IN THE EMPLOYMENT COURT
AUCKLAND

AC 50/07
ARC 48/07

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	SERVICE AND FOOD WORKERS UNION NG RINGA TOTA INC Plaintiff
AND	SPOTLESS SERVICES (NZ) LIMITED Defendant

Hearing: 22 August 2007
(Heard at Auckland)

Appearances: Peter Cranney and Timothy Oldfield, Counsel for Plaintiff
Shan Wilson and Katherine Burson, Counsel for Defendant

Judgment: 23 August 2007

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] This interlocutory judgment deals with:

- the appropriate plaintiff parties;
- whether hearing of the wages arrears claim should be stayed pending the determination of an appeal that has been lodged; and
- whether additional particulars of the claim and defence should be given.

[2] Claims for wages for employees purportedly locked out have been set down for hearing on 17 and 18 September 2007, having been removed for hearing in this Court by the Employment Relations Authority.

Who can sue?

[3] The first point made by the defendant is that claims for arrears of wages must be brought by, and in the names of, individual employees in respect of whom an employer may be liable. Here, the plaintiff is their union which is not entitled to the wages. Ms Wilson said that the union has no standing to pursue wages claims on behalf of its members as it now purports to do.

[4] Although Mr Cranney argued that s18(1) and (3) and s236 permit the union to bring wage arrears claims on behalf of its members, I find these only go so far as to permit representation of members by unions in Authority or Court proceedings. Section 131 relied on by Ms Wilson is particular and, by reference to the words in s131(1)(b) *"may be recovered by the employee by action commenced in the prescribed manner in the Authority"*, means that it is for an employee to do so. Such an employee may be represented by his or her union pursuant to ss18 and 236 but that representation does not extend to the union issuing the proceedings in its own name as the plaintiff purported to do in this case.

[5] In any event, Mr Cranney accepted that if he was required to do so, he would add the names of employees as plaintiffs. I grant leave for that to be done. The numbers and identities of any such added individual plaintiffs are for the union to determine but I leave in place the current representative nature of the proceeding. By this I mean that it will not be necessary at the forthcoming hearing for the plaintiff to call many hundred individual employees, many of whose circumstances may be materially identical or so similar that principles can be established and applied to their particular circumstances by the parties after the hearing.

[6] When I last dealt with this matter in a conference with counsel on 3 August before the removal proceedings from the Employment Relations Authority, I directed that the hearing on 17 and 18 September was to *"deal with the broad questions of liability for wages of employees during the periods that the Court has determined that Spotless purported to lock out those employees, albeit unlawfully. The parties are agreed that the Court will attempt to provide a judgment that will*

enable them to subsequently determine the amounts payable to individual employees (if the defendant is liable) without a necessarily lengthy further hearing."

[7] The particular directions set out at the end of this judgment will timetable the filing of amended pleadings to allow for these additions to be made. I am satisfied that this is a largely mechanical exercise that will not affect adversely the ability of the parties to present their cases on the scheduled dates.

Should there be a stay?

[8] The second question is the effect of the defendant's application for leave to appeal to the Court of Appeal against my judgment given on 23 July 2007 and the reasons for that judgment given on 27 July 2007 that permit the claims for wages to be made. The defendant said that at least until the Court of Appeal determines that leave should not be granted, the wage recovery aspects of the case should be adjourned and, if leave is granted, that position should apply until the appeal has been disposed of.

[9] Mr Cranney emphasised the desirability from the point of view of the union and its members that these questions are resolved promptly. The individual employees are low paid by any account and suffered loss of income for periods in July that they can ill-afford. I accept that many will have gone into debt or suffered other financial hardships as a result of those losses and, without determining liability for payment, a prompt decision is desirable.

