IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2017] NZEmpC 6
EMPC 9/2017

IN THE MATTER OF	an application for an interim injunction
BETWEEN	LYTTELTON PORT COMPANY LIMITED Plaintiff
AND	MARITIME UNION OF NEW ZEALAND INC Defendant

Hearing:	27 January 2017 (heard at Wellington)
Appearances:	R Towner and E Coats, counsel for plaintiff J Goldstein, counsel for defendant
Judgment:	31 January 2017

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] The Maritime Union of New Zealand Inc (MUNZ or the Union) has notified Lyttelton Port Company Limited (LPC) that it intends to conduct a continuous strike from 0100 hours on Friday, 3 February 2017 continuously until 2359 hours on Sunday, 5 February 2017.

[2] LPC has issued injunction proceedings alleging that the requirements of s 82A of the Employment Relations Act 2000 (the Act) have not been met; this section provides that before a strike may proceed, a union must hold a secret ballot of its members who are employed by the relevant employer and who would become

a party to the strike; and the result of this secret ballot must be in favour of the strike.[1]

[3] LPC says that since there has not been compliance with this essential requirement, the proposed strike will be illegal. It accordingly seeks an urgent injunction to restrain that strike.

[4] MUNZ says that the necessary secret ballot was in fact undertaken on 7 January 2017 and that members were in favour of striking; the ballot resulted in two notices of strike being signed on 10 and 17 January 2017, the latter relating to the strike which is intended for 3, 4, 5 February 2017.

[5] This proceeding was filed on 19 January 2017. On 20 January 2017, I granted LPC's application for urgency, and fixed a timetable for the filing of evidence and submissions. I also directed that the application would be heard promptly on 27 January 2017.

[6] The statutory requirement for unions to hold secret ballots before striking was enacted with effect from 14 May 2013.[2] The applicable provisions have not been considered by this Court previously. However, the key issues which I must resolve for the purposes of this interim injunction application are mainly factual in nature. They require a clear understanding of the genesis of the proceeding, which I shall now summarise.

Evidence

[7] LPC filed two affidavits in support of its application. The first was filed by Mr D Parker, Container Terminal Manager, of LPC. He summarised the background to bargaining which followed the expiry of a collective agreement on 7 March 2016. He said the parties had met and bargained on approximately 30 to 35 occasions between June 2016 and January 2017.

---

1 Employment Relations Act 2000, s 82A(2).
2 By s 7 of the Employment Relations (Secret Ballot for Strikes) Amendment Act 2012.

[8] Mr Parker then outlined the history of industrial action which has taken place. He said there had been a series of strike notices that MUNZ issued during December 2016 and January 2017. The first of the relevant strike notices was the subject of a decision in this Court, in which a strike proposed for 24 December 2016 and 25 December 2016, and Saturdays and Sundays thereafter, was restrained by order of this Court.[3]

[9] He pointed out that strike notices issued after the 7 December 2016 strike notice had related only to specified two-day periods (either a Friday and Saturday, or a Saturday and Sunday). The 17 January 2017 strike notice, which is the subject of this application, however, relates to a proposed three-day period of strike action.

[10] Mr Parker went on to explain his concerns as to the impact of a three-day strike on the Port's operations, which he said would result in a significant loss of revenue, cause reputational damage and affect the interests of the general public.

[11] Ms S Parker, Industrial Relations Manager of LPC, said in her first affidavit that she was aware MUNZ had a meeting with its members under s 26 of the Act on 1 December 2016. She referred to an email from MUNZ's advocates which confirmed that a secret ballot had been conducted on that occasion. She said it was her understanding that the vote that took place on that occasion was a general vote to support the MUNZ executive in the action it wished to take so as to advance collective bargaining. She was unaware of any vote which had been taken in relation to strike action for any particular dates. She also said she was not aware of any further meeting of MUNZ members pursuant to s 26 of the Act having taken place since 1 December 2016, although one was proposed for 26 January 2017. Nor was she aware of any secret ballot having been undertaken for the strikes which had previously been undertaken, or in relation to the strike notified by the 17 January 2017 notice.

