Judgment Number: CC 23/02
File Number: CRC 20/02

IN THE EMPLOYMENT COURT
CHRISTCHURCH REGISTRY

IN THE MATTER	of an application for an interim injunction to restrain a strike
BETWEEN	Professor Graeme Fogelberg, Vice Chancellor University of Otago
	Plaintiff
AND	The Association of University Staff
	Defendant

Court:	Palmer J
Hearing:	Christchurch 4 October 2002
Appearances:	Mr P B Churchman, Counsel for Plaintiff Mr P Cranney and Ms K Gray, Counsels for Defendant
Judgment:	11 October 2002

INTERLOCUTORY JUDGMENT OF PALMER J

Introductory

1 The University of Otago, through its Vice-Chancellor (Professor Graeme Fogelberg) commenced proceedings herein against and affecting the Association of University Staff – subsequently referred to as such or simply as "AUS", the "Union", and/or as the defendant and – through the Union – its agents and affected members who are, or become, active participants in the events which the plaintiff's pending proceedings encompass.

2 These pending proceedings were commenced herein on 30 September 2002. The proceedings encompassed both an application by the plaintiff for particularised declaratory relief and also proceedings brought by the Vice Chancellor for interim injunctive relief

whereby he seeks to restrain – until further order of this Court – the defendant and its agents, officials and/or affected members, "*from engaging in any secret strike action*" – so characterised by the plaintiff, and defined specifically in its notice of application for interim orders – which the Vice Chancellor further contends is unlawful strike action and is allegedly in breach of the Union's obligation of good faith owed to the plaintiff, in the material circumstances which these interlocutory proceedings allegedly concern.

3 The Vice Chancellor in support of his pending applications for declaratory relief and for interim injunctive relief, has filed herein full pleadings, including in support of the interlocutory relief, the primary affidavits of Mr Stephen Gray, and Ms Ruth Hamilton, respectively sworn on 27 and 30 September 2002. They are, respectively, I confirm, the Director of Human Resources for the University of Otago, and the Human Resources Manager for the University of Otago.

4 Through the plaintiff's application/s for interim injunctive relief, the Vice Chancellor has sought urgent interim relief against and affecting the defendant in these particularised terms, that is to say –

> 1 *An interim injunction that, pending further order from the Court, the defendant be restrained from engaging in any secret strike action that is strike action where, after the commencement of the strike, the defendant fails or refuses to notify the plaintiff of the details of the strike including:*
>
> *1.1 the fact that a strike is underway;*
>
> *1.2 the identity of the employees striking;*
>
> *1.3 the nature of the strike activity; and*
>
> *1.4 the duration of the strike.*
>
> 2 *Costs of this application*

5 At the close of the interlocutory proceedings on Friday, 4 October 2002, I reserved my decision herein and confirmed that I anticipated it would be available to the parties in written form during the week commencing Monday, 7 October 2002.

6 Given the plaintiff's application for urgency concerning the interlocutory application/s made by him, and my own view of the inherent urgency of the interlocutory relief being actually sought, I accorded urgency following the filing of the proceedings – initially in faxed form – on 30 September 2002. I issued the following chambers minute to the parties on 1 October 2002, namely –

CHAMBERS MINUTE

1 The University of Otago through its Vice Chancellor (Professor Graeme Fogelberg) has applied both for declaratory relief particularised in the plaintiff's statement of claim and also for interim injunctive relieve [relief] against and affecting AUS. The pleadings in faxed form were received at approximately 5pm on 30 September, and then in assured hard copy form on 1 October 2002.

2 Urgency has been sought by the plaintiff for the hearing of the interlocutory relief. Urgency is, in my view, made out upon the plaintiff's pleadings. I accordingly assign urgency for the hearing of the contested interlocutory relief sought by the plaintiff.

3 I now assign a hearing date for the plaintiff's interim injunctive relief, in this Court, that is to say the Employment Court, Christchurch, on Friday, 4 October 2002 at 10am.

4 I understand from Mr Peter Churchman's faxed letter of 30 September enclosing the plaintiff's faxed pleadings, that he had arranged for copies of all of the pleadings to be served on AUS at Dunedin during the late afternoon of 30 September, or for such service to occur on Tuesday, 1 October 2002. For the avoidance of doubt, I now order that copies of the pleadings should be served/faxed by the plaintiff's solicitors immediately to AUS or its counsel, if that has not yet occurred.

5 The affidavit or affidavits by AUS in reply to the plaintiff's affidavits shall, I now order, be filed herein on or before 4pm on Wednesday, 2 October 2002 and immediately faxed/copied by AUS to Mr Churchman.

6 Any affidavit/s filed herein by the plaintiff strictly in reply (the emphasis is mine) shall, I further order, be filed herein by the plaintiff, on or before 1pm on Thursday, 3 October 2002.

7 The hearing shall, I direct, proceed in the usual way for interlocutory hearings, that is to say on the untested affidavit evidence relied upon by the parties, coupled with their submitted arguments.

8 It seems to me that there may well be advantage to both parties if I was to confer with counsel for the parties at an arranged [time] *between 3pm and 4pm today, 1 October 2002. Would you please make whatever arrangements are necessary for this teleconference to occur.*

9 I direct that this chambers minute shall be immediately faxed to counsel for the parties. I reserve the question of costs.

7 AUS duly filed herein within the urgent pleadings timeframe prescribed; the Union's Notice of Opposition to the interim injunctive relief sought against it by the plaintiff, and

affidavits supportively of the defendant's case. These affidavits were respectively sworn on 2 October 2002, by Mr Jeffrey ("Jeff") Rowe, the lead advocate for AUS in the pending University of Otago Academic (Non-Medical Dental) Collective Employment Agreement and Doctor "Shef" (Candler Shieffield) Rogers, the President of AUS at the University of Otago Branch. Additionally, the Union filed herein supportively of its case, the affirmation of Mr Shaun Scott the Otago Branch Organiser for AUS and the co-advocate assisting Mr Rowe in his primary advocacy role.

8 Ms Ruth Hamilton, filed her second affidavit filed herein dated 2 October 2002, in reply to the defendant's affirmation filed on behalf of Mr Scott, correcting her contended unintentional error made in the third paragraph of her first affidavit dated 30 September 2002.

9 On 2 October, I undertook, I confirm, a teleconference with counsel, primarily to ascertain whether the parties – or either of them – required me to direct that mediation should take place in advance of the interlocutory hearing, given the provisions of s188 of the Employment Relations Act 2000 and especially in the immediate context, section 188(2)(b) of the Act. Neither party, I confirm, required me to direct mediation in advance of the hearing for interim injunctive relief. It was my view – as I recorded in the minute I issued to the parties – that "*Mediation at this stage was simply not called for* [because of] *the reasons sequentially particularised in s188(2)(b)(i), (ii) and (iii) of the Employment Relations Act.*

The Court's approach to contested interim injunctive relief

10 In the course of their respective arguments, Mr Churchman and Mr Cranney have each addressed me upon the principled discretion exercisable by this Court upon contested applications for interim injunctive relief. In support of their submissions, counsel have cited particular cases where this Court's principled approach is summarised. Among the authorities cited by Mr Churchman was my unreported decision in *Healthlink South Ltd v National Union of Public Employees (Inc)*, 8 July 1993, CEC 34/93, wherein I sought to materially summarise this Court's approach.

