

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2017] NZEmpC 1
EMPC 346/2016**

IN THE MATTER OF an application for amended orders

AND IN THE MATTER of an application for interim injunction

BETWEEN LYTTELTON PORT COMPANY
 LIMITED
 Plaintiff

AND THE RAIL AND MARITIME
 TRANSPORT UNION INC
 First Defendant

AND MARITIME UNION OF NEW
 ZEALAND INC
 Second Defendant

AND NZ MERCHANT SERVICE GUILD
 IUOW INC
 Third Defendant

Hearing: 6 January 2017 (by telephone)

Appearances: R Towner, counsel for plaintiff
 G Davenport, counsel for first defendant
 L Ryder, counsel for second defendant
 G Ballara, counsel for third defendant

Judgment: 6 January 2017

JUDGMENT OF JUDGE B A CORKILL

[1] This judgment resolves two urgent applications which were made with regard to proposed picketing. These followed my judgment of 29 December 2016 which also dealt with picketing issues.¹

¹ *Lyttelton Port Co Ltd v The Rail and Maritime Transport Union Inc* [2016] NZEmpC 179.

[2] On 30 December 2016 the Maritime Union of New Zealand Inc (MUNZ) applied to amend the orders made by the Court, pursuant to leave reserved for that purpose. The effect of the application, if granted, would be to allow limited picketing subject to conditions.

[3] I convened an urgent telephone hearing that night, which was attended by counsel for all parties. By then, documents had been filed which outlined the position for MUNZ and the Lyttelton Port Co Ltd (LPC). Counsel for MUNZ, Ms Ryder, proposed that the Court's order should be amended to permit limited picketing during the two periods for which notices of strike have been given, 31 December 2016/1 January 2017, and 7/8 January 2017. Counsel for LPC, Mr Towner, strongly opposed the application, principally on the ground that an amendment at that later stage would cause confusion. Counsel for The Rail and Maritime Transport Union Inc (RMTU), Mr Davenport, advised the Court that the first defendant saw the application as being a matter between MUNZ and LPC, but that RMTU would abide the decision of the Court, noting the terms of the injunction that had already been issued against it.

[4] The amendments sought were potentially significant. I was particularly concerned that the application was in effect being heard a short time before the picketing would have commenced for a two-day period. Numerous persons had been advised that there would be no picket at all. The reality was that advice to the contrary at such a late stage would have been both impracticable and could potentially have led to confusion and uncertainty. Accordingly, I declined to make any amendments to the relevant order for the purposes of the weekend of 31 December 2016/1 January 2017.

[5] I considered it appropriate for LPC and MUNZ to attend mediation as soon as possible, with regard to their unresolved bargaining. I directed that this should take place on or before 5 January 2017. I also directed that the MUNZ application for amendment would be reviewed at a hearing to be convened at 11 am on 6 January 2017.

[6] The parties then attended mediation (which did not resolve the bargaining issues); and filed evidence and submissions.

[7] LPC also filed an application for leave to join the NZ Merchant Service Guild IUOW Inc (MSG) as a third defendant. This was for the purposes of then applying for an interim injunction in the same terms as had been granted in respect of RMTU.² So as to hear directly from MSG on an urgent basis, I joined that party as third defendant and established a timetable for the filing of a response to the order of interim injunction. I directed that the application be heard also at the hearing which was scheduled for 6 January 2017.

[8] Earlier today, I heard counsel with regard to both applications. At the conclusion of the hearing I indicated that I would make an order of amendment which would allow limited picketing on a prescribed basis. I dismissed the application for an interim injunction against MSG. Shortly after the hearing, I issued a Minute incorporating the Court's orders, so that affected persons could be advised promptly of the Court's views.

[9] This judgment records my reasons for reaching my conclusions, though it does so briefly given the urgent circumstances.

Application to amend

[10] In her submissions Ms Ryder emphasised that confined and peaceful picketing was proposed. A form of order was advanced which, she submitted, was intended to ensure that there would be no picket line which it would be necessary for LPC employees to cross, when entering or leaving the Port. At my request, evidence was obtained in the course of the hearing as to the precise location at which it was proposed the picket would be undertaken. It is on the corner of Donald Street and State Highway 74, Lyttelton, which persons or vehicles entering the main gates of the Port have to pass. It would be confined to, and include, a lay-by area at that location.

² At [72](a).