[12] She referred to unanswered correspondence which she had directed to Mr T Ornsby, President of the Lyttelton Branch of MUNZ, when she asked if a strike ballot had been held before a particular notice had been issued, that of

---

[3] *Lyttelton Port Co Ltd v Maritime Union of New Zealand Inc* [2016] NZEmpC 173.

28 December 2016. There was no reply to that email. She also referred to an email exchange between the parties' lawyers: confirmation was sought as to what authority the Union had to issue the strike notice dated 28 December 2016. One of the lawyers acting for MUNZ stated that the Union had obtained a mandate from its members to engage in strike action pursuant to a secret ballot which had been held on 1 December 2016. The lawyer, in an email of 4 January 2017, said the strike notices which had subsequently been issued had been authorised by that secret ballot.

[13] MUNZ filed two affidavits. The first was from Mr Ornsby. It was sworn on 25 January 2017. Mr Ornsby explained that a secret ballot of members with regard to striking had been undertaken at the Lyttelton offices of MUNZ (which are not on LPC premises) on 7 January 2017. Mr Ornsby referred to texts sent to some 155 MUNZ members advising them of the proposed meeting; these texts were sent on 5 and 6 January 2017. A yet further reminder was sent on 7 January 2017 to those MUNZ members confirming that there was to be a secret ballot vote at 3.00 pm that day.

[14] Mr Ornsby said the meeting went ahead with Union members secretly voting whether they were in favour of the strikes. The two Returning Officers, Mr J Wilson and Mr P Paulsen, counted the ballot papers and announced that its result was in favour of striking. He said that as a result, strike notices were completed and signed by him on 10 January 2017 (relating to a proposed strike on 27/28 January 2017) and on 17 January 2017 (relating to the proposed strike of 3, 4 and 5 February 2017).

[15] Then he stated that the Union had issued a s 26 notice, advising that it intended to hold a meeting with its members on 26 January 2017; the purpose of that meeting would be to report back to members as to the progress being made with regard to bargaining, and that it had "nothing to do with the strike notices that have been issued".

[16] He concluded by stating that as far as the Union was concerned, it did hold a secret ballot asking members whether they were in favour of the strikes, and those members had confirmed that this was the case.

[17] The second affidavit was from Mr Wilson, one of the two MUNZ Returning Officers. He confirmed that he had received prior notice of the ballot which took place on 7 January 2017. He said that at the meeting of that date there were 81 MUNZ members present, each of whom signed the attendance book. He said that the ballot was to decide whether the members were in favour of removing their labour or striking. Each member present was given a ballot paper, a copy of which was placed before the Court.

[18] He said that after the members had voted, he and Mr Paulsen counted the ballot which was in favour of striking by 79 to two. He announced the result of the ballot to the members who were present at the meeting.

[19] Ms Williams filed an affidavit in reply on 27 January 2017. It annexed a strike notice which was dated the previous day, and which proposed strike action from 0100 hours on Saturday, 11 February 2017 and would be continuous until it ended at 2359 hours on Sunday, 12 February 2017.

Submissions

[20] In its submissions, counsel for LPC said that the key issue now raised by its application was whether the ballot taken by its members on 7 January 2017 complied with the secret ballot provisions of the Act. If those requirements were not met then the threatened strike would be unlawful and could not proceed.

[21] Counsel submitted there was no evidence that the Union's members voted specifically on whether they were in favour of proceeding with a three-day strike on 3, 4 and 5 February 2017, before the notice was issued. It was submitted that it was unclear as to what question or motion the defendant's members had voted on. For example, the evidence did not clarify whether the vote authorised participation in strike action generally or authorised strike action on any particular dates.