11 As I have repeatedly said in earlier cases, this Court's approach concerning interim injunctive relief is both well-established and well known. It is a principled approach. I now

adopt and repeat what I said in *Healthlink South Ltd v National Union of Public Employees (Inc)* unreported, 8 July 1993, CEC 34/93, namely:

> *This discretionary approach is in my view admirably dealt with by Colgan J who delivered the Full Court judgment of this Court in X v Y Ltd and NZ Stock Exchange [1992] 1 ERNZ 863 at pp 872-3 as follows:*
>
> > If the plaintiff satisfies the Court that he has an arguable case, or in other words that there is a serious issue between himself and one or both of the defendants [there being two defendants in that case], that is not by itself the end of the enquiry. This is because the remedy of injunction is discretionary. The Court, in the exercise of its discretion to grant or withhold that remedy, has to weigh up the inconvenience to a defendant of having to bear the burden of an injunction before the substantive case is heard when the defendant may well win that case, and against that the inconvenience to a plaintiff who may have a just case, of having to bear the detriment of wrongful or unjustifiable action until the case has been heard. Inconvenience in this context has a stronger meaning than colloquially; it means detriment or injury.
> >
> > The Court puts various matters in the balance in arriving at a position, but having done so it recognises the risk of matters of detail overwhelming considerations of substance. It therefore stands back from the case, having arrived at a decision on the balance of convenience and considers what the overall justice of the case requires it to do.
>
> *I also refer in this particular setting concerning the principled approach which the Court is obliged to have recourse to, to what was succinctly said by the Full Court of this Court in* Tasman Pulp & Paper Co Ltd v NZ (with exceptions) Shipwrights etc Union & Ors *[1991] 1 ERNZ 886. There the Court stated at p 894:*
>
> > ... while the principles on which the discretion is exercised have been described in various ways, one of these ways has been to say that there are four elements in the way to a decision:
> >
> > 1. Is there an arguable case?
> > 2. Where does the balance of convenience lie?
> > 3. Whether other remedies are available to the plaintiff.
> > 4. The overall justice of the case.
>
> *As Travis J, in* Kendall v Presbyterian Support Services (Northern) *[1992] 2 ERNZ 413 at p 418 - after immediately citing with approval the observations of the Full Court which I have immediately referred to - then observed:*
>
> > These four elements are not to be applied mechanically and it appears from many decisions of this Court and other Courts exercising the same jurisdiction, that at the end of the day the balance of convenience is the most important and guiding principle. This is confirmed in a decision of the Privy Council in Eng Mee Yong v

Letchumanan [1980] AC 331, where the Privy Council described the approach as follows, at p 337:

> *... The guiding principle in granting an interlocutory injunction is the balance of convenience; there is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the court that there is a "probability," a "prima facie case" or a "strong Prima facie case" that if the action goes to trial he will succeed; but before any question of balance of convenience can arise the party seeking the injunction must satisfy the court that his claim is neither frivolous nor vexatious; in other words that the evidence before the court discloses that there is a serious question to be tried. ...*

12 Additionally, I take full cognisance of what has been said by the Court of Appeal in its judgment delivered by Gault J in *Port of Wellington Ltd v Longwith* [1995] 1 ERNZ 87. More particularly, at pp 92-93 His Honour materially observed:

> *While this Court has not encouraged the use of any form of check list of factors going to the balance of convenience because of the importance of flexibility and the widely differing circumstances in which interlocutory injunction applications arise, the cases demonstrate that it is a broad discretion in which all the circumstances are to be considered. That may include, in cases where an interim mandatory injunction ordering reinstatement is sought, an assessment of the strength of the plaintiff's claim because of the tendency, with current delays in tribunal hearings, for the final determination to be overtaken or influenced by what occurs in the interim. The greater the likelihood of that the greater the weight to be given to the strength of the respective parties' cases so far as they can be assessed on the affidavits: Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd [1985] 2 NZLR 129, 142. ...*

13 This is, I now confirm, the approach I followed in this case, but bearing particularly in mind the need to be cautiously most circumspect concerning fundamentally contested affidavit evidence relied upon respectively by the parties recognising that this contested evidence had not been tested by cross-examination.

The issues and their material background

14 The University of Otago through its Vice Chancellor who is the employer of all the staff at the University is currently renegotiating with AUS the expired collective agreement (University of Otago Academic Non-Medical/Dental) Collective Employment Agreement.

15 AUS, I confirm, is a party to the collective agreement representing the 504 academic staff encompassed by that agreement.

16 The prior agreement expired on 31 July 2002, and the Association of University Staff initiated during early June of 2002 bargaining for a new collective agreement.

17 Negotiations between the parties rapidly broke down after three days.

18 Two hundred and ninety six academic staff members within AUS, went on strike during the afternoon of 2 September 2002. The striking staff members were suspended and the University of Otago has purposefully taken action to deduct their pay for the duration of the strike. The parties were purposefully engaged in mediation on 11 and 12 September, which was conducted by a Mediator provided by the Mediation Service. A revised offer was made by the employer which AUS agreed it would appropriately refer to its members for their instruction. They confirmed that the Union's approach would be not to recommend acceptance of that offer but they would be "*neutral about it*".

19 At the report back meeting which was held by the Union and its attending members on 19 September 2002, attending academic staff were asked by AUS to vote by secret ballot on whether the revised salary offer should comprise the subject of a formal ratification ballot. Of the academic staff present at this report back meeting, 41 voted in favour of the revised wage offer being put to ratification, and 196 members present voted against the ratification process being then invoked.

20 Mr Stephen Gray explained that he became aware through a published account in the Otago Daily Times issue for Saturday, 21 September 2002, that a further meeting of AUS members on 20 September 2002, had voted to commence rolling stoppages in support of their pending and unresolved wage claims addressed in the current collective bargaining affecting them and their employer. Mr Gray further contended in paragraph 6 of his affidavit that the Union did not, and has not formally notified the employer concerning these contended rolling stoppages.

