to ensure that the persons to whom the notice is addressed are informed of its contents. Whether that has occurred in any particular case will be a matter of fact, as will the time at which that occurred. The employer and the chief executive can only be informed if and when they have a realistic opportunity to read, comprehend, and act on the notice. Thus, we find as a general rule that notice will only be given for the purposes of s90 when it comes to the attention of the intended recipient.

[43] This approach can be applied consistently to all three types of strike notice. It might be said, as the defendants did, that little if anything was lost when a 14 day notice to the chief executive became an 11 day notice because it did not affect his ability to provide mediation services. However, the same could not be said for a 3 day statutory notice under Schedule 1 Part B to the Act sent in the same circumstances. If a 3 day notice was sent to the chief executive at 5.41 pm on a

Friday evening, describing a strike scheduled to commence at 1 minute past midnight on the following Tuesday morning, the effective notice to the chief executive would be reduced from 3 days to less than one day. That would almost certainly reduce the opportunity to provide mediation services and the statutory scheme would be compromised or frustrated. Similarly, delay in a 24 hour notice under s93 coming to the attention of the employer would defeat the purpose of that section which is to provide notice to the travelling public.

[44] Although we find that the general rule will be that notice is not given until brought to the attention of the recipient, there may be exceptions to that rule in particular cases. For example, if an employer has asked that formal notices, including strike notices, be communicated in a particular way, there may be a presumption that the notice will be received when it is sent by that means. The same may be the case where there is an established practice of communicating by a particular means. Any such presumption will, however, be rebuttable and, if challenged, the party giving notice may need to establish its receipt.

[45] In this case, we accept there was a custom of giving strike notices by fax. Accordingly, their transmission by the union, at times when they could reasonably be expected to have been received and read immediately, was prima facie evidence of notice having been given. Had the notice of strike been sent by fax to the chief executive during office hours, as many other such notices were, the statutory test would have been satisfied. But it is artificial and wrong to say that a notice sent to the chief executive's fax machine during times when it is very unlikely that the notice will come to the chief executive's attention, has nevertheless been properly given at the time of sending and receipt by the unattended fax machine.

[46] In this case, we find that the first occasion on which the chief executive had a realistic opportunity to act on the notice given by the union was at start of business on Monday 12 May 2008. Prior to that time, the office was unattended and neither he nor any of his staff could have known or expected that a notice would be sent. It follows that notice was not given to the chief executive 14 days before the date on which the strike was to begin and that the strike action which took place in accordance with that notice was unlawful.

Issue 3: The application of s219 to strike or lockout notices

[47] Section 219(1) provides:

> ***219 Validation of informal proceedings, etc***
>
> *(1) If anything which is required or authorised to be done by this Act is not done within the time allowed, or is done informally, the Court, or the Authority, as the case may be, may in its discretion, on the application of any person interested, make an order extending the time within which the thing may be done, or validating the thing so informally done.*

[48] The words of the section and its purpose are plain. In appropriate cases, the Court and the Authority have a discretion to extend the time for doing anything the Act requires to be done within a specified time or to validate anything which requires to be done but which has been done informally. Thus, on its face, it confers jurisdiction on the Court to make orders in relation to giving notice of a strike in an essential industry. The times within which such notice must be given and the form of notice are clearly things required or authorised to be done by the Act.

[49] Mr Toogood submitted that the requirements of s90, both as to content of a strike notice and as to the time at which notice was given, were of such importance to the scheme of the Act that the discretion conferred by s219 ought not to be exercised to vary time or validate an otherwise informal notice. We do not agree. It would be wrong in principle to find that a statutory discretion ought never to be exercised in particular circumstances. The factors Mr Toogood relied on may properly be taken into account but whether the discretion is exercised in any case will depend on the particular circumstances of that case.

[50] The issue is whether the discretion to validate the informality in the strike notice and to abridge time ought to be exercised in this case. We conclude that it should not for the following reasons.

[51] The strike notice is spent and the strike action that took place in reliance upon it is over. In these proceedings, no remedies are sought for past breach of s90. The plaintiff only seeks compliance by the defendants with that section in future. The defendants in turn have undertaken to the Court that, if required by judgment, they

will amend their procedures and conduct to comply in future with the law as found by the Court. Based on what we have concluded in this judgment, such future compliance will not be difficult. The union will have to change the formula of words it uses to meet the minimum notice requirements of s90(3)(a)(i). In addition, the union will have to ensure that notices of strike action are sent to the plaintiff and the chief executive at times when they are likely to be received immediately or, if they are sent out of office hours, factor into the timing that notice will not be given for the purposes of s90 until the start of the next business day.

[52] While we have decided that the statutory powers under s219 are broad enough to remedy errors or omissions in strike or lockout notices, it should not be thought by those giving such notices that they can rely upon breaches of ss90 to 94 being remedied under s219. We confirm the longstanding judicial view that precision and certainty is required of such notices and note that this requirement has been generally accepted by employers and unions. Parliament has re-enacted on several occasions the relevant strike and lockout notice provision in substantially identical terms despite being aware of the strict approach of the courts to compliance. Any application to legitimise informal strike or lockout notices under s219 will have to be decided on its facts and the discretion exercised in light of the need for strict compliance. The givers of notice should focus their efforts on compliance with the statutory rules in the first instance rather than rely on the uncertain backstop of s219.

Costs

[53] These were reserved at the request of the parties. Neither the plaintiff nor the union has been wholly successful and we see the respective measures of success and failure as roughly equal. Furthermore, this has been a true test case, determining for the first time points of law affecting the giving and receiving of strike and lockout notices in essential services generally.

[54] In these circumstances, our preliminary view is that costs should lie where they fall but, in view of the assurance given at the close of the hearing, we leave it open to any party to file a memorandum in support of an order being made. Any such

memorandum must be filed and served within 21 days after the date of this judgment. Other parties will then have a further 14 days in which to respond.

GL Colgan
Chief Judge
for the full Court

Judgment signed at 3 pm on Wednesday 17 September 2008