[22] Counsel also analysed the applicable provisions of the statute and its legislative history. The Court was also invited to consider the Trade Union and Labour Relations (Consolidation) Act 1992 of the United Kingdom, which affords

trade unions statutory immunity against the normal legal consequences of organising industrial action, provided, among other things, that action is authorised by a postal ballot. It was submitted that the purpose behind the United Kingdom legislation was broadly the same as that of the New Zealand statute, and that assistance could be derived from the relevant United Kingdom case law.[4]

[23] Counsel then submitted that a general motion in relation to "striking" or "strikes" was not the same as a secret ballot in favour of "the strike" as required by s 82B. The use of the definitive article was deliberate and significant. Specificity was required. Furthermore, before voting, members should have been given information which would be contained in a proposed strike notice, so that a proper choice could be made when voting.

[24] Counsel accepted that a Union may be able to comply with the legislative requirements through a single ballot in relation to a number of different particular strikes. This was consistent with the finding made by this Court in its judgment of 20 December 2016, where it was found that it was possible for a series of weekend strikes to amount to a single strike.[5] The key issue would be whether the members were informed about "the strike" (that is, each strike they were voting on), before that vote was undertaken.

[25] In oral submissions presented for LPC, Ms Coats emphasised the requirement for specificity, and the fact that there was no direct evidence of the motion put to MUNZ members.

[26] She also developed a submission which was to the effect that only those persons who would become party to a strike were permitted to take part in a secret ballot under s 82A(2); and there was no evidence that those members who voted were persons who would in fact become party to the strike. This submission was supported by reference to the strike notice dated 10 January 2017 (which related to a two-day strike on a Friday and a Saturday), the strike notice of 17 January 2017

---

4 *London Underground Ltd v National Union of Rail, Maritime and Transport Workers* [1995] IRLR 636 (CA), *British Airways PLC v Unite the Union* [2010] EWCA CIV 669, [2010] IRLR 809 and *National Union of Rail Maritime and Transport Workers v Midland Mainline Ltd* [2001] EWCA CIV 1206, [2001] IRLR 813.

5 *Lyttelton Port Co Ltd v Maritime Union of New Zealand Inc*, above n 3, at [54] – [58].

(which related to a proposed three-day strike, Friday, Saturday and Sunday) and to the most recent strike notice of 26 January 2017 (which was different again in that it related to Saturday and a Sunday). She submitted it was highly likely that different members would be affected by various strikes, and that it was not clear whether those who voted were members who would become party to the proposed strike notified for 3, 4 and 5 February 2017.

[27] Turning to the submissions advanced for MUNZ, Mr Goldstein emphasised that LPC must initially establish that it had a strongly arguable case. He said that the company had not put any evidence before the Court that established any arguable case, strong or otherwise, that the defendant had failed to meet its s 82A obligations. He said that the evidence put forward by LPC itself was speculative and without substance.

[28] This was to be contrasted with the defence evidence. The result of the secret ballot held on 7 January 2017 was that members confirmed they were in favour of "the strikes". He submitted it was clear that the strikes being referred to were the ones set out in the notices to strike issued on 10 and 17 January 2017, because Mr Ornsby had confirmed that the result of the secret ballot caused him to complete and sign the strike notices of which one only was being challenged by LPC. He submitted that the Union's evidence was not contradicted at this interlocutory stage. He argued that it was not up to the Union to prove anything; the onus to establish the allegations was on LPC, not MUNZ. He submitted that there was no basis for the plaintiff's claim as put in the first instance. He also submitted that there had been numerous strikes over various weekends in January which had taken place without any question as to whether there had been compliance with the secret ballot provisions being raised.

[29] Finally, he said from the bar that at the s 26 meeting which took place on 26 January 2017, the Union had undertaken a secret ballot which resulted in the notice of strike being signed which had been issued that day; that is, the authorisation for the notice was not derived from the ballot of 7 January 2017, contrary to the submission made for LPC.