21 AUS, through its lead and co-advocates, Mr Jeff Rowe and Mr Shaun Scott, contest this account by Mr Gray, in material aspects. They commonly contend that during the course of further negotiations which commenced again at 2 pm on Thursday, 19 September 2002, Mr Rowe informed the University's negotiating team which included both Mr Gray and Ms Hamilton, that academic members at the University had rejected the report back offer. Mr Rowe said that he confirmed that this offer had been rejected towards the end of the further meeting held between the parties on 19 September. He also contended – and Mr Scott has confirmed – that he (Mr Rowe) informed the University's representatives that

academic staff members would commence rolling stoppages without notice on Monday, 23 September 2002. (Paragraph 8 of Mr Rowe's affidavit.) Mr Scott similarly confirmed this situation in paragraph 14 of his affidavit, that is to say Mr Rowe's explicit advice to Mr Gray that "*academic members would commence rolling stoppages without notice the following Monday 23 September 2002*".

22 Furthermore, and consistently with the advice which was given by Mr Rowe to the University negotiating team on Thursday, 19 September, Mr Scott explained that he sent a purposeful e-mail to affected staff members at 4.19pm on 19 September, which is copied as annexure "G" to his affidavit. It will suffice for me to say that this e-mail – according to Mr Scott – was sent to all of AUS' academic members who comprised part of the e-mail "*discussion list*". Through this e-mail, Mr Scott confirmed that members were informed of the outcome of the negotiations and, more particularly, that the employer had been informed that academic staff would be undertaking rolling stoppages which would commence if an improved salary/wage offer was not made by the University to its academic employees/affected members of AUS. Consistently with this approach, Mr Scott further confirmed that at close to 5 pm on Thursday, 19 September a further e-mail was sent calling upon academic staff members to attend and participate in lunchtime meetings to discuss "*rolling action next week*". This further e-mail is copied as annexure "H" to Mr Scott's affidavit.

23 Mr Scott further confirmed that the proposed imminent rolling stoppages and the picketing of lecture theatres at the University were discussed at meetings appropriately held on Friday, 20 September 2002, together with other related measures such as information leaflets which would be provided to affected students who sought to attend any lectures that had been cancelled through strike action being taken, or who were being taught by non-Union staff in the absence of striking lecturers.

24 Mr Scott also addressed a further e-mail – copied as annexure "I" to his affidavit - which he sent to academic members advising them that rolling stoppages would be occurring at the Dunedin University Campus from Monday 23 September. He stressed that he notified members through this e-mail that particularised notice of which University buildings/lecture theatres were affected through the intended rolling stoppages "*would be given a half hour before the action was to begin.*" (Paragraph 18 of his affidavit).

25 The following day, at 8.22 am, Mr Scott confirmed that he further notified all academic members on the AUS list that the first teaching ban and picket would be

commonly undertaken at the St David complex, upon the University campus. This complex has the largest lecture theatre at the University and there are other reasons which Mr Scott detailed as to why this venue was chosen from the outset as the site of the first teaching ban and picket. This particular ban was to be conducted at the complex from 9 am until 1 pm with the picket commencing at 8.50 am.

26 Mr Scott then purposefully confirmed through an e-mail which was sent to all AUS members at 11.33 am on Monday, 23 September 2002, that the afternoons picket would be hold outside Castle Lecture theatres commencing at 12.45 pm and that the teaching ban would commonly commence from this time. He further confirmed that at 5.09 pm that day AUS members were informed by him through further e-mail that the following morning a picket would be established at the Quad lecture theatres combined with a teaching ban at those theatres, between the hours of 9 am -1 pm. This particular industrial action was duly taken on Tuesday, 24 September, pursuant to the notified schedule and, additionally, Mr Scott confirmed, that sombre music was played through a portable stereo as an accompaniment to what was occurring.

27 Mr Scott confirmed that further picketing and teaching ban action was notified by him to the AUS "*invitation list*" for the afternoon of Tuesday, 24 September commencing from 12.45 pm. The venue for this particular picket and teaching ban was the Archway theatres commencing at 1 pm on that date. Again, at relatively short notice this e-mailed information was communicated to affected members as exhibit "M" confirms.

28 Mr Scott further confirmed in his affidavit that there were further pickets and teaching bans set in place by AUS for Wednesday and Thursday of that week, that is to say on Wednesday, 25 September at respectively the Burns Building and the Commerce Building, am and pm, and Thursday, 26 September at respectively the Colquhoun and Barnett theatres, am and pm, and on Friday morning similar picket and teaching banning was undertaken by the Union and particular participating members, at the Chemistry Building. This industrial action is sequentially outlined in the copy annexures to Mr Scott's affidavit, "N", "O", "P", "Q".

29 Dr Shef Rogers, the Otago Branch President of AUS, sent an e-mailed message informing academic members of the Friday picket venue and confirming through exhibit "Q" the further action which the Union had planned comprising "*something slightly different for lunchtime and afternoon, so look for another email with instructions about 10:45 in the morning.*"

30 Mr Scott confirmed that the rolling strike action ceased on the Union's instructions to its members on Friday, 27 September at 1 pm. The plaintiff however has contended through Mr Gray that the University had not been notified of this ongoing rolling stoppage situation except – initially - through Mr Scott's affidavit filed here.

31 Mr Scott confirmed that Dr Rogers e-mailed members of AUS during the morning of Friday 27 September, informing them through annexure "R" that the pickets of teaching buildings would not continue beyond that date and (inter alia) that leaflets thanking students for their patience and support should be distributed in their prepared form on that particular Friday. Significantly, I remark, the intended leaflets that the students addressed in this e-mail stated (inter alia) that "*...we have ended the pickets of teaching buildings and will [now] proceed to other forms of action*". Furthermore, this particular e-mail from Dr Rogers confirmed that before the end of Friday, 27 September AUS would deliver the petitions it had prepared in support of its wage claims in the pending collective agreement negotiations – and which had allegedly been signed during that week by "*over 1600 students*" – to the Vice Chancellor and to the Otago Daily Times. This particular advice which I have immediately cited from Dr Rogers' e-mail is to be found in the prepared leaflet for students which AUS members were to distribute that day.

32 Consistently with the defendant's evidence – essentially through Mr Scott – Mr Stephen Gray confirmed that on Monday, 23 September 2002 when AUS members began picketing outside the St David Street lecture theatre complex, they placed notices on the building which said "*AUS ban on teaching in this building 9am – 1pm*". Similarly, he confirmed that during the afternoon of that day when AUS members picketed the Castle Street Lecture theatre, they placed similar notices on the building, but particularised the duration of the teaching ban as being from 1 pm to 5 pm rather than 9 am to 1 pm.

