IN THE EMPLOYMENT COURT
AUCKLAND

AC 49/06
ARC 58/06

IN THE MATTER OF	an application for interim injunction
BETWEEN	NATIONAL DISTRIBUTION UNION First Plaintiff
AND	NZ AMALGAMATED ENGINEERING PRINTING AND MANUFACTURING UNION Second Plaintiff
AND	GENERAL DISTRIBUTORS LIMITED First Defendant
AND	THE SUPPLY CHAIN LIMITED Second Defendant

Hearing: 31 August 2006

Appearances: Peter Cranney and David Fleming, Counsel for Plaintiffs
Stephen Langton and Michael O'Brien, Counsel for Defendants

Judgment: 4 September 2006

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] The plaintiffs (the NDU, the NZAEPMU or the unions) want the Court to restrain by interlocutory injunction the defendants (GDL, TSCL or the companies) from contravening s97 of the Employment Relations Act 2000. Section 97 addresses what an employer may and may not do, when there is a strike or lockout, to have performed the work of striking or locked out employees.

[2] There is a collective employment agreement bargaining dispute between these parties that has both generated a good deal of publicity (some of it rhetorical) by each side, and attracted publicity. This case deals with the lawfulness of the employers' attempts to have performed the work of employees who were formerly

on strike but are now locked out. This proceeding and the judgment does not address the merits of the parties' cases in bargaining including about whether there should be collective employment agreements and their coverage, the levels of remuneration increases claimed and the like.

[3] The unions have sought interlocutory injunctions to restrain the companies from what the unions say is unlawful conduct until the merits of those claims can be determined at trial and following the usual litigation procedures of considered pleadings, disclosure of relevant documents, evidence-in-chief and cross-examination and considered submissions on the law.

[4] I was satisfied after hearing from counsel for the parties at an urgently convened telephone conference call last Wednesday afternoon that the application for interim relief warranted a urgent hearing. This judgment deals only with what is to happen until the Court can, at a priority substantive hearing, determine the case on its merits.

[5] At the end of the hearing last Thursday, 31 August, I indicated that I proposed giving my decision early on the following morning but, in the meantime and irrespective of the outcome, I would direct the parties to further mediation as the statute requires unless there were persuasive grounds against this course. Counsel for the plaintiffs, Mr Cranney, then proposed that the direction to mediation be one to co-mediation with a Judge and a statutory mediator. The defendants did not demur from this suggestion, nor did any party from mine that I should reserve judgment sine die but with leave for either party to request a judgment if mediation was unsuccessful.

[6] I record my appreciation of the readiness by the mediator who had previously assisted the parties, to resume mediation on the following morning, Friday 1 September, with another Judge at the Court's premises. I only know that further mediation took place but has not resolved the dispute. In these circumstances the plaintiffs have asked for this judgment. It does not address the heart of the dispute between the parties, whether there should be a multi-employer/multi-union collective agreement or several single-employer/multi-union agreements, and the terms of these. Nor does this judgment deal with what Mr Cranney for the plaintiff has told me (but has not been made the subject of its application) is a challenge to the

defendants' cross-initiation of bargaining. Issues of lawfulness of strike, suspension and lockout are likewise not dealt with by this case, at least at this stage.

[7] Earlier today the plaintiffs filed an amended statement of claim in this Court and indicated that they would shortly file proceedings in the Employment Relations Authority and seek to have these removed, urgently, to the Court. For the purpose of this decision, however, I propose to have regard only to the original statement of claim filed. The defendants have had no opportunity to address the amended pleadings and I regard those as applicable only to the substantive trial whenever that occurs.

[8] For these reasons three tests are applied by the Court in deciding whether to restrain the companies. First, the unions must show that they have an arguable case of current and prospective unlawful conduct by the employers in breach of the statute. Second, if so, the Court must determine where the balance of convenience will lie between the parties until the issues can come to trial and be decided substantively. In practice that means whether it will be more just for the companies to be restrained from what they intend to do in the event that this is subsequently found to be lawful conduct or, on the other hand, whether it will be more just for the employers to be allowed to continue with their intended course of action in the event that the Court finds this to have been unlawful. One element of this balance of convenience exercise is to determine whether damages will be an adequate remedy for the unions if no interim injunction is issued. Finally, the remedy of injunction being discretionary, the Court must stand back from the detail of the first two tests and determine whether the overall justice of the parties' relevant circumstances warrants intervention by injunction.