[11] Ms Ryder submitted that the concerns raised by LPC, and to some extent RMTU, would be met by the proposal that there be no picket for a period of 30 minutes before each shift started, and for a period of 30 minutes after each shift finished, with any amendment to the normal start and finish times to be notified to MUNZ by LPC. It was also proposed that there would be no picketing at any other time that an employee of LPC exited or entered the Port. Originally it was proposed that this obligation would be met by the Union instructing its members to drop all placards and turn their backs, and not to engage in any verbal communication whilst any LPC employee was entering or exiting the Port. Following discussion with the Court, it was agreed that this latter aspect of the proposed order could be modified so that those persons would retire to their legally parked vehicles, or leave the area.

[12] Mr Towner, counsel for LPC, in summary, submitted that MUNZ was effectively seeking a change to the orders made by the Court in its substantive judgment, which would defeat the intent of that judgment. He said that if MUNZ held such concerns, it should amount to an appeal to the Court of Appeal.

[13] Mr Towner also relied on extensive affidavit evidence which had been filed for LPC, raising logistical concerns. These included:

- (a) Practical difficulties in advising a MUNZ representative of any amendments for start and finish times;
- (b) the absence of a requirement to clear the picket of any third party needed to use the entry point (such as trucking company employees, contractors and subcontractors, some of whom may be members of unions);
- (c) the absence (at that stage) of a requirement to disperse if LPC employees were passing the picket point;
- (d) whether MUNZ members would know who LPC employees were, there being some 520 of them;

- (e) whether MUNZ members would be properly regulated when picketing; and
- (f) whether members of RMTU and MSG would still refuse to cross the picket line, particularly if it was not being properly managed.

[14] Mr Davenport confirmed his instructions which were to the effect that the issue of amendment was one which arose between LPC and MUNZ, and that RMTU would abide the decision of the Court, noting the order of injunction which had already been issued against RMTU.

[15] Mr Ballara, counsel for MSG, also submitted the issues as to amendment were between LPC and MUNZ.

[16] I do not accept Mr Towner's submission that if MUNZ was dissatisfied with the interim order made against it in the substantive judgment, then its remedy lay solely in bringing an appeal to the Court of Appeal. The order was one which was made until further order of the Court and leave was reserved for any party to make a subsequent application in respect of the orders which had been issued. It allowed for the possibility of an application for the present kind.

[17] That said, however, the Court must be satisfied that it is appropriate to amend its orders. In my view, the Court should assess any reasonable proposal so as to consider whether, in this instance, a limited form of legal picketing should in fairness be sanctioned, given the conclusions reached in my substantive judgment. That assessment involves such issues as to whether:

- (a) the proposed picketing would allow the striking party to exercise its right to inform in a peaceful way;
- (b) realistic and workable limitations are proposed which would fairly balance the issues that the Court considered in its substantive judgment when assessing the balance of convenience and overall justice.

[18] I proceed accordingly.

[19] I am satisfied that the concerns raised by LPC in its notice of opposition to the application for amendment, particularly with regard to practical issues, have been appropriately and genuinely addressed.

[20] For example, counsel referred to issues which could arise with regard to members of the marine staff who may have to start or finish at times other than the normal start and finish times. Situations of that sort can be addressed, I am satisfied, by the provision of notice of that circumstance to a union representative present on the picket, which will cause the dispersal of the picket. The Court has been advised that a union representative will hold a cell phone which will constitute the point of contact.

[21] The notice of opposition for LPC also expressed a concern that during a normal eight-hour shift, cargo handlers may leave and return to the Port twice for breaks. Again, that issue can be addressed by the giving of reasonable notice, as provided for in the proposed order.

[22] Turning to the position of third parties, concern was raised that members of RMTU may be concerned by the limited picketing, and refuse to enter or exit the Port at relevant times. However, the proposed orders would ensure that if leaving or entering the Port at standard shift times, there will be no picket; or at other times for which LPC has given reasonable notice. In any event, were an RMTU member to decline to enter or leave the Port whilst a picket was in operation, it is likely that would contravene the order made in the Court's substantive judgment. With commonsense, however, I would have thought that such a difficulty would readily be avoided.