33 Mr Gray further confirmed in his affidavit that when he attended the Castle Street Lecture theatre complex when the picket was occurring and the banning notice concerning teaching had been placed on the building, he subsequently met shortly after 3.30 pm, Dr Shef Rogers at that site and conversed with him and other picketers who were present. During this conversation Mr Gray said he was asked why he was there and he responded that he *"had heard of their picket and, as the union had not informed me of any industrial action it might be taking, I decided to come and see for myself"*. He further said that Dr Rogers then remarked to him that AUS was not required to advise the University of the

industrial action they were taking, causing Mr Gray to inform him that the University "*did not accept that view.*"

34 The Vice Chancellor (Professor Fogelberg) wrote to Dr Shef Rogers on 26 September 2002, in these material terms – annexure "A" to Mr Gray's affidavit refers –

> *Dear Dr Rogers*
>
> *I have become aware that, as part of your pickets, you have been placing notices on University buildings stating that there is a ban on teaching in particular buildings for certain periods. I have sought a legal opinion on this matter and must advise you that I consider this action to be illegal. The Association has no right to "ban" teaching on University property or to convey such an impression.*
>
> *Your members are entitled, under the Employment Relations Act, to withdraw their labour and not teach if that is their choice. However, you have no right to interfere with the normal activities of non union staff or the relationships between the students and the University.*
>
> *I am particularly concerned that a number of lectures are occurring in the buildings which you are picketing and students may, in view of your signs, not attend those lectures believing that they have been cancelled. This may have serious implications for students' academic progress and is grossly unfair to them.*
>
> *Whilst you are entitled to picket, this does not give you the right to place notices on University property which state that you have taken action which you are not entitled to do, that is, in this case ban teaching. I will be writing to the students clarifying their rights in respect to your picket and will forward a copy of that communication for your information.*
>
> *I request that you stop placing signs on University property and that you do nothing which impedes staff or students going about their lawful business or which amounts to an attempt to unlawfully interfere in the relationship between the students and the University.*

35 No substantive reply to this letter has been sent by Dr Rogers to the Vice Chancellor prior to the present interlocutory hearing.

36 In addition to the picket action of which he had progressively become aware, Mr Gray confirmed that he came to know that "*some union members appeared to be cancelling their lectures as part of the industrial action*". (Paragraph 14 of his affidavit.) He said his understanding of the legal situation that was taking place, was "*that the placing of the ban on lectures and the failing to give lectures could fall within the definition of strike action*".

37 Mr Gray confirmed that on Friday, 27 September he duly wrote to the Lead Advocate for AUS – as required by the agreed bargaining protocols governing the parties – informing Mr Rowe of the University's belief that strike action was then taking place. In short, in this purposeful letter which Mr Gray sent to Mr Rowe, he required quite specific information of

him, and he required that that information should be imparted to the plaintiff that day. This letter – annexure "B" to Mr Gray's affidavit – dated 27 September, materially provided

> *Dear Jeff,*
>
> *It has come to my attention that a number of staff who are members of the AUS are, or have been, failing to turn up to undertake their normal duties or aspects of those duties. There is some anecdotal evidence that would suggest that these people believe that what they are doing is participating in some sort of strike activity. Your Union, the AUS, has not, at any time notified the University that these members, or any other members, are engaged in any strike activity. This puts the University in a very difficult situation. I therefore ask that you immediately let me know whether the Union is presently engaged in strike activity or have recently been engaged in such activity, which members of the Union are participating or have participated in that strike activity and what the nature of that strike activity is that these members of your Union are each undertaking or have undertaken. Could you also let me know the duration of any strike activity. I ask that you let me have this information today.*

38 It was, and is the plaintiff's case, that what was occurring - or had immediately occurred prior to 27 September - comprised contended "*secret strike action/secret strikes*" by the Union and its affected members, which were unlawful essentially because of the allegedly secrecy which materially encompassed events that were occurring in an industrial action context, of which the plaintiff either had no notice after the commencement of the strike action and/or no sufficient notice at that time.

39 Materially, the plaintiff has pleaded in paragraphs 10 to 16 of his statement of claim, that –

> *10 The actions of the AUS and its members in placing selective bans on teaching and in failing to deliver lecturers amounts to strike action within the definition of "strike" in the Employment Relations Act.*
>
> *11 To the extent that the AUS or its members are engaged in strike action, then such strike action is "secret" strike action.*
>
> *12 The action of the AUS and its members in engaging in secret strike action and failing or refusing to advise the University after the commencement of such strike action of the fact that strike action was occurring, the identity of the people engaged in such action, the nature of the strike action and its duration is unlawful.*
>
> *13 The AUS and the plaintiff, as the employer of the members of the AUS, are bound by the obligations of good faith in the Employment Relations Act.*
>
> *14 The secret strike action that the AUS and its members have been engaged in is in breach of the obligations of good faith in that the conduct of the AUS is misleading or deceiving or is likely to mislead or deceive. In particular in purporting to engage in strike activity but in failing or refusing to disclose what activity was occurring, the AUS was misleading or deceiving the University about the action it was taking.*

> *15 That the secret strike activity being engaged in by the AUS and its members is causing serious disruption to the students enrolled at the University of Otago. These students are in their final weeks of lectures with examinations scheduled to commence shortly.*
>
> *16 The disruption of the final weeks of lectures and examinations by the unlawful secret strike activity will cause irreparable harm to the University.*

40 Mr Churchman enlarged during his submitted argument, upon the contended unlawfulness of what was occurring in this immediate setting, by exercising submitted analytical recourse to material aspects of s 86, 87, 97 and 98 of the Employment Relations Act. I shall enlarge upon these particular arguments of counsel in due course.

41 AUS - prior to the present hearing – had not formally replied by letter to Mr Gray's letter to Mr Rowe dated 27 September. The Union confirmed through Mr Scott on 27 September through its e-mailed interim reply to Mr Gray, that AUS was currently seeking legal advice concerning the particular content of Mr Gray's letter and thus was not in a position to formally respond to that letter until it had received such advice.

42 It will suffice however for me to immediately acknowledge that both through its notice of opposition to the interim injunctive relief sought by the plaintiff and also through Mr Cranney's developed argument during the present interlocutory hearing, the Union's position/response to Mr Gray's request for the particular information he sought in his letter to Mr Rowe of 27 September 2002, is unmistakably plain. AUS contends that there is no requirement whatsoever in the material circumstances of this case, for the Union to provide the information which Mr Gray has contended it must provide to the Vice Chancellor. In the course of his submitted argument, Mr Cranney has submitted in considerable detail how and why in his view, the response/s by the Union and its affected members at all material times while industrial action was being taken by AUS and certain of its members, was irreproachably – in counsel's contention – lawful strike action. Counsel, I stress, explained how and why in his view this was plainly so.

43 AUS through Mr Cranney has given no undertakings concerning future strike action. He has not done so because he is of his submitted view that if future strike action followed the patterned approach – either in the same or in a different subject form as the systematic approach concerning the lawful picketing and related banning strike action of teaching at designated lecture sites which occurred between 23 and 27 September 2002 (inclusive) - then any such future strike action would be lawful strike action. In these circumstances no undertakings were required, because in counsel's contention AUS would in future only take

industrial action which was lawful against and affecting the Vice Chancellor, just as Mr Cranney submitted the Union had wholly lawfully proceeded to date.

