IN THE EMPLOYMENT COURT
AUCKLAND

[2018] NZEmpC 67
EMPC 160/2018

IN THE MATTER OF	of an application for an injunction and an interim injunction
AND IN THE MATTER	of an application for urgency
BETWEEN	WENDCO (NZ) LIMITED Plaintiff
AND	UNITE INC. Defendant

Hearing: 8 June 2018
(heard at Auckland)

Appearances: T Oldfield, counsel for the plaintiff
P Cranney and S Meikle, counsel for the defendant

Judgment: 12 June 2018

REASONS FOR ORAL JUDGMENT OF JUDGE B A CORKILL: APPLICATION FOR AN INTERIM INJUNCTION

Introduction

[1] Late last week Wendco (NZ) Ltd (Wendco) filed an application for urgency and for an interim injunction against Unite Inc. (Unite), a Union whose members are employed by Wendco in its 23 restaurants.

[2] An urgent hearing was timetabled for hearing on Friday, 8 June 2018, on the basis that Unite was able to file a notice of opposition and affidavits prior to the hearing; urgency was then granted.

[3] The issue before the Court is whether Unite should be restrained from picketing, or threatened picketing, on Wendco's property including but not limited to

the drive-throughs of its restaurants.[1] The context for the alleged picketing is strike action in response to collective bargaining between the parties which commenced in April 2017 but which has not yet concluded.

[4] At the conclusion of the hearing, I granted Wendco's application, indicating that these my reasons for judgment would issue as soon as possible thereafter.[2]

Overview of the parties' cases

[5] Wendco alleges that on 25 May 2018, its lawyers wrote to Unite, in response to a strike notice which had been issued that day, stating:

> Finally, we remind you that during any strike you may not picket unlawfully. This means that you may not picket on private property. You are not permitted to picket on any of Wendy's property, including stores, car parks, driveways or drive thrus. You are also not permitted to block drive thrus.
>
> It is unlawful to intimidate any employee or customer of Wendy's.
>
> If any trespass, unlawful picketing or intimidation occurs the police will be called and Wendy's reserves its rights to take legal action in respect of any unlawful picketing.

[6] The Chief Executive Officer of Wendco, Ms Danielle Lendich, says she also sent a memorandum to employees the same day advising them of these "rules"; and that the memorandum went on a crew noticeboard when strikes subsequently occurred.

[7] These steps were prompted by the fact that Unite members had stood in drive-throughs during pickets when they went on strike in 2015.

[8] The evidence focused on two pickets which occurred on 1 June 2018; one at the Dominion Road restaurant in Auckland, and the other at the Te Atatu Road restaurant in Auckland where Wendco's head office is based.

[9] In summary, Ms Lendich's evidence asserted that in the context of picketing, people had stood in the drive-through at Wendco's Dominion Road restaurant holding placards, one of which was a Unite placard; subsequently, Unite had placed

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1 Described by the parties as "drive thrus".
2 *Wendco (NZ) Ltd v Unite Inc.* [2018] NZEmpC 65.

photographs on its Facebook page showing picketers standing across the drive-through on Wendco property.

[10] Unite had also placed an article on its website entitled "Wendys Workers strike in West Auckland", which was accompanied by a photograph showing picketers holding Unite placards outside Wendco's Te Atatu Road restaurant. The article stated that "Pickets went up on the drive through and the entrance to the car park."

[11] Ms Lendich stated that strikes had taken place at two other South Island Wendco restaurants at Hornby, Christchurch and Andersons Bay, Dunedin, where picketers had stood on public land outside each Wendco restaurant, to which there was no objection.

[12] Wendco alleges that significant health and safety issues could arise if picketers were to stand in drive-throughs and carparks on its private property, as used by customers as well as co-lessees of the affected carparks. They say there were not only obvious health and safety concerns, but also a risk of intimidation of customers and interference with the use of Wendco restaurants by customers, as well as workers who are not members of Unite. The evidence is that Wendco employs about 530 employees, of whom approximately 120 are members of Unite.

[13] It is asserted that such picketing breaches the torts of trespass, the tort of breach of statutory duty with regard to health and safety obligations, and the tort of causing loss by unlawful means.

[14] For its part, Unite opposes the application on multiple grounds.

[15] It is argued that the effect of s 99(3) of the Employment Relations Act 2000 (the Act) is that where tortious claims are made in a proceeding where there is a lawful strike or lockout, the sub-section precludes a claim being brought with regard to picketing, since such conduct would relate to a strike.

[16] It also says the statutory prerequisites for establishing jurisdiction are not satisfied. This is because no strike or picketing was taking place when the proceeding

was issued; nor was there a threatened strike or threatened picketing. These prerequisites would need to exist were s 100 of the Act to apply.

[17] Next, it was asserted that there was no reliable evidence of unlawful activity during past strikes, nor as to any health and safety issues, nor as to any claimable loss.

[18] In short, Unite says it was fully entitled on behalf of its members to strike and to picket, and thereby to bring pressure on Wendco in a situation where it has legitimate and valid complaints about Wendco's labour practices.