[23] I am not persuaded that the particular position of persons who are not LPC employees, who need to enter or exit the Port, requires any further condition in the order. This is for several reasons:

- (a) As Ms Ryder submitted, those persons can be advised as to how the picket is intended to operate, and its location; such advice should serve to alleviate any concerns of third parties.
- (b) Secondly, the evidence before the Court from the local President of MUNZ, Mr Ormsby, is to the effect that two years ago MUNZ picketed at the Port in support of industrial action occurring at the Auckland Port. At that time there were no difficulties with regard to members of MSG, or third parties such as trucking companies, customers, contractors and subcontractors, crossing the picket. History does not support the contention that difficulties will necessarily arise.
- (c) Thirdly, the proposed order relevantly states that any picketing must not obstruct others when passing, whether by vehicle or foot, or involve the commission of a tort such as that of inducing a breach of contract or the tort of public or private nuisance. The order would be breached if these conditions were not met.
- (d) Finally, the cause of action brought against MUNZ, for which relief was granted by the Court, focused on the allegation that picketing would cause LPC employees to cease work (such as members of RMTU and MSG), thereby causing potential financial harm; no such allegation was made in respect of drivers employed by trucking companies and the like; no cause of action in relation to such entities was placed before the Court.

[24] The affidavit evidence filed for LPC also raised potential compliance issues, including whether any proposed picket would be properly managed, and the ability of the Police to respond if concerns arise. I accept Ms Ryder's submission that these are compliance issues. If the extensive assurances given by MUNZ to the Court are not implemented, then those outcomes may have to be considered by the Court for compliance or other purposes.

[25] Concerns were raised as to the appropriateness of the site from which the intended picketing would be undertaken. Any health and safety issues will be a matter for the Union, as will any issues relating to the use of private property. Reference was made to a Saturday morning market which would give rise to parking issues in the nearby area. That, too, is a matter for the Union and its members. I would have expected these to be issues which can be resolved in a commonsense way.

[26] At this stage, I am satisfied that the proposals advanced for MUNZ, as modified in the course of the hearing process, strike a fair balance between the rights of the various parties. I consider there are satisfactory proposals for peaceful picketing, and that realistic and workable conditions have been agreed, or would be accepted, by the applicant Union.

[27] Accordingly, I confirm that in my Minute of earlier today, the following order was made which is to apply during the strike period for which notice has been given, 7/8 January 2017:

- (i) MUNZ (and its officers, employees and agents) are to refrain from being party to, or directing, encouraging, or inducing its members employed by LPC to participate in picketing at the Port of Lyttelton for a period of 30 minutes before each shift starts and for a period of 30 minutes after each shift finishes (that is 0700, 1500 and 2300 hours; any amendment to those normal start and finish times are to be notified to MUNZ by the plaintiff on reasonable notice); and
- (ii) MUNZ (and its officers, employees and agents) are to refrain from being party to, or directing, encouraging, or inducing its members employed by LPC to participate in picketing at the Port of Lyttelton at any time that an employee of LPC exits or enters the Port. MUNZ is to meet this obligation by instructing its members to retire to their legally parked vehicles, or leave the area, and not to engage in any verbal communication whilst any LPC employee is entering or exiting the Port; and

- (iii) such picketing is to be confined to the area which is bound by the lay-by on the corner of Donald Street and State Highway 74, Lyttelton; and
- (iv) any picketing that does take place must not:
 - (a) obstruct others in passing or re-passing any highway, footpath or footway;
 - (b) if on private property, infringe the law of trespass;
 - (c) involve any criminal activity;
 - (d) involve the commission of a tort such as the tort of inducing a breach of contract or the tort of public or private nuisance.

[28] The Court was informed by counsel that later strikes have been notified, but the present application was not made with regard to them.

[29] I reserve costs with regard to the application to amend.

Application for order against MSG

[30] Mr Towner submitted in effect that mirror orders should be made against MSG as were made against RMTU.

[31] Mr Towner also suggested that the general rule of union solidarity, mentioned in my substantive judgment,³ meant that LPC had a legitimate concern as to the possibility of concerted action, and an illegal strike by members of MSG.

[32] Mr Ballara submitted that there was no evidence that MSG proposed to engage in an illegal strike; rather, it had indicated that whether individual MSG members chose not to cross a picket line would be a matter for them.

³ At [17]-[18].

[33] Mr Ballara also submitted that there was a breach of good faith obligations by the bringing of the application for an interim order.

[34] For two main reasons, I was not persuaded that an interim order against MSG was necessary.

[35] First, the form of the amended orders, as discussed earlier in this judgment, will ensure that there is in fact no picket when relevant members of MSG enter or leave the Port. Sub-clause (2) of the amended order specifically covers that possibility.

[36] Secondly, with regard to the claim that MSG would engage in concerted action with MUNZ, thereby participating in a strike, there is very limited evidence, if any, to support even an inference to that effect.

[37] For these reasons I was not persuaded to grant an interim order against MSG.

[38] I reserve costs on this application.

BA Corkill
Judge

Judgment signed at 5.45 pm on 6 January 2017