The opposing arguments of counsel

44 It is common ground between the parties that the bans and the selective withdrawal of labour undertaken by AUS and its agents and/or affected members all fall within the definition of "strike" as defined in s 81 of the Act. As Mr Churchman has submitted in sub-paragraph 2.3 of his prepared argument, "*that in the absence of the actions falling within the protection of the ERA, the defendant's conduct* [encompassing participating academic members of AUS] *would indeed be substantial breaches of their employment agreements*". Counsel does not, I now stress, accept that what occurred materially in this case does fall within the protection of the ERA.

45 Mr Churchman has advanced in his structured argument how and why "*a secret strike or strikes is now actually occurring*", and that such industrial action by way of secret strike – as counsel has explained and developed this characterised concept – "*is unlawful and a breach of good faith*".

46 Counsel has stressed that when AUS went on strike on the afternoon of 2 September 2002, it gave the University notice of its intention to take strike action and an indication of what the strike action encompassed. In marked contrast, Mr Churchman has submitted that the subsequent strike activity taking the form of banning certain lectures and members failing to deliver certain lectures occurred in circumstances where AUS "*has failed or refused to inform the University of the nature of the strike action or even of the fact that it is occurring*" (paragraph 9 of the plaintiff's statement of claim). Counsel has submitted - clearly correctly – that in imposing selective bans on teaching and through failing to deliver lectures, AUS and its affected academic members are on strike. I have previously cited - but now refrain from repeating – paragraphs 11 to 16 of the Vice Chancellor's statement of claim – particularising why in the plaintiff's contention "*secret strike action*" has occurred and is occurring. Mr Churchman has submitted that this "*secret strike action*" is unlawful for particularised reasons including the contention that such strike action is unlawful because it is in breach of the obligations of ongoing good faith imposed upon AUS and its affected members in their relationship with the plaintiff. These fundamental obligations of good faith are those imposed, Mr Churchman has strongly submitted, through the Employment Relations Act. Indeed, counsel has stressed both through s 3 of the Act and as a pervasive

theme throughout the Act, the fundamental importance which Parliament has attached to good faith behaviour as the underpinning cornerstone of an employment relationship.

47 Counsel has submitted that through failing to carry out their normal employment obligations through the contended "*secret strikes*" which they have participated in but had allegedly failed to notify the University of the reason/s for failing to perform their normal duties, the employees concerned are, Mr Churchman has submitted, "*clearly engaging in misleading and deceptive conduct and are in breach of their duty of fidelity*". (Sub-paragraph 2.5.)

48 Counsel has submitted – and this is a fundamental aspect of his argument – "*that the structure of the ERA is such that it is an implicit requirement that once strike action commences the Union is obliged to inform the employer that there is now a strike taking place*". In short, counsel has submitted that an employer's knowledge that a strike is occurring at any particular time is plainly necessary "*because various mechanisms within the ERA are contingent on there being a strike and that the employer has knowledge of the details of that strike*". (Sub-paragraph 2.8.)

49 Counsel has submitted that the carefully defined exercisable right by an employer pursuant to s 87 of the Act, of suspending actively striking employees or employees who are parties to the strike, can only be implemented during the period of a strike. Mr Churchman has stressed that without notice of the strike – and counsel contemplates notice, I remark, after the strike has commenced materially concerning the strike – then the employer's right to suspend under s 87 is rendered nugatory (sub-paragraph 2.10 of counsel's prepared argument).

50 Mr Churchman has further referred in support of his argument to the positive obligations required to be undertaken by an employer concerning employees either participating in the strike or affected by a lockout. This particular section in the Employment Relations Act is self-explanatory. I now cite it, that is to say –

Record of strikes and lockouts

98 Record of strikes and lockouts
If a strike or lockout occurs, the employer of the employees participating in the strike or affected by the lockout must-
(a) keep a record, in the prescribed form, of the strike or lockout; and
(b) give to the chief executive, within 1 month after the end of the strike or lockout a copy of that record.

51 "*The prescribed form*" referred to in paragraphs (a) of s 98 is the form prescribed as Form 3 in the Employment Relations (Prescribed Matters) Regulations 2000. Counsel has correctly submitted that this is a detailed form which a qualifying employer of the employees participating in the strike or affected by the particular lockout must complete. Focusing upon a strike situation which this present case concerns, Mr Churchman has submitted that "*In order to effectively fulfil this statutory duty the employer must have notice of the commencement of strike action*" (sub-paragraph 2.12 of counsel's argument).

52 Mr Churchman has also referred to s 97 of the Employment Relations Act in support of his argument that an affected employer given his exercisable rights under this section, necessarily requires knowledge at the commencement of the strike, "*in order to know whether or not they* [that is to say the affected employer] *are lawfully entitled to hire replacement workers*" (sub-paragraph 2.14).

53 To understand the thrust in counsel's argument it is now necessary for me to cite s 97 of the Act, that is to say –

Performance of duties of striking or locked out employees

97 Performance of duties of striking or locked out employees

(1) This section applies if there is a lockout or lawful strike.
(2) An employer may employ or engage another person to perform the work of a striking or locked out employee only in accordance with subsection (3) or subsection (4).
(3) An employer may employ another person to perform the work of a striking or locked out employee if the person-
  (a) is already employed by the employer at the time the strike or lockout commences; and
  (b) is not employed principally for the purpose of performing the work of a striking or locked out employee; and
  (c) agrees to perform the work.
(4) An employer may employ or engage another person to perform the work of striking or locked out employee if-
  (a) there are reasonable grounds for believing it is necessary for the work to be performed for reasons of safety or health; and
  (b) the person is employed or engaged to perform the work only to the extent necessary for reasons of safety or health.
(5) A person who performs the work of a striking or locked out employee in accordance with subsection (3) or subsection(4) must not perform that work for any longer than the duration of the strike or lockout.
(6) An employer who fails to comply with this section is liable to a penalty imposed by the Authority under this Act in respect of each person who performs the work concerned.

54 Counsel has contended that in the absence of knowledge by an affected employer following the commencement of the strike, concerning affected employees' actual

participation in strike action, then the affected employer can only speculate as to whether or not he, she or it – as the case may be – is lawfully entitled to hire replacement workers. As counsel has strongly submitted without notice the affected employer will be "*left wondering if an employee is absent, sick, late or on strike*" (paragraph 2.14 of Mr Churchman's argument).

55 Mr Churchman has submitted that a lockout is "*partially a mirror image of the strike*". Counsel has further strongly submitted that it is implicitly required under the Employment Relations Act that an employer must give notice to affected employees that they are locked out. Any other contention would in counsel's view be wholly untenable. Plainly, Mr Churchman has submitted an affected employer locking out his or her workers as the case may be could not begin to deduct their pay upon the basis of a secret lock-out not previously notified to the affected workers at the commencement of the lockout.