[19] Unite submitted that Wendco had no arguable case including as to jurisdiction, that the balance of convenience favoured Unite, and that overall justice also strongly favoured Unite.

[20] I will refer to the evidence of the parties, and counsel's submissions, in more detail where relevant.

Relevant principles

[21] When resolving the application for interim relief, it was first necessary to consider the issue of jurisdiction: in short, could the Court consider Wendco's application having regard to the provisions of ss 99 and 100 of the Act?

[22] It was then necessary for the Court to determine whether there was an arguable case as to the merits of Wendco's claim. This was followed by an assessment as to where the balance of convenience lay. Finally, it was necessary for the Court to stand back and examine whether the overall justice of the case required the granting of the relief sought, taking into account whether there were alternative remedies: *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd*.[3]

[23] It is well established that for interim injunction purposes, the Court normally prefers the plaintiff's affidavit evidence and assumes that is the position which is likely

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[3] *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (HC & CA).

to be established at trial. Thus, in *Golden Bay Cement v New Zealand Merchant Service Guild*, Judge Travis stated in respect of an application for interim injunction:[4]

> ... the plaintiff is entitled to the benefit of a presumption that evidence which has not been demonstrated to be fundamentally flawed at the interim hearing will be able to be established as the basis of the plaintiff's claim at the substantive hearing.

Jurisdiction

[24] The issue as to jurisdiction centres on ss 99 and 100 of the Act, which provide as follows:

> **99 Jurisdiction of court in relation to torts**
>
> (1) The court has full and exclusive jurisdiction to hear and determine proceedings founded on tort—
>
> (a) issued against a party to a strike or lockout that is threatened, is occurring, or has occurred, and that have resulted from or are related to that strike or lockout:
>
> (b) issued against any person in respect of picketing related to a strike or lockout.
>
> (2) No other court has jurisdiction to hear and determine any action or proceedings founded on tort—
>
> (a) resulting from or related to a strike or lockout:
>
> (b) in respect of any picketing related to a strike or lockout.
>
> (3) Where any action or proceedings founded on tort are commenced in the court, and the court is satisfied that the proceedings resulted from or related to participation in a strike or lockout that is lawful under section 83 or section 84,—
>
> (a) the court must dismiss those proceedings; and
>
> (b) no proceedings founded on tort and resulting from or related to that strike or lockout may be commenced in the District Court or the High Court.
>
> **100 Jurisdiction of court in relation to injunctions**
>
> (1) The court has full and exclusive jurisdiction to hear and determine any proceedings issued for the grant of an injunction—
>
> (a) to stop a strike or lockout that is occurring or to prevent a threatened strike or lockout; or

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4 *Golden Bay Cement v New Zealand Merchant Service Guild* [2002] 1 ERNZ 456 (EmpC) at [17].

(b) to stop any picketing related to a strike or lockout or to prevent any threatened picketing related to a strike or lockout; or

(c) to stop a specified pay deduction that is being, or is to be, made.

(2) No other court has jurisdiction to hear and determine any action or proceedings seeking the grant of an injunction—

(a) to stop a strike or lockout that is occurring or to prevent a threatened strike or lockout; or

(b) to stop any picketing related to a strike or lockout or to prevent any threatened picketing related to a strike or lockout; or

(c) to stop a specified pay deduction that is being, or is to be, made.

(3) Where any action or proceedings seeking the grant of an injunction to stop a strike or lockout or to prevent a threatened strike or lockout are commenced in the court, and the court is satisfied that participation in the strike or lockout is lawful under section 83 or section 84,—

(a) the court must dismiss that action or those proceedings; and

(b) no proceedings seeking the grant of an injunction to stop that strike or lockout or to prevent that threatened strike or lockout may be commenced in the District Court or the High Court.

...

[25] Mr Cranney, counsel for Unite, strongly argued that where there is a lawful strike, the Court has no jurisdiction in respect of tortious actions, because the statute-bar in s 99(3) of the Act applies. He asserted that actions of the type brought by Wendco were founded on tort, and that the Court should find that they "resulted from or related to participation in a strike ... that is lawful under section 83 ...",[5] which meant that the Court must dismiss the proceeding.

[26] Relying on an argument advanced in an application for leave to appeal to the Court of Appeal in *New Zealand Fire Service Commission v McCulloch*, Mr Cranney said that s 99(3), on which Unite relies, provides immunity from suit where there is a legal strike or lockout.[6]

[27] He said this conclusion was reinforced by s 85 of the Act which provides that lawful participation in a strike or lockout cannot give rise to proceedings under s 99 that are founded on tort, or to proceedings under s 100 for the granting of an injunction.

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5 Employment Relations Act 2000, s 99(3).

6 *New Zealand Fire Service Commission v McCulloch* [2011] NZCA 177, (2011) 8 NZELR 488 at [4].

[28] Mr Oldfield, counsel for Wendco, submitted that s 99(3) did not preclude an employer from obtaining relief in respect of picketing, including where there is a lawful strike or lockout. He said the sub-section was only designed to address immunity from suit in respect of strikes or lockouts.

[29] This is an issue which required resolution by a consideration of the text of the relevant provisions, and their purpose. I start with the text.