[30] Ms Coats said in reply that there had been a legitimate basis for LPC to issue its proceedings, and it had then responded in submissions made for the company to the evidence which the Union had placed before the Court in reply.

[31] She also said that there was no formal evidence relating to what occurred at the meeting which had taken place on 26 January 2017, and that indeed Mr Ornsby had said that the meeting was only for the purposes of reporting back as to what had occurred in bargaining.

Legal principles

[32] The relevant principles are well established. First, the Court must be satisfied as to whether there is an arguable case as to the merits of the claim. Whether there is an arguable question to be tried will turn on whether any of the causes of action relied on by the plaintiff have a real prospect of success in obtaining a permanent injunction.[6]

[33] If a plaintiff's interim application will effectively dispose of the defendant's substantive rights to strike on the basis of notices already issued, then something more than a barely arguable case is required. In *Tasman Pulp and Paper Company Ltd v New Zealand Shipwrights Union*, the full Court observed that where the proposed action is incapable of being deferred without effectively being cancelled so that the grant of the interim relief effectively becomes a summary judgment, the more relevant to the overall justice of the case are the relevant strengths and weaknesses of the parties' cases.[7] In such a case, the Court must be satisfied that there is a strongly arguable case.[8]

---

6 Andrew Beck and others, McGechan on Procedure (online looseleaf ed, Westlaw NZ) at [HR7.53.02].

7 *Tasman Pulp and Paper Company Ltd v New Zealand Shipwrights Union* [1991] 1 ERNZ 886 (EmpC) at [898].

8 *Golden Bay Cement v New Zealand Merchants Service Guild* [2002] 1 ERNZ 456 (EmpC) at [18]; *Chief Executive Officer of the Department of Corrections v Corrections Assoc of New Zealand* [2006] ERNZ 235 (EmpC) at [53].

[34] The onus is on the applicant to "adduce sufficiently precise factual evidence to satisfy the Court that he or she has a real prospect of succeeding in his claim for a permanent injunction at the trial".[9]

[35] Having dealt with these threshold issues, the Court must then assess where the balance of convenience lies.

[36] Finally, the Court must stand back and examine whether the overall justice of the case requires the granting of the relief sought, taking into account whether there are alternative remedies.[10]

Relevant provisions as to secret ballots

[37] The applicable provisions as to secret ballots for present purposes are contained in ss 82A to 82C of the Act. They provide as follows:

> **82A Requirement for union to hold secret ballot before strike**
>
> (1) This section applies to—
>
> (a) a union that—
>
> (i) is bound by a current collective agreement; or
>
> (ii) will be bound by a proposed collective agreement; and
>
> (b) members of that union who are employees who are or have been in the employment of the same employer or of different employers and who—
>
> (i) are or were bound (as the case may be) by the current collective agreement referred to in paragraph (a)(i); or
>
> (ii) will be bound (as the case may be) by the proposed collective agreement referred to in paragraph (a)(ii).
>
> (2) Before a strike may proceed under this Part,—
>
> (a) the union must hold, in accordance with its rules, a secret ballot of its members who are employed by the same or different employers (as the case may be) and who would become a party to the strike; and
>
> (b) the result of the secret ballot must be in favour of the strike.

---

9 *Re Lord Cable (Dec'd)* [1976] 3 All ER 417 (Ch) at 431.

10 *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA); *New Zealand Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90, (2013) 13 TCLR 531 and *Brooks Homes Ltd v New Zealand Tax Refunds Ltd* [2013] NZSC 60.

(3) For the purposes of subsection (2)(b), the result of a secret ballot is determined by a simple majority of the members of the union who are entitled to vote and who do vote.

(4) As soon as is reasonably practicable after the conclusion of the secret ballot under subsection (2), the union must notify the result of the ballot to the members of the union who were entitled to vote.