56 Mr Churchman has focused strongly in his argument upon the contention/s that the secret strike or strikes which have occurred, or are now occurring and/or, I remark, will, in future occur, are and/or will be in breach of the defendants – and its affected members – obligations of good faith owed to the plaintiff in the employment setting which this case concerns in that –

(i) *"The conduct of the AUS is misleading or deceiving or is likely to mislead or deceive*" (paragraph 14 of the plaintiff's statement of claim); and, more particularly,

(ii) "*...in purporting to engage in strike activity but in failing or refusing to disclose what activity was occurring, the AUS was misleading or deceiving the University about the action it was taking*" (also paragraph 14 of the University's statement of claim).

57 Counsel has stressed in his argument that through his reference to the defendant's conduct as being "*misleading or deceptive*" and/or being "*likely to mislead or deceive*" the plaintiff has drawn from s 4 of the Employment Relations Act which materially requires – including the sections introductory headings/recitals, that –

Good faith employment relations

4 Parties to employment relationship to deal with each other in good faith

(1) The parties to an employment relationship specified in subsection(2) –
  (a) must deal with each other in good faith; and
  (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything-

(i) to mislead or deceive each other; or
(ii) that is likely to mislead or deceive each other.

(2) The employment relationships are those between-
(a) an employer and an employee employed by the employer:
(b) a union and an employer:
(c) a union and a member of the union:

...

I now stress that I have simply cited material aspects of s 4 of the Act which are directly – or I might add indirectly – immediately relied upon by counsel.

58 Counsel has contended that New Zealand courts have tended to attribute to the expression "*mislead or deceive*" their ordinary meanings upon the conventional "plain words/plain meaning" approach: See *Goldsbro v Walker* [1993] 1 NZLR 394. Consistently, this has effectively been the approach taken in Australia in *Weittmann v Katies Limited* (1977) 29 FLR 336 wherein a dictionary meaning approach was applied, the Court holding that "*deceive*" means "*to cause to believe what is false*", and "*to mislead as to a matter of fact, to lead into error*" (sub-paragraph 2.19 of Mr Churchman's argument).

59 Counsel has further submitted in reliance upon the Court of Appeal judgment in *AMP Finance NZ Limited v Heaven* (1997) 8 TCLR 144 that whether something is misleading or deceptive or likely to mislead or deceive, must be addressed by asking 3 questions:

(i) Was it capable of being misleading?

(ii) Was the person complaining in fact misled?

(iii) Was it reasonable for that person to have been misled?

60 Mr Churchman has submitted that the defendant is plainly in breach of its good faith obligation/s by purporting to take strike action and deliberately concealing that strike action once it had begun (sub-paragraph 2.21 of counsel's argument). Furthermore, counsel has submitted that the actions of the defendant deliberately misled the employer to believe that his employees were in fact undertaking their normal employment obligations, notwithstanding that AUS knew that this was incorrect.

61 Furthermore, counsel has submitted that AUS' affected members allegedly breached their obligations of good faith owed to their employer by "*also engaging in deceptive conduct by agreeing to be paid their normal remuneration when in fact they were not carrying out*

their normal employment obligations but they were concealing that from their employer..." (sub-paragraph 2.22). Mr Churchman has contended that through failing to give the plaintiff notice of the particular strike/s both the defendant, and its affected members who are employees of the Vice Chancellor were and are in breach of their obligations of good faith.

62 Counsel has further submitted given the fundamental reliance in the Employment Relations Act of the general mutual obligation of good faith as underpinning the framework of the Act, the implied duty of fidelity by an employee to his/her employer is obviously an important aspect of the general good faith obligation. Counsel has stressed that conduct which undermines the mutual relationship of trust and confidence between an employer and an employee necessarily breaches the duty of fidelity. In support of this proposition Mr Churchman has relied upon the decision of the Court of Appeal in *Tisco Ltd v Communication & Energy Workers Union* [1993] 2 ERNZ 779 at p 782. The President of the Court (Sir Robin Cooke – as he then was), in delivering the judgment of the Court, materially observed at p 782 –

> *Any conduct by an employee which is likely to damage the employer's business, for instance by impairing its goodwill, or to undermine significantly the trust which the employer is entitled to place in the employee, could constitute a breach of duty. The duty of fidelity and good faith carries with it a duty not to undermine the relationship of trust and confidence.*

63 Counsel has submitted that through their participation in these contended "*secret strikes*", the defendant and its affected members are "*clearly in breach of their duty of fidelity to the Plaintiff*" (paragraph 2.25).

64 Counsel has submitted that if this Court accepts – as he urges the Court should accept – that notice of strike action is required to be given when the strike actually starts, then it will not be a difficult task to purposefully formulate what that notice should encompass. Counsel has submitted that the Employment Court judgment in *Attorney-General (on behalf of the Director-General of the Ministry of Agriculture and Forestry) v National Union of Public Employees* [2000] 1 ERNZ 704 comprising a case concerning strikes in essential industries provides "*helpful guidance*".

65 Mr Churchman has submitted, in substance, that the notice requirements under s 90 of the Act in an essential industry setting could and should have been used in respect of the contended "*secret strike action*" presently at issue between the parties – save and accept that advance notice of the strike/s was not required but that notice upon the commencement of the strike/s should have been given by AUS, that notice encompassing –

(i) The nature of the actual strike/s including whether or not the strike action will be continuous; and

(ii) The place or places where the actual strike/s are occurring; and

(iii) The date upon which the strike which has then commenced, actually commenced.

I have para-phrased my understanding of Mr Churchman's immediate argument through counsel's modified reliance upon certain - but not all – the strike notice provisions contained in the Act having application in essential industries settings.

66 Mr Cranney in his prepared opposing arguments advanced on behalf of the defendant and affected members of AUS has been rejectively dismissive of Mr Churchman's arguments. He has explained in his substantial submissions how and why in the present material circumstances of this case – and in the abstract – he rejects Mr Churchman's argument/s in all material aspects. I have, I now confirm, brought fully to account Mr Cranney's detailed submissions extending to 133 paragraphs, which I shall – without, I stress, any intended discourtesy to counsel – materially – but not exhaustively – summarise.

67 Counsel has submitted that the plaintiff has no arguable case for the interim injunctive relief sought by the Vice Chancellor. Alternately, if this Court holds that the plaintiff has made out an arguable case for the interim interlocutory relief sought, then a weighted evaluation of the balance of convenience and the overall interests of justice in this particular case justly require that the interim injunctive relief sought should be declined. In short, Mr Cranney has argued in the alternative that if the Vice Chancellor is held to have made out an arguable case – contrary to counsel's primary submission – then the discretionary factors brought to account by this Court should cause it to conclude that the defendant's case against the making of the interim orders sought is a much stronger case even upon the untested evidence, than is the case advanced by the plaintiff in favour of the interlocutory relief sought by the Vice Chancellor.

