IN THE EMPLOYMENT COURT
AUCKLAND

[2015] NZEmpC 232
EMPC 383/2015

IN THE MATTER OF	of an application for injunction and declaration
AND IN THE MATTER	of an application for interim injunction
BETWEEN	BIDVEST NEW ZEALAND LIMITED Plaintiff
AND	FIRST UNION INC Defendant

Hearing:	20 December 2015 (by telephone conference call) (Heard at Auckland)
Appearances:	J Goldstein and L Ryder, counsel for plaintiff S Parry, counsel for defendant
Judgment:	20 December 2015
Reasons:	21 December 2015

REASONS FOR INTERLOCUTORY JUDGMENT
OF CHIEF JUDGE G L COLGAN

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[1] These are my reasons for the judgment delivered yesterday after hearing the plaintiff's urgent application for an interlocutory injunction restraining the defendant and its relevant members from undertaking strike action scheduled to start at 9 pm last evening, Sunday 20 December 2015.

[2] At the conclusion of the hearing, I announced that there are orders made in terms of the prayer for relief in the plaintiff's application for interlocutory injunction filed on 18 December 2015 (as amended appropriately). These are set out at [44] of these reasons.

[3] Bidvest New Zealand Limited (Bidvest) is a supplier of foodstuffs and associated products to businesses and other undertakings throughout New Zealand. It is regionally based at distribution centres, one of which is in Hamilton, and is that with which this case is concerned. The defendant, FIRST Union Inc (the Union) is a union having, as members, some of the staff at the plaintiff's Hamilton distribution centre who are engaged in warehousing, truck loading and the regular distribution of foodstuffs and associated products to Bidvest's customers throughout the Waikato/King Country region.

[4] Bidvest's operations take place 24 hours per day over six days per week. These hours commence at 9 pm on a Sunday night. The overnight activities undertaken include, principally, the assembly and loading of deliveries to be undertaken by the company's trucks from approximately 6 am on the following day. Union members are involved in both of these categories of activity with Bidvest in Hamilton.

[5] The parties are currently engaged in collective bargaining for a collective agreement covering the work of the Union's members at Bidvest and intended to replace a now expired collective agreement. On 17 December 2015 the Union gave Bidvest separate notices of the intention of its members to take strike action for two periods of 24 hours, the first from 9 pm on 20 December to 9 pm on 21 December 2015, and the second from 9 pm on 23 December to 9 pm on 24 December 2015.

[6] Bidvest's response was to advise the Union that it considered that these notices were defective in that they did not provide 14 days of notice before the intended strike action. That was because, in Bidvest's view, the employees were engaged in an essential service under s 90 of, and sch 1 to, the Employment Relations Act 2000 (the Act).[1] The Union's response was to disagree, to contend that the strike action would be lawful, and to advise of its continued occurrence.

[7] Even although, as required by the statute, notice of the intended strikes was given to the Chief Executive of the Ministry of Business, Innovation and

[1] Specifically, Employment Relations Act 2000, s 90(3)(i) and sch 1 cl 11.

Employment (MBIE),[2] no attempt to resolve their dispute by mediation, either at the initiative of the parties or of the Chief Executive, was made by the time that the plaintiff filed its proceedings in this Court mid-afternoon on Friday 18 December 2015.

[8] At the heart of the legal dispute between the parties is whether the employees are engaged in an essential service, requiring at least 14 days' notice of strike action as the defendant contends, or not, as is the Union's position.

[9] Whether employees are employed in providing services to an essential service is a question of fact and degree in any particular case.[3] *Cunningham Construction*, a judgment of the Court of Appeal, was decided under a materially similar provision of the Labour Relations Act 1987. Because an employee is not engaged as such by the direct provider of essential services does not mean that an essential services notice does not have to be given. Equally, the judgment of the Court of Appeal contemplates that someone may be engaged so distantly and indirectly in the essential service that he or she cannot reasonably be considered as being a part of it. It will be, as the Court of Appeal confirmed, a matter of fact and degree where, on that continuum, the particular employees sit.[4]

[10] This has been an application for an interlocutory injunction, that is to determine the position until the dispute can be examined fully on its merits. In these circumstances, there are three tests that the Court must apply.[5]

[11] First, it must be satisfied that there is an arguable case that the plaintiff will succeed at trial. This is done on the basis of pleadings and untested affidavit evidence.