82B Terms of question for secret ballot

The question to be voted on in a secret ballot for the purposes of section 82A is whether the member of the union is in favour of the strike.

82C When requirement for secret ballot does not apply

Sections 82A and 82B do not apply if the proposed strike is lawful under section 84 (which relates to lawful strikes on the grounds of safety or health).

[38] The stated intention of the Employment Relations (Workers' Secret Ballot for Strikes) Amendment Bill, which introduced these provisions, was to protect union members from being intimidated when voting on strike actions.[11] In introduction the Bill at its first reading, Mr Tau Henare (National Member of Parliament) stated:

> This Bill requires unions to hold a secret ballot for their members when voting on strike action … one of the reasons why I suggested this Bill to my colleagues was that one such person felt that he was under pressure when it came time to decide whether he would be part of the withdrawal of labour at his workplace … this Bill will provide a protection mechanism for workers who may feel intimidated through the voting process. People must feel at ease with the process, whether it is about choosing to withdraw their labour or choosing their representatives every three years … this Bill will ensure that a secret ballot before strikes is a legal requirement for all unions. It is nothing new. Actually, all that this Bill does is to codify and standardise what is already occurring within some of the major unions of this country.

[39] Although initially the Bill had cross-party support, it was only passed by a majority at its third reading (the opposition having withdrawn its support). At that reading, Mr Henare repeated his assertions as to the purpose of the Bill:

> This is a bill that states quite categorically that when strike action is to be taken, there must be a secret ballot. That is the least that we ask of our country when we go to the polls – voting by a secret ballot.
>
> It is about choice. Choice is about making a decision without the sword hanging over the top of you – if it does … it is about that individual making that choice for whom him or herself … all it does is allow a couple of things:

---

[11] Employment Relations (Workers' Secret Ballot for Strikes) Amendment Bill (21 April 2010) 662 NZPD 10351.

> one is choice …; the other is freedom – freedom to choose without fear of somebody else putting the hard word on you.

[40] For present purposes, I conclude that the primary intention of these provisions was to protect the interests of workers.[12] An amendment was also made to s 86, which now relevantly reads:

> **86 Unlawful strikes or lockouts**
>
> (1) Participation in a strike or lockout is unlawful if the strike or lockout—
>
> (aa) in the case of a strike, takes place in contravention of section 82A; …

Arguable case

[41] Before turning to the factual issues, there is one legal matter on which I comment; in doing so I observe that the opportunity for either presenting submissions as to the legal position regarding these secret ballot provisions, or to consider them, has been limited due to the urgent circumstances. Furthermore, I am only required to consider these issues for the purposes of whether the plaintiff has established an arguable case according to the principles identified earlier.

[42] In my view, although the primary thrust of the applicable statutory provisions is to protect union members, as already mentioned, an employer may be said to have some interest in the secret ballot procedure, since non-compliance with the statutory provisions will render the proposed strike unlawful for the purposes of s 86(1)(aa) – and thus disqualify it from the protection afforded by s 83 of the Act.

[43] I also note that Ms Darien Fenton (Labour Member of Parliament) attempted to introduce a new subsection to s 82A that would have expressly prevented employers from challenging the legality of a secret ballot:[13]

---

[12] This has been stated also as being the position for the purposes of the Trade Union and Labour Relations (Consolidation) Act 1992: *London Underground Ltd*, above n 4, where Millett LJ said that the requirements had not been imposed for the protection of the employer or the public, but for the protection of the union's own members. For present purposes I regard the United Kingdom legislation as being of limited assistance only, as that statute imposes a regime which is considerably more prescriptive than that which was introduced by the New Zealand provisions. There are also a range of distinguishing features, not the least of which is that the United Kingdom provisions provide protection from certain tort liabilities, whereas the New Zealand provisions are relevant to the question of whether a proposed strike is legal.

> 5. For the avoidance of doubt, the legality of a ballot can only be challenged by a member of the union holding it.