68 Mr Cranney has submitted that the strikes undertaken by AUS and its affected members were, throughout, wholly lawful strikes within the purposive authorising scope of

the Employment Relations Act. He has submitted how and why in his structured argument this is so.

69 More particularly, counsel rejects what he has characterised in paragraph 17 of his argument, as the plaintiff's principal contention as to illegality is that the Act requires the defendant to notify the plaintiff after the commencement of any strike, of the information particularised in the substantive injunction sought in paragraph 17(a) of the Vice Chancellor's Statement of Claim, that is to say the stated requirement –

> *"...to advise the University of the commencement of such action, the identity of those involved in such action, the nature of the action and its duration"*

As to the duration of the strike Mr Cranney expresses his understanding that this is a reference to *"the start and finish dates of the strike"*.

70 Counsel has submitted, I now re-emphasise, that the defendant's conduct and the conduct of its actively participating members, met in all aspects the prescribed obligations requiring to be met in this case for the rolling stoppages to comprise lawful strike action.

71 Again, counsel has strongly submitted how and why this was, and is so, and how and why in his developed argument the plaintiff has advanced a contended notice code which is neither expressly nor impliedly called for in the Act, except – and then only to the designated extent expressly required – for strikes by workers employed within essential industries so characterised in the Employment Relations Act.

72 Mr Cranney has submitted that notwithstanding that *"there is no such requirement under the Act, outside of essential industries..."*, *"that a union is obliged to notify the employer of the nature of the strike, after it has commenced"*, it was obviously apparent to the plaintiff when each of these rolling stoppages commenced within the week Monday 23 September until Friday, 27 September 2002 (paragraphs 29, 30 and 31 of counsel's argument). More particularly, Mr Cranney has submitted in paragraph 31 that *"the nature of the picketing/bans strike was perfectly apparent to the Plaintiff from the time of its commencement (Gray 7)"*. Thus counsel has submitted that although there is no requirement *"to notify an employer of the nature of the strike, but on the facts of this case, the employer knew anyway"*.

73 Counsel has submitted that the rolling strikes/bans were not unlawful "*secret strikes*" – so characterised by Mr Churchman - for any of the reasons advanced by him.

74 Furthermore, counsel has submitted in paragraph 44 of his argument that "*far from engaging in "secret strikes"* [the defendant] *openly and publicly picketed buildings so as to ensure no lectures took place*". In short, counsel strongly submitted that the actions of the defendant and its affected members in relation to the picketing and bans that occurred during the week 23 – 27 September 2002, at differing complexes/sites on the University campus was wholly transparent and open for all to observe and discern.

75 As to the plaintiff's case founded upon contended breaches of good faith by AUS and its affected members, the plaintiff has rejected Mr Churchman's particularised submissions, for the reasons he (Mr Cranney) has developed in his structured argument/s.

76 In paragraph 16 of his argument, counsel submitted that this case in an interlocutory and substantive setting, "*falls to be determined in accordance with broad and generous principles*". Counsel further submitted that "*Narrow and technical arguments, such as the argument about the Plaintiff's asserted difficulty in keeping a record of strikes and lockouts under section 98, should be rejected*".

77 Mr Cranney then turned under the subject heading **THE SETTLED PRINCIPLES** at paragraph 50 – 62 (inclusive) of his prepared argument to the well established principled approach followed by this Court in relation to the granting or withholding of interim injunctive relief sought by a particular plaintiff and opposed by a particular defendant or defendants. Counsel has also appended an explanatory memorandum attached to the Employment Court's judgment in *Baker v Armourguard Security Ltd* [1998] 1 ERNZ 424. This memorandum is addressed in paragraph 54 of counsel's submissions and the appendix which is published in Brookers is attached to counsel's prepared argument. It will suffice for me to now say that I have carefully considered all that Mr Cranney has submitted in this principled setting, before I prepared the present judgment. Under the subject heading **THE PRINCIPLES APPLIED**, and the sub-heading **ARGUABLE CASE**, Mr Cranney has addressed this particular but multi-faceted issue/s. He has submitted that there is no arguable case for the interim injunctive relief sought by the Vice Chancellor, upon the differing grounds particularised by him.

78 In paragraphs 67 to 122 (inclusive) under differing subject headings, counsel has addressed how and why in his developed submissions, no arguable case upon the differing

grounds advanced by the plaintiff for the interlocutory relief sought, has been made out. I have now, I re-emphasise, brought to account the whole of counsel's arguments in these particular settings.

79 I next turn to Mr Cranney's submitted argument under the subject headings **BALANCE OF CONVENIENCE** and **OVERALL JUSTICE** which effectively traverse paragraphs 123 to 129.9 (inclusive) at pp 26 – 28 of counsel's argument, and then paragraphs 130-132.3 (inclusive) of Mr Cranney's argument.

80 It will suffice for me to now remark that contrary to Mr Cranney's primary argument/s I am of the view that the Vice Chancellor has made out an arguable case for the interim injunctive relief sought by him against and affecting AUS, its agents, and affected members.

81 Notwithstanding that material aspects of the evidence in this interlocutory hearing is untested by cross-examination, a great deal of the evidence is common ground between the parties.

82 The threshold of an arguable case in contested proceedings for interim injunctive relief is not, of course, a high threshold to meet.

83 Given that the Vice Chancellor has made out an arguable case the "weighting" and application of the discretionary factors which I must bring to just account, that is to say the balance of convenience and – more especially – the overall justice of the case in the present interlocutory hearing is, thus obviously extremely important in reaching a decision to grant or withhold the interim injunctive relief sought.

84 Mr Cranney has submitted that upon an thoughtful evaluation of the balance of convenience and the overall justice of this case in its material circumstances, the interim injunctive relief should be declined, if this Court should hold – contrary to counsel's primary argument – that the plaintiff has made out an arguable case (paragraph 129.6) of Mr Cranney's submissions. Furthermore, Mr Cranney has submitted in that sub-paragraph that even if an arguable case has been made out by the Vice Chancellor in support of his application for interlocutory relief, then the case "*is very weak*". Alternately, he submits, "*very significant components of its* [the University's] *case fall into that category* [that is to say that it is a very weak case in Mr Cranney's contention]".

85 More particularly, in paragraph 132 of counsel's argument, he has submitted that an evaluation of the overall justice of the case favours the defendant's submission that the interim injunctive relief sought by the plaintiff should be declined for the reasons Mr Cranney has there summarised. More especially, counsel has stressed in the material circumstances of this case "*the effect of any injunctive relief would weigh heavily on the Defendant and its members and damage their interest in the collective bargaining process*".