[12] Second, and if so, the Court must determine where the balance of convenience will lie between the parties for that period. That means, in effect, whether it will be more just to stop the intended strike action in the event that it may

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[2] Section 90(1)(b)(i).
[3] *Cunningham Construction (1987) Ltd v New Zealand Labourers Union* [1991] 2 NZLR 12 (CA).
[4] At 14.
[5] *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504 per Diplock LJ: *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA) at 142.

later be found to have been lawful or, on the other hand, to allow the strikes to proceed in the event that they are found to have been unlawful. The strength of the plaintiff's case is one element of that balance of convenience, as is whether damages or other relief may subsequently be an adequate remedy for the ultimately successful party.

[13] Finally, the remedy of injunction being discretionary, the Court must assess where the overall justice of the case lies in the meantime. There may be a variety of discretionary considerations that are applied to this test.

[14] Amongst the plaintiff's Hamilton warehouse customers are some 27 aged care facilities, health service providers, hospitals, a prison, and other similar institutions which it has listed. Many of those institutions do not have sufficient food storage facilities for more than one or two days' supply, so that Bidvest delivers foodstuffs to some of them on either five or six days per week by a fleet of about 20 trucks. Bidvest's customers telephone in particular orders and these are assembled, generally by night shift staff, for delivery on the following day. Bidvest has currently about 16 union members employed on the terms of the expired collective agreement and on whose behalf the Union is bargaining for a renewed collective agreement. Nine of these union members work as warehouse staff with the balance of about seven being drivers. Those unionised staff equate to a little less than one-half of all relevant staff at Bidvest's Hamilton warehouse.

[15] By the time that the strike notices were received by Bidvest, it says its customers did not have an opportunity to order additional stocks and, more particularly, to arrange to hold these, if deliveries did not take place on 21 and 24 December 2015, as might be the consequence of the strike action. Nor has Bidvest had sufficient time to attempt to arrange for such deliveries as may be made by unionised staff to be made by non-union staff, at the same time as meeting its other contractual commitments to non-essential service customers. In addition, the allocation of work, particularly within the warehouse but also performed by truck drivers, may be sufficiently personalised that other staff unfamiliar with it may not be able to achieve the same standards of performance and product care as do those union members who usually perform this work. That is said to extend, also, to the

operation of forklifts, reach trucks and other specialised equipment used in the loading and unloading of trucks and the packing and storage of incoming goods.

[16] Additionally, Bidvest does not deliver on 25 or 26 December 2015 and although its customers are aware of this and will probably have made contingency arrangements, Bidvest says that it is unlikely that it will be able to do so at very short notice for 21 and 24 December 2015.

[17] Bidvest services a substantial number of customers from its Hamilton warehouse. Those customers constitute a range of business enterprises and service providers. At issue in this case are the food and associated-product services provided by Bidvest to hospitals, rest homes, combined rest homes and hospitals, other aged care facilities, and to prisons and other like custodial institutions in the Waikato/King Country area. In the case of hospitals, for example, these may be as geographically separated as Raglan in the west and Te Aroha in the east.

[18] In accordance with customers' specific requirements, Bidvest purchases foodstuffs and associated products in bulk. These are stored at its Hamilton warehouse on the basis of anticipated customer need.

[19] Up until about 10 pm on the day before delivery (except on Sundays), customers advise Bidvest of their particular orders for the following day or days. Beginning at about 9 pm on each of those six nights per week, warehouse workers pick customers' particular orders for the following day or days and load these onto Bidvest trucks so that they are ready to depart from about 6 am on the day of delivery. It appears that Bidvest's trucks cover particular geographic areas of the Waikato/King Country so that a truck's deliveries can include to the whole range of its customers in an area on any particular day. It may be that in the case of probably its largest institutional customer (Waikato Hospital in Hamilton), the entire contents of a delivery truck will be for that customer and in most, if not all, other cases, mixed loads are carried to and delivered within a geographical region.

[20] It follows, logically, that the picking and loading of trucks may be undertaken in the same way; that is that each warehouse employee will generally have a truck or

trucks to load with a range of foodstuffs and associated goods destined for a range of customers.

[21] In these circumstances, it may be very difficult, in practice, for Bidvest to rearrange its logistics systems to allocate picking, loading and delivery work in respect of hospitals (including those associated with rest homes) to be undertaken solely by non-union staff.

[22] As well as defining "essential services", sch 1 to the Act deals with work that is connected to essential services, in two ways. The first is to omit any express reference to indirectly connected work. An example is cl 1 which defines an essential service simply as: "The production, processing, or supply of manufactured gas or natural gas (including liquefied natural gas)." Clauses 2A and 3 are further examples. The second way in which sch 1 Part A deals with an indirect connection between work and essential service is exemplified by cl 11 which is at issue in this case and provides that an essential service includes:

> The operation of—
>
> (a) a hospital care institution within the meaning of section 58(4) of the Health and Disability Services (Safety) Act 2001; or
>
> (b) a service necessary for the operation of such an institution.