[44] The amendment was not approved. Arguably, from this evidence it could be inferred that it was the legislature's intention to permit employers to challenge the legality of a ballot, rather than reserving that right only to members of a union.

[45] I turn next to the primary submission which is now made for LPC, to the effect that it is unclear and uncertain from MUNZ's affidavits as to what the members voted on. Reliance is placed on apparent differences of expression in the affidavits of Mr Ornsby on the one hand, and Mr Wilson on the other.

[46] Ms Coats emphasised that in his affidavit Mr Wilson stated that:

> 5. … This secret ballot was in regard to whether the members were in favour of striking.
>
> …
>
> 8. … The ballot was to decide whether the members were in favour of removing their labour or striking.

[47] On the other hand Mr Ornsby said that:

> 4. [It was intended to] hold a secret ballot in regard to striking.
>
> …
>
> 11. At the meeting the union members secretly voted whether they were in favour of 'the strikes'.
>
> …
>
> 12. [The Returning Officers] announced that the result of the secret ballot was … in favour of striking.

[48] Although counsel accepted that Mr Ornsby's reference to "the strikes" in para 11 seemed to refer to particular strikes, he had not been explicit as to which particular strikes were voted on; moreover this was different from what Mr Wilson had described, which he had said was a ballot about whether members "were in favour of removing their labour or striking more generally".

---

[13] (21 March 2012) 678 NZPD 1195.

[49] Counsel submitted that it would have been a simple matter for the Union witnesses to provide the relevant details of the motion, and that the Court would draw an adverse inference from the fact that this had not happened.

[50] In my view, there needs to be a clear understanding as to the procedural sequence of events in this case. LPC's initial assertion was that it had no knowledge of a secret ballot having been undertaken for the purposes of the 3, 4 and 5 February strike. The Union appeared to be relying on a secret ballot undertaken on 1 December 2016. The inference was that there was no subsequent qualifying secret ballot. Moreover, the original ballot taken on 1 December 2016 had resulted in a strike notice which referred to a sequence of two-day strikes, implying that the motion could not have referred to an intended strike for the period for 3, 4 and 5 February 2017.

[51] It was this allegation which MUNZ faced and countered. It responded by clarifying that, contrary to the belief that there appeared to have been no post 1 December secret ballot, there was one: it took place on 7 January 2017. It provided two affidavits outlining the steps which were taken, including notice given to members, the location of the vote, and its result. That evidence amounted to a refutation of the case which had been advanced by LPC when the proceeding was issued.

[52] Consequently, the company advanced an alternative case, which was that the secret ballot which had allegedly taken place on 7 January 2017 did not comply strictly with the legislative provisions.

[53] While I accept that it would have been helpful if the Union had provided details of the motion as actually put, I accept Mr Goldstein's submission as to the effect of Mr Ornsby's evidence, which summarised the position. Mr Goldstein submitted that the result of the secret ballot was that members confirmed they were in favour of "the strikes"; as a result of the vote Mr Ornsby completed and signed the two strike notices of 10 and 17 January 2017.

[54] Although it was submitted for LPC that there was a third and different strike notice which was signed on 26 January 2017 which Ms Coats submitted was apparently also authorised on 7 January 2017, I accept Mr Goldstein's statement from the bar that this followed a secret ballot which was conducted on 26 January 2017. It is appropriate to accept that statement of counsel, since the submissions made with regard to that particular strike notice arose from Ms Williams' affidavit in reply, which had introduced a new matter about which the Union had not had an opportunity of referring to in evidence. As to the point that Mr Ornsby stated the only purpose of the meeting was to report back, it would be unsurprising if it was subsequently decided that a ballot should also be conducted, given the legal challenges which the Union was facing.

[55] In short, the evidence provided by the Union met the case as initially put by LPC. It must be assessed in that light. The case originally advanced for LPC did not contend that the various technical requirements of s 82A and following had not been met. The issue was simply whether there had been a secret ballot at all authorising the strike notice for industrial action intended for 3, 4 and 5 February 2017.