[10] On the other hand, Spotless is entitled to appeal, as it has done within time, and the finding of liability that I made on the question of whether there was a lawful lockout is not authoritatively established at appellate level in employment law. If this Court were to determine that the employees were entitled to wages amounting in aggregate to several hundred thousands of dollars, then questions might arise about staying execution of any remedies until any appeals might be determined. The reality of the position is that if Spotless were required to pay out the employees, their financial circumstances are such that it would be very difficult and even unfair to require those employees to refund Spotless if it were ultimately successful. If the

plaintiff's claim is not now stayed and the defendant is ultimately successful on appeal, both parties will have expended significant sums on a hearing.

[11] Whether the mechanism is adjournment of the hearing of the wage arrears claim or of stay of this aspect of the proceeding, is not the issue. Rather, decision of the defendant's application turns on where the interests of justice (including those of the parties) lie. There are a number of relevant considerations.

[12] The money at issue for each affected employee will vary but on average may be between $750 and $1,000 at most. These are not modest sums. The evidence is that most affected employees are low paid with little or no discretionary income. Although some people may have obtained unemployment benefits from Work and Income New Zealand, others did not. Some employees had to make arrangements for postponed payments of mortgages and other loans. Many would no doubt have borrowed to tide them over a loss of income for a week and a half. It is important to the employees that they know where they may stand legally, even if there are rights of appeal exercisable by Spotless and by them that may delay any entitlement they have.

[13] Although the defendant says that appeal rights should be exhausted on a judgment by judgment basis, I consider on balance that the proceedings in this Court should be concluded before the parties exercise the rights of appeal that they have and, in respect of the defendant's current appeal, will be preserved.

[14] There are ongoing collective employment agreement negotiations between these parties and there is at least a theoretical possibility of further strikes and/or lockouts. While it is desirable for the legal position to be settled as soon as possible, I do not think that including the wages recovery elements of the case in this Court will delay the consideration of the application for leave to appeal and, if leave is granted, any appeal itself in the Court of Appeal.

[15] As Mr Cranney pointed out, the defendant's defence to the wages claim raises untested, if not unique, legal issues for decision and it may well be that either party will also wish to test on appeal these aspects of the case if and when they are decided

by this Court. It would be preferable in my view that all such matters be considered together on appeal rather than in consecutive appeals with the prospect in each of further (albeit limited) rights of appeal to the Supreme Court.

[16] So although not a one-sided issue, I consider on balance that the proceedings before this Court can and should continue and will be able to do so without prejudice to the defendant's rights to prosecute its application for leave to appeal to the Court of Appeal.

Particulars of pleadings

[17] Finally turning to particulars, I agree that Spotless should admit or deny whether it prevented affected employees from working but, equally, it can only do that if such an assertion is made expressly in the statement of claim. As I understand the position, Mr Cranney will now include an allegation to this effect in which case the defendant will have to address that specifically.

[18] I accept also that the defendant's current reference to the employees having been *"suspended"* requires further particularisation. The defendant must identify whether this was a statutory suspension and, if so, which of the statutory suspensions was invoked.

[19] These are matters that I am confident will be attended to in the amended pleadings that I will direct now be filed.

Summary of orders and directions

[20] I grant the plaintiff leave to add individual employee parties to the proceeding. The identities of those added individual employee parties are to be determined by the plaintiff.

[21] I refuse the defendant's application for adjournment or stay.

[22] The plaintiff must file and serve an amended statement of claim by 4 pm this Friday 24 August 2007 and the defendant must file and serve its statement of defence to that amended statement of claim by 4 pm on the following Friday 31 August.

[23] Mr Cranney's amended statement of claim will have to plead expressly whether the defendant prevented employees from attending work if he wishes to have it admit or deny that. If the defendant maintains the pleading currently set out in paragraph 5 of its statement of defence it will have to identify whether the suspension of employees was statutory and, if so, which category of statutory suspension.

[24] The matter will proceed on the dates allocated for it. I reserve costs on these applications and the hearing.

GL Colgan
Chief Judge

Judgment signed at 9 am on Thursday 23 August 2007