[9] Although no issue was taken by the defendants, I am satisfied that the Court is empowered to enforce compliance with the statute by injunction including interlocutory injunction. Although the statutory sanction for breach of 97 is a penalty able to be imposed by the Employment Relations Authority after the event, where a breach is established and the Court is satisfied of the likelihood of a repetition or continuation of that breach, the law permits prospective illegality to be restrained. Although I do not suggest so in this case at this stage, this would ensure that, under s97, an employer cannot cynically calculate that the cost to it of a penalty subsequently imposed will be a lesser sanction than the cost of compliance with the

law. Regulation 6 of the Employment Court Regulations 2000 permits the Employment Court to have recourse to r238 (Injunctions) of the High Court Rules as recently confirmed in the judgment of this Court in *Axiom Rolle PRP Valuations Services Ltd v Kapadia & Anor* unreported, 4 August 2006, AC 43/06.

[10] GDL and TSCL are wholly owned subsidiaries of Progressive Enterprises Ltd (Progressive). GDL operates several supermarket chains known as Countdown, Foodtown, Woolworths, Super Value and Fresh Choice. GDL employs large numbers of employees both in these supermarkets and at Progressive's South Island distribution centres in Christchurch. TSCL operates and employs staff at Progressive's North Island distribution centres at Mangere in Auckland and Palmerston North. Employees at the company's distribution centres are members of NDU and NZAEPMU.

[11] Although no doubt in part for reasons of haste, the plaintiffs' evidence in support of its claim for injunction deals only with its Auckland distribution centre and even then only identifies one other commercial entity that they claim has been engaged by the companies (in effect by TSCL which employs union members in Auckland). I have no evidence from the plaintiffs about the situation elsewhere in New Zealand or, significantly in my view, about how suppliers of products usually handled by the distribution centres may have made alternative and arguably lawful arrangements for the continued delivery of these products to supermarkets other than by "engagement" by the two nominated employers, GDL and TSCL.

[12] Some, but not all, of the products sold at the supermarkets are delivered in bulk to the companies' distribution centres. As and when required, distribution centre employees (including members of the unions) "pick" quantities of items for repacking and despatch to the supermarkets. They do so at the request of the supermarkets owned and operated by GDL. The distribution centres are a vital part of the companies' supply chain and serve the function of compiling and despatching to the supermarkets quantities of various stock items required by them on a regular, even in some cases twice-daily, basis. The work of the striking or locked out employees includes these "picking" and loading-out functions. Products are delivered to and removed from the distribution centres by independent transport companies.

[13] TSCL's Mangere distribution centre receives bulk goods for its supermarkets from various suppliers. Between 80 and 90 "pickers" on each shift fill orders for individual supermarkets from these supplies. GDL's supermarkets receive their goods from the three service centres and, with the exception of fresh products such as fruit, vegetables, meat, bakery, dairy, chilled and frozen products, and about 20 percent of the "dry goods", suppliers do not deliver directly to the supermarkets.

[14] The unions and the employers have been in bargaining for a collective agreement (in the case of the unions) or for separate collective agreements (in the case of the companies) since early July. Following a breakdown of those negotiations, on 25 August union members began strike action that consisted initially of a complete cessation of work for 48 hours followed by an overtime ban and a go slow. These latter tactics are statutorily defined as strike action. On 25 August the striking employees were suspended by the companies and then, three days later on 28 August, were locked out.

[15] In an advertisement or public notice published in daily newspapers on 29 August the companies announced that they had suspended operations at their grocery distribution centres but had implemented other methods of supplying their supermarkets. These public statements were reiterated and published on the following day, 30 August.

[16] The plaintiffs say that the companies have engaged another entity, Linfox Logistics (NZ) Ltd, to prepare goods for delivery to GDL's Auckland supermarkets and that Linfox has arranged for its own employees to do this work accordingly. The unions say that this has been, and will continue to be at the request of the companies. The unions say this is in breach of s97 that provides materially:

> ***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 a 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.*

[17] Subsection (5) provides that a person performing the work of a striking or locked out employee must not do so for any longer than the duration of the strike or the lockout and subs (6) provides that an employer who fails to comply with the section is liable for a penalty under the Act.

[18] The section had no precedent before the Act came into force in 2000 and there have been few, if any, cases interpreting and applying it since then.