[56] Mr Goldstein referred to the issue of onus for the purposes of an interlocutory injunction. I have already touched on dicta already referred to on a number of occasions, as articulated by Slade J in *Re Lord Cable (Dec'd)*.[14] The Court relevantly said:[15]

> I add one further observation in relation to the evidentiary position. *American Cyanamid Company v Ethicon Ltd* may have led prospective plaintiffs to the belief, perhaps partially justified, that it is not necessary for them to adduce affidavit evidence in support of a motion for an interlocutory injunction of such a precise and compelling nature as might have been required before that decision. Nevertheless, in my judgement it is still necessary for any plaintiff who is seeking interlocutory relief to adduce sufficiently precise factual evidence to satisfy the court that he has a real prospect of succeeding in his claim for a permanent injunction at the trial. If the facts adduced by him in support of his motion do not by themselves suffice to satisfy the court as to this, he cannot in my judgement expect it to assist him by inventing hypothesises of fact on which he might have a real prospect of success.

---

14 Re Lord Cable (Dec'd), above n 9, at [34].
15 At 431.

[57] This dicta has been referred to with approval in New Zealand on several occasions.[16]

[58] This guidance has particular significance in the present case. LPC did not present any direct evidence either as to when the relevant secret ballot had occurred; or that if it had taken place, that it did not comply with the statute. Its case was advanced on a speculative basis. In the face of the Union's evidence in response that there was a secret ballot on 7 January 2017, LPC altered its allegations to assert that the ballot held on that occasion had not complied with the statute. But that was not the allegation it made originally which the Union had answered. Nor did LPC itself adduce precise factual evidence in support of the propositions it advanced.

[59] Although an employer has some interest in a question as to whether a secret ballot has occurred given the provisions of s 86(1)(aa), I must also take into account the primary purpose of the secret ballot provisions as to strikes. They are for the protection of members. It is significant that there is no direct or reliable evidence that the interests of individual members have not been respected in the course of the secret ballot process undertaken on 7 January 2017.

[60] Accordingly, I am not persuaded that LPC has established a strongly arguable case with regard to its assertion that a qualifying secret ballot has not been conducted. Indeed, having regard to the various factors I have reviewed, I regard LPC's assertion as to the lack of specificity of the ballot which the Union conducted as being weakly arguable.

[61] A further issue was raised by Ms Coats, which related to the question of whether those who voted were those who would become party to the strike.

[62] Although submissions were required to be filed and served in writing prior to the hearing, this submission was not contained in them. It was advanced for the first time at the hearing, orally.

---

[16] For example, *Ansell v New Zealand Insurance Finance Ltd* EmpC Wellington A434/83, 30 December 1983; *Meates v Taylor* HC Christchurch CP495/87, 22 December 1987; *Alarm New Zealand Ltd v 15 Hopetoun Ltd* [2016] NZHC 813 at [32]; *Precast NZ Ltd v Anystep Ltd* [2016] NZHC 377 at [40].

[63] Effectively, it proceeded on the basis that the Court should infer from three notices which proposed strikes of differing types,[17] that the secret ballot undertaken on 7 January 2017 was not a ballot of members who would become party to each such strike, as required by s 82A(2)(a) of the Act. This was because different members would withdraw their labour on each occasion, and there was no evidence that all members who voted would be those who would strike on 3, 4 and 5 February 2017.

[64] For three reasons I am not persuaded that this submission either should be considered, or if it was, that it would take the matter any further.

[65] First, it was premised on the basis that, as an aspect of this submission, the Court should consider the most recent strike notice dated 26 January 2017. I have already outlined Mr Goldstein's response to the factual basis for this submission, and my acceptance of counsel's statement.[18] Accordingly, the factual basis for this submission is not established in a significant respect.