The outcome of this contested interlocutory application/s

86 At completion of this hearing during mid-afternoon of 4 October, I informed both counsel that I wished to reflect further upon the extensive opposing arguments which they had respectively addressed to me and that I would issue my judgment, I anticipated, in written form within the week commencing 7 October. This I now do.

87 I am of the considered view upon the evidence before me including, of course, the untested evidence, that the plaintiff has made out an arguable case upon differing grounds for the interim injunctive relief sought by him.

88 Significantly, I now stress, shortly prior to this hearing, a Full Court of the Court of Appeal headed by the President (Justice Gault), had delivered its decision in *Carter Holt Harvey Limited v National Distribution Union Incorporated*, unreported 25 September 2002, CA22/02. The Court of Appeal comprising five justices – dismissed the appeal brought by Carter Holt Harvey Limited against the decision delivered by a Full Court of the Employment Court as the Trial Court.

89 The Court of Appeal in its judgment delivered by the learned President materially made, I now remark, certain comments upon the concept of good faith, which is, I stress, the cornerstone of the Employment Relations Act 2000. Furthermore, the Employment Court in its decision made significant observations concerning the concept of good faith which were of both particular application to the case before it but also, in my respectful view, of wider application to employment law, just as are the remarks subsequently made by the Court of Appeal. This was especially so, I remark, because it approvingly endorsed in all material legal aspects the approach/es taken by the Employment Court in its decision.

90 The Employment Court in its unreported judgment in the Carter Holt Harvey Limited case, AC 79/01, Goddard CJ, and Travis and Colgan JJ, 3 December 2001 materially remarked in a "*good faith*" concept setting in paragraph [77] at p 24, that –

> *As a general comment, it would appear that most, perhaps all, breaches of the legislation's provisions setting out the rights and obligations of employers, unions, and employees may, in addition to being breaches of the particular provision, also amount to a failure or refusal by one party to act towards the other in good faith as is required in the classified employment relationships in s4. Inadvertent or technical breaches may not amount to failures or refusals to act in good faith but, on our factual findings in this case, it is not such a situation here. Certainly dealings between parties in the specified relationships not amounting to breaches of the legislation may, nevertheless, constitute failures or refusals to act in good faith. An action or omission in reliance upon a genuine but mistaken view of the law and a party's rights and obligations under it, may also not amount to a dealing otherwise than in good faith. Good faith has more to do with notions of honesty, frankness, and what lawyers call 'bona fides' rather than adherence to legal rules. That is exemplified by s4(1)(b)'s references to misleading and deceiving. In this sense, good faith is more about the spirit than the letter of the law.*

91 The Court of Appeal responded to these comments by remarking in paragraph [51] of its judgment, that –

> *[51] In the course of its judgment the Employment Court made the general comment that most, perhaps all, breaches of the legislation's provisions setting out the rights and obligations of employers, unions, and employees may, in addition to being breaches of the particular provision, also amount to a failure or refusal by one party to act towards the other in good faith. However, it is quite possible to postulate circumstances in which persons acting in good faith might engage in conduct which amounts to a breach of statutory rights. Whether rights have been breached and whether persons have acted in good faith involve rather different considerations. They do not arise in this case.*

92 Having said this, the learned President of the Court of Appeal upheld the Employment Court's finding of a breach of good faith through paragraph [52] of the Court of Appeal's decision, in these terms –

> *[52] The findings of the Court* [the Employment Court] *were that the company refused to allow the union representatives access to the plant area for a claimed safety reason when that could not be justified and failed or refused to disclose the true reason. The company then set in train criminal processes against the representatives. On those findings the conclusion that the company did not act in good faith was inevitable.*

93 Furthermore, in my respectful view, certain material remarks made by the Court of Appeal were redolent of observations made in the Employment Court concerning the concept of good faith which is pervasively so fundamental to the Employment Relations Act. More especially, I now refer to these observations succinctly made by the Learned President of the Court of Appeal in paragraph 55 of the Court's judgment, that is to say –

> *[55] The matter is not greatly assisted by seeking to characterise the enquiry as subjective or objective. Good faith connotes honesty, openness and absence of ulterior purpose or motivation. In any particular circumstances the assessment*

> *whether a person has acted towards another in good faith will involve consideration of the knowledge with which the conduct is undertaken as disclosed in any direct evidence, and the circumstantial evidence of what occurred. We do not find the Employment Court proceeded inconsistently with that in this case.*

94 I have brought to account in this present judgment, what the Court of Appeal and the Employment Court have respectively said in the *Carter Holt Harvey Limited* case, concerning the concept of good faith. During the present hearing, I very briefly remarked during Mr Churchman's argument in reply, to the recent Court of Appeal's judgment in the *Carter Holt Harvey Limited* case focussing upon the good faith concept then addressed by the Court. I referred more especially to the Court of Appeal's response to certain submitted argument from Mr Harrison QC – which incidentally is addressed in paragraph [54] of its decision – purporting to rely upon the submitted aspects of the Court of Appeal's earlier decision in *Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533.

95 I have brought to account the principled remarks made by the Court of Appeal and the Employment Court respectively concerning the concept of good faith, because those remarks have highly relevant application in the present case. They are relevant to the contested submissions I have heard comprising the plaintiff's arguments - which the defendant contests – concerning how and why alleged breaches of good faith by the defendant and its affected members rendered unlawful the contended "*secret strikes*" which had occurred, and which were occurring, and which arguably, I remark, might occur in the immediate future by AUS and its affected members.

96 I am presently of the firm view that upon a thoughtful weighted application in the material circumstances of this case, of the balance of convenience and the overall justice of the case, I should justly decline the interim injunctive relief expressly sought by the Vice Chancellor.

97 The case for withholding such relief presently impresses me upon my evaluation of the competing cases between the plaintiff and the defendant and its affected members, as being an appreciably stronger case than the case advanced by the plaintiff for the interlocutory relief sought.

98 For the reasons I have expressed, I now formally decline the interim injunctive relief expressly sought by the plaintiff.

Costs

99 I now refer to the issue of costs. I discussed this topic with both counsel at the close of the hearing and they are in agreement with the course/s I shall take.

100 Given that this decision is, I stress, of an interlocutory character I now simply reserve the issue of costs and disbursements/expenses upon 7 days notice as between the parties. In the event that the substantive proceedings by the plaintiff for a declaration and injunction are not progressed further, then I direct that an application for costs and disbursements/expenses may be made by the defendant through Mr Cranney upon 7 days notice to counsel for the plaintiff. Mr Churchman, in this event, shall, I order, file a memorandum in reply to Mr Cranney, also within 7 days of receiving his memorandum. I shall then deal with costs issues upon the memoranda submitted.

101 In the event that costs associated with the present proceedings becomes an active issue as between the parties, then counsel may informal elect to settle those issues by mutual agreement.