[19] Mr Cranney for the plaintiffs argued that the phrase "an employer" used a number of times in s97 should be read as "any employer" and not as "the employer of striking or locked out employees". That is very unlikely to be correct. That is for a number of reasons, not the least of which is that if this very broad interpretation were correct, it would nevertheless exclude from the process of engagement any legal person that was not an employer. If Parliament had intended to mean "any person", it would have done so and not artificially constrained the status of any persons engaging others to perform the work of striking or locked out employees by requiring that they be employers. It seems almost inarguable that the constraints imposed by s97 are upon the employers of striking or locked out employees so that it is those employers who are not to employ or engage others to perform the work of their striking or locked out employees. It cannot be argued, at least with any degree of confidence, that Parliament intended a broader definition of the nature of persons so constrained.

[20] The evidence of a breach given for the plaintiffs is that on 29 August the Secretary for the Transport, Energy and Stores sector of the NDU visited Linfox's premises in Mangere and there spoke to managers of that company. The Secretary, Karl Andersen, put to those managers that Linfox and its employees were undertaking the work of locked out distribution centre workers in breach of s97. Mr Andersen's evidence is that these managers denied that this was so and, although

reluctantly, allowed Mr Andersen to speak with NDU delegates at Linfox. Mr Andersen says that he was shown various pallets of "picked" and seal-wrapped goods which had written on them the names of various GDL supermarkets. There is hearsay evidence (admissible on an application such as this although the weight to be given to it must be assessed carefully) that a drivers' delegate, John Keogh, had said that Linfox drivers were carting "picked pallets" to various shops, work they would not normally perform for Linfox. Mr Andersen says that when he again spoke to Linfox managers and put to them that they were involved in a breach of s97, Linfox's manager Stewart Halligan again said that the NDU would be jeopardising the employment of another 150 workers, I infer Linfox's workforce, if it persisted in this challenge. The Linfox managers spoke about damage to the relationship between Linfox and the NDU.

[21] There is evidence that on 29 August a Linfox manager, Nick Snelling, asked workers to stay late and others to come in early to do extra work than that normally performed by them. One of Linfox's store workers, Keresepi Talisau has deposed to Linfox directing its employees to "pick" products for individual supermarkets which Linfox's employees have never done before. Mr Talisau has deposed to these goods picked for supermarkets having been stacked on pallets which had the stores' names on them. Mr Talisau alerted the NDU to these events and although overheard Linfox managers telling the NDU Secretary Mr Andersen that Linfox employees were asked to do what they do every day, says this was not true. Mr Talisau says that he and his colleagues at Linfox supply TSCL's service centre where picking is done but Linfox has never previously picked for individual supermarkets. Further, Mr Talisau says that the goods from Linfox go to TSCL's service centre and not, at least until now, straight to individual supermarkets. Mr Talisau says that although Linfox employees undertake what is known as "layer picking" (taking layers of goods off pallets), these are sent to TSCL's service centre at Mangere but not to individual supermarkets.

[22] The scheme of s97 is to prevent employers employing or engaging others to perform the work of their striking or locked out employees except in particular defined circumstances. These are, first, to allow the employment of other persons to perform such work if those other persons are already employed by the employer at the commencement of the strike or lockout and are not employed principally for the purposes of performing the work of the striking or locked out employees and agree

to perform the work. That category of exempted alternative employees does not apply in this case.

[23] The second alternative is broader in one sense but narrower in another. It not only includes persons who may be employed but also those who may be "engaged". This very arguably extends the nature of the relationship of the employer of striking or locked out employees beyond employing others and includes the engagement of contractors. However, such engagement can only be for the performance of the work of striking or locked out employees if there are reasonable grounds for believing that it is necessary for the work to be performed for reasons of safety or health and that such persons are engaged to perform that work only to the extent necessary for reasons of safety or health. The unions say in this case that although Linfox and/or others have been engaged to perform the work otherwise performed by the striking and/or locked employees, this is not work that is either necessary to be performed for reasons of safety or health or could form a reasonable ground for so believing. So, if Linfox has been engaged by the defendants to perform work that would otherwise be performed by the unions' members, that would not meet the exemption provided for in s97(4) and the engagement would be unlawful.

Arguable case

[24] Is there an arguable case that GDL and/or TSCL have engaged Linfox to undertake the work of the striking and/or locked out employees? I consider the evidence of the unions alone, without taking account of the companies' including the denials of relevant allegations on affidavit of their witnesses.

[25] First, there are the newspaper publications. In its public notice of 29 August published in newspapers, the defendants' holding company (Progressive) announced that it had implemented other methods of supply to its supermarkets than through its own distribution centres. In an article in the Dominion Post newspaper on 30 August a company representative is reported to have said that it had set up an alternative distribution network with suppliers delivering goods directly to the supermarkets.