[23] Also relevant to this case is the plaintiff's business in delivering foodstuffs to prisons or welfare institutions. Clause 14 of sch 1 Part A refers only to the fact that an essential service includes: "The operation of a residential welfare institution or prison."

[24] Even in cases of essential services where there is not the additional subcl (b), the Court of Appeal's judgment in *Cunningham Construction* allows for coverage of employment in an associated business on a case-by-case basis. Where, as here, the wider net is cast expressly by subcl (b), the argument is at least no less, and arguably stronger, for the inclusion of employees of businesses such as Bidvest.

[25] The plaintiff's application was a blanket one in the sense that it purported to enjoin strike action by all union members employed by Bidvest irrespective of

whether that engagement relates to the provisioning of what the plaintiff says are essential services or not. The evidence may indicate that some employees are allocated specifically to unload, store, pick, load and deliver produce to those institutions specifically, but that is not clear. Bidvest services a number of customers who do not fall allegedly into the categories of essential services.

[26] Bidvest's evidence or case does not address expressly the statutory requirement that in addition to employees being engaged in an essential service, the public interest must be affected by the proposed strike action.

[27] At the heart of the dispute is whether some 27 of Bidvest's customers, to whom deliveries are made, fall within the category of "a hospital care institution" within the meaning of s 58(4) of the Health and Disabilities Services (Safety) Act 2001 (the HDS Act). A subsidiary question in the dispute between the parties is whether Bidvest constitutes "a service *necessary* for the operation of [a hospital care institution as defined above]" (emphasis added). As already noted, these are the relevant categories of essential services set out in cl 11 of sch 1 Part A to the Act. A "hospital care institution" is defined in s 58(4) of the HDS Act as:

> … premises used to provide hospital care, in accordance with section 9; but where only parts of any premises are used for that purpose, means only those parts and any other parts used for ancillary purposes …

[28] Section 9 of the HDS Act is entitled "Providers of health care services to meet service standards". It is not easy to establish from s 9 any better definition of "premises used to provide hospital care" because that section deals with a requirement for a person "providing health care services of any kind":

- to be certified by the Director-General to provide health care services of that kind;

- to meet all relevant service standards;

- to act in compliance with any conditions subject to which the person was certified by the Director-General to provide health care services of that kind;

- to comply with the HDS Act; and

- if the services are rest home care, or geriatric services that are hospital care, to act in compliance with any applicable regulations promulgated under s 53(1)(a) of that Act.

[29] It may be that the plaintiff will need to establish at trial the legal status, in terms of the HDS Act, of any or all of the customers which it contends are hospital care institutions. In the meantime, however, the Court is prepared to accept that, in addition to what are clearly and generally recognised public and private hospitals, there are also facilities attached to, or combined with, rest homes and aged care facilities in which the residents of those facilities are assessed and treated for medical or other health-related conditions; that is that they perform the functions of a hospital.

Arguable case for trial?

[30] I was satisfied that the plaintiff has an arguable case that its operations at and from its Hamilton distribution centre amount to a service necessary for the operation of a hospital care institution pursuant to cl 11 of sch 1 Part A to the Act. A not insignificant amount of Bidvest's operations deals with the selection and distribution of foodstuffs to hospitals and institutions which include hospital facilities. It is unnecessary, in these circumstances, to determine the associated question of whether deliveries by Bidvest of food and associated products to a prison or other secure custodial institution are also covered by sch 1 Part A.

[31] There is really no issue between the parties about what might be called 'the public interest test' being satisfied under s 90(2) of the Act. This provides that notice of a strike in an essential service need only be given if "(a) the proposed strike will affect the public interest, including (without limitation) public safety or health …". I accept that a strike which may affect the provision of food to a hospital care institution, by limiting or negating the provision of food for consumption by patients, would affect issues of public health and, thereby, the public interest.

Balance of convenience

[32] This favoured the plaintiff's position. The inability of essential service hospital customers, in conjunction with the plaintiff, to make provision for non-delivery of foodstuffs and associated products may put in issue the plaintiff's contractual arrangements with those services. There is some evidence, also, that it may put at issue the plaintiff's expectations of the provision of expanded services to one major hospital customer. The resulting losses may, indirectly, affect the plaintiff's willingness in collective bargaining to agree to the defendant's wage claims which are the sticking point in those negotiations at the moment.