[66] Secondly, no advance notice of any type was given as to this submission, either in the statement of claim or application; or, apparently, by notice to counsel prior to the hearing. The issue is one which would necessitate further evidence, as well as appropriate legal submissions on behalf of the Union, which Mr Goldstein understandably did not attempt to advance. It would be unfair to rely on this point in those circumstances, even if it was made out.

[67] Thirdly, there is dicta to the effect that it is not necessary to actually take part in a discontinuance of employment to be party to a strike,[19] and that a person may be party to a strike if he or she means to support it.[20]

[68] Accordingly, I do not accept this submission.

---

17 Those dated 7, 10 and 26 January 2017.
18 At [54].
19 *Tawhiwhirangi v Attorney-General* EmpC Wellington WEC8/98, 3 March 1998.
20 *Heke v Attorney-General in respect of the Department of Corrections* [1998] 1 ERNZ 583 (EmpC).

[69] My conclusion with regard to arguable case, then, is as found earlier: LPC's case is only weakly arguable.

Balance of convenience/overall justice

[70] Detailed evidence was given by Mr Parker as to what would occur if interim relief was not granted. This included, as already mentioned, a potential for significant loss of revenue, and damage to reputation; but also potential impacts on the general public. Mr Parker also explained that LPC continues to experience an increase in cargo volumes as a result of the recent Kaikoura earthquakes. He said that Lyttelton is the nearest major port to the south of Kaikoura. The proposed strike would create delays in the port itself, and may result in outlying ports having to be used, which has the potential to increase that delay.

[71] A point which is significant with regard to the balance of convenience relates to whether LPC has been consistent in assertions of this kind. As is evident from the various previous judgments of this Court, relating to picketing,[21] there have been multiple two-day strikes in the course of January where the company did not oppose the fact of a proposed strike. Furthermore, following the secret ballot of 7 January 2017, two strike notices were issued. The first, as already explained, related to 28 and 29 January 2017; this strike was not contested on the basis that there had not been a qualifying secret ballot. It is only that which relates to 3, 4 and 5 February 2017 which is contested. Ms Coats submitted that this was because it related to the possibility of a three-day strike which was considered more serious and onerous than the previous two-day strikes. Whilst that may be so, I must also take into account that there have been four two-day strikes which have been permitted to proceed throughout January 2017 without objection on legal grounds.

[72] Against the factors raised for the company, I must consider the right of MUNZ to strike legally. Such a right has long been recognised as a fundamental protection for workers both in New Zealand employment law provisions and in

---

[21] *Lyttelton Port Company Ltd v The Rail and Maritime Transport Union In*c [2016] NZEmpC 179; *Lyttelton Port Company Ltd v The Rail and Maritime Transport Union Inc (No 2)* [2017] NZEmpC 1; *Lyttelton Port Company Ltd v The Rail and Maritime Transport Union Inc (No 3)* [2017] NZEmpC 2; *Lyttelton Port Company Ltd v The Rail and Maritime Transport Union Inc (No 4*) [2017] NZEmpC 3.

international instruments. It is also a significant aspect of the right of freedom of association.

[73] I also take into account the fact that if it transpires at trial, subsequently, that the ballot procedures were not correctly conducted, contrary to the evidence placed before the Court at this interlocutory stage, the company would have the right to seek relief by way of damages; there may be difficult problems of assessment, but they are not insurmountable.

[74] After assessing all factors, I am satisfied the balance of convenience favours MUNZ.

[75] Finally, because the LPC case is weak and is not strongly arguable, overall justice leads to the conclusion that the application for interim relief should not be granted. It is accordingly dismissed.

[76] I reserve costs. This issue should be discussed directly between counsel in the first instance. If unresolved, any application for costs may be made by memorandum and any supporting evidence filed and served by 14 February 2017. Any responses should be filed and served by 28 February 2017.

B A Corkill
Judge

Judgment signed at 10.15 am on 31 January 2017