[26] Next, there is the evidence of Linfox requiring its own employees to "pick" products for individual Progressive supermarkets where such goods had previously been supplied to the second defendant's service centre.

[27] Next, the evidence is that when it was put to Linfox managers that they were breaching s97 by undertaking the work usually done by the defendants' employees, their responses addressed the effect of the unions' involvement with Linfox staff, alleged threats to the employment of their staff and to the relationships between NDU and Linfox but did not amount to a denial of the undertaking of work that would amount to a breach of the statute.

[28] I am not satisfied, even on their evidence alone, that the plaintiffs have an arguable case of "engagement" by GDL or TSCL that, if proven at trial, will require the defendants to desist from engaging in unlawful conduct.

[29] Taking a purposive approach to s97, it should be interpreted to prevent employers from avoiding the economic consequences of strike or lockout action in all but certain specified respects. As the Court of Appeal noted in *Carter Holt Harvey Ltd v National Distribution Union Inc* [2002] 1 ERNZ 239, 249:

> *[30] … Section 97 imposes restrictions on the persons employers may employ or engage to do the work of striking or locked out workers. Although the section is couched in terms of what the employer "may" do, it was accepted that without the section the employer would be free to employ persons to do the work unconstrained. The section, in imposing the restriction, is doing so to constrain the bargaining power of the employer for the benefit of the striking or locked out employees. That patently confers rights on the employees.*

[30] Employees on strike or locked out suffer the economic consequences of that status by not receiving income. For low paid employees as are those involved in this case, the effect of striking or being locked out is immediate and significant. The industrial weapons of strike and lockout necessarily involve the infliction of economic hardship upon employers and employees designed to influence or persuade them to unwilling acceptance of the other side's demands. In the past, employers subject to strike or lockout action have adopted ingenious strategies to allow their enterprises to keep operating without the involvement of employees on strike or locked out. These tactics have, in turn, broadened some disputes in the sense of compelling employees and unions to curb or eliminate that avoidance behaviour by such tactics as picketing, secondary boycotts, black bans, and similar tactics aimed at the activities of others who assist the employer subject to the strike or lockout action. Such responses have often tended to inflame and harden disputes rather than to encourage their settlement under economic duress. So Parliament has legislated, it

may be said, for reciprocity of pain sharing to encourage resolutions of employment bargaining disputes on their merits.

[31] But a purposive interpretation of a statute is just that, a guideline to interpreting the words and phrases that Parliament has used and which must themselves be given effect to. In the case of s97, Parliament has required that the prohibition is upon the employment or engagement of others. In this case, it is engagement which is in issue. For the necessary evidential foundation before an injunction can be granted, the unions must establish an arguable case that the employers (GDL and TSCL) have engaged another or others to perform the work usually done by the striking or locked out employees. Even if it might be said that there is an inference that TSCL has engaged Linfox to perform this work, it is equally open to the Court to draw the inference that suppliers of products (not the employers) have engaged Linfox to do this work. Indeed the evidence for the defendant companies is that this is what has occurred, that is the engagement of Linfox has not been by TSCL. In practical terms, although the supermarkets no doubt determine what they require to be supplied, it is open to them to so advise their suppliers and for suppliers to arrange deliveries to supermarkets, even via other logistics companies. So, on the evidence, it is equally open to the Court to infer that it is the suppliers who have engaged others to do the work of the striking or locked out employees or have even found ways of avoiding distribution centre work altogether.

[32] It is not at present arguable for the plaintiffs (at least any more than faintly and by inference that is contradicted by the affidavit evidence for the companies) that the defendants have engaged others and, in particular Linfox Logistics (NZ) Ltd, to perform the work of their striking or locked out employees. The engagement, by the employer, of others is an essential ingredient of the prohibition.

[33] It is difficult for plaintiffs in the circumstances of these parties to obtain evidence of engagement of others in breach of s97. The plaintiffs have not done so to an arguable case standard but document disclosure before trial of the case will assist the Court to determine with an appropriately greater degree of certainty whether the defendants have engaged others to perform the work of striking or locked out employees in breach of s97.

Balance of convenience and overall justice

[34] The unions having failed to satisfy the first test, it is unnecessary and would be inappropriate to consider the second and third tests.

[35] Costs are reserved on this application.

[36] The substantive trial of the issues in this case must be heard promptly. Time is available in the Court next week. I will meet at the earliest available opportunity with counsel to make directions for trial.

GL Colgan
Chief Judge

Judgment signed at 3 pm on Monday 4 September 2006

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