[33] On the other hand, the defendant's ability to issue lawful advice of strike action on 14 days' notice is conceded by the plaintiff. At least as far as those hospital services' customers are concerned, their requirements will not be seasonally affected as may be those of non-hospital care service customers of the plaintiff, so that, within a short time, the Union will still be in a position to bring commercial pressure on the plaintiff by giving undoubtedly lawful notice of strike action without significant delay.

[34] Without minimising the importance to the Union of exerting financial pressure on Bidvest, which is an important motivation for strike action to persuade the employer to settle bargaining, that right is not prohibited by this judgment but only delayed and for a relatively short period. Counsel for the plaintiff confirmed that, except for its length of notice, there were no other elements of the defendant's strike notices or intended strikes which could be said to have been unlawful.

[35] In these circumstances, the balance of convenience between the parties favours the granting of the interlocutory injunctive orders claimed by the plaintiff.

Overall justice

[36] This final and discretionary consideration requires the Court to stand back from the minutiae of the first two tests and assess whether the interests of justice

require that the interlocutory injunctive orders be allowed. In my assessment the overall justice of the case follows the balance of convenience.

[37] The non-provision of food services to hospital patients who are potentially vulnerable persons and who are not parties to, but are affected by, the proposed strike action, must be taken into account by the Court. As counsel for the plaintiff pointed out, if the statutory 14 days' notice of strike action is given, Bidvest and its customers will have time to make alternative arrangements to ensure that essential foodstuffs are on hand in those hospital facilities.

[38] There is an additional factor identified by Mr Goldstein for the plaintiff. That is the contents of the parties bargaining process agreement (BPA). Although this cannot trump what would otherwise be the lawfulness of the strike action,[6] it may be a discretionary element in considering whether to grant interlocutory relief.

[39] The BPA which applies to the parties' current collective bargaining provides, at cls 8.5 and 10.1 as follows:

> 8.5 The parties will work together to identify barriers to agreement and will actively explore ways to overcome those differences.
>
> …
>
> 10.1 If the bargaining process breaks down either party may call on the assistance of a [mediation] conducted through the Ministry of Business, Innovation and Employment in an attempt to resolve the situation. The parties agree that it is desirable and in the best interests of good faith to attend Mediation prior to industrial action, strike/suspension/lockout.

[40] As Mr Goldstein submitted, there has been a breakdown in the negotiations, principally over the rate of increased remuneration, although recent offers and counter-offers have brought the parties closer together. That road block was encountered relatively early in the bargaining, at least qualitatively if not chronologically.

[41] Despite the requirement of cl 8.5 set out above, it appears that the Union did not identify that barrier to agreement and did not explore actively ways of

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[6] *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission* [2011] NZCA 595, [2011] ERNZ 360 at [37].

overcoming it before resorting to strike action. Similarly, although cl 10.1 provides that "it is desirable" that mediation be explored before strike action, it is in the spirit of the Act, as well as being agreed by the parties, that the assistance of a Mediator should be used before strike action takes place. Combined with the directions that I have made to urgent mediation in the bargaining, this is a factor in favour of the plaintiff's position.

Direction to mediation

[42] Despite the strike notices having been provided to the Chief Executive of MBIE, as is required by the legislation, no involvement of a mediator in the parties' dispute has yet been signalled.

[43] Pursuant to s 188(2) of the Act, not only must the Court refer the parties to mediation but I am of the view that it will be particularly appropriate to do so in the circumstances of this case. Given that the defendant is aware that it can give lawful notice of strike action of 14 days, the parties are directed to urgent mediation to be facilitated by MBIE and, to that end, a copy of this judgment should be sent by the Registrar to the Mediation Service.

Costs

[44] Any questions of costs between the parties are reserved until after the resolution of the substantive hearing about the lawfulness of strike action on less than 14 days' notice if these matters cannot be resolved between the parties themselves.

Orders

[45] The formal orders of the Court, as conveyed to the parties immediately after yesterday's hearing, are as follows:

1. The defendant and its members employed at the Hamilton branch of Bidvest New Zealand Limited are prohibited from undertaking strike

action on 20 and 21 December and 23 and 24 December 2015 pursuant to strike notices given by the defendant to the plaintiff on 17 December 2015.

2. Leave is reserved to either party to apply for any further orders or directions on reasonable notice.

GL Colgan
Chief Judge

Reasons for judgment signed at 4.50 pm on Monday 21 December 2105