[30] Sections 99 and 100 are parallel provisions, in that subs (1) of each provides for the Court's "full and exclusive jurisdiction" to hear and determine proceedings founded on tortious causes of action. In each case, the Court's powers are first in respect of strikes and lockouts in subs (1)(a), and second in respect of pickets in subs (1)(b).

[31] Similarly, subs (2) of each section differentiates between strikes and lockouts on the one hand, and picketing, or threatened picketing, on the other hand.

[32] Section 99(3) refers to the dismissal of tortious claims, where the Court is satisfied "... that the proceedings resulted from or related to participation in a strike ... that is lawful ...". The words "resulted from" and "related to" are exactly as appear in s 99(1)(a) and s 99(2)(a) where the distinction to which I have referred arises.

[33] The word "strike" has a statutory meaning, as set out in s 81(1)(a) which states:

> **81 Meaning of strike**
>
> (1) In this Act, **strike** means an act that—
>
> (a) is the act of a number of employees who are or have been in the employment of the same employer or of different employers—
>
> (i) in discontinuing that employment, whether wholly or partially, or in reducing the normal performance of it; or
>
> (ii) in refusing or failing after any such discontinuance to resume or return to their employment; or
>
> (iii) in breaking their employment agreements; or
>
> (iv) in refusing or failing to accept engagement for work in which they are usually employed; or
>
> (v) in reducing their normal output or their normal rate of work; and

> (b) is due to a combination, agreement, common understanding, or concerted action, whether express or, as the case requires, implied, made or entered into by the employees.
>
> ...

[34] The word "lockout" also has a statutory definition.[7]

[35] The word "picketing" is not defined in the Act, although it is conduct which the Act recognises in ss 99 and 100.

[36] It has often been said that "picketing" is not a term of art, and that it covers a broad spectrum of behaviour. As one commentator puts it:[8]

> To "picket" premises most commonly means to place, or station a guard or patrol, at or near premises or a place of work, in order to persuade or coerce employees, or others to do or not do some act.

[37] Picketing may occur where there is an employment dispute, but it can also describe conduct arising in a context where no strike or lockout takes place.[9]

[38] Although picketing often takes place in the context of a strike, legal or illegal, the two concepts are different. To strike, legally or illegally, involves the discontinuance of employment in the various respects described in s 81. To picket, legally or illegally, involves conduct where attempts are made by picketers to obtain support for their views, and to bring economic pressure to bear on the target of pickets, thereby exercising rights of free speech and to assemble and protest peacefully.[10]

[39] For present purposes, I find that the language used in ss 99 and 100 suggests that Parliament recognised this difference; it intentionally distinguished between strikes and lockouts on the one hand, and picketing or threatened picketing on the other.

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7 Employment Relations Act 2000, s 82(1).

8 *Mazengarb's Employment Law* (online looseleaf ed, LexisNexis) at [1600]; John Hughes "What picketing means".

9 As in *International Stevedoring Operations Ltd v New Zealand Waterfront Workers Union* [2001] ERNZ 321.

10 As explained in *Port of Napier Ltd v Rail and Maritime Transport Union Inc* [2007] ERNZ 826 at [54].

[40] The bar on proceedings in s 99(3) was restricted to one only of these categories; that is, proceedings which have "resulted from or related to participation in a strike ... that is lawful." It did not refer to picketing at all.

[41] I do not consider that reference to the Court of Appeal's decision in *McCulloch* assists, since the Court did not comment as to the scope of any statutory immunity. Moreover, the Court was only concerned with a question as to whether there was a strike on health and safety grounds; it was not required to consider picketing at all.

[42] Section 85 takes the matter no further, since it too is restricted to lawful participation in a strike or lockout; it does not refer to picketing.

[43] It appears that support for this conclusion arises from the legislative history. The forebear of s 99 was s 73 of the Employment Contracts Act 1991, which stated:

> **73 Jurisdiction of court in relation to torts—**
>
> (1) Where a strike or lockout is threatened or is occurring or has occurred and as a result proceedings are issued against any party to the strike or lockout and such proceedings are founded on any of the following torts, namely:
>
> (a) conspiracy; or
>
> (b) intimidation; or
>
> (c) inducement of breach of contract; or
>
> (d) interference by unlawful means with trade business or employment—
>
> The Court shall have full and exclusive jurisdiction to hear and determine such proceedings.
>
> (2) No court (other than the Court) shall have jurisdiction to hear and determine any action or proceedings founded on a tort specified in subs 1 of this section resulting from a strike or lockout.
>
> (3) Where any action or proceedings founded on a tort specified in subs 1 of this section is commenced in the Court, and the Court is satisfied that the action or proceedings resulted from participation in a strike or lockout that is lawful under s 64 of this Act, the Court shall dismiss that action or those proceedings, and no proceeding founded on such a tort and resulting from that strike or lockout shall be commenced in the High Court.

[44] Thus, the claims based on the economic torts in respect of which the Court had jurisdiction were to be dismissed if the Court was satisfied that the relevant action "resulted from participation" in a strike that was lawful. The scope of potential torts

now able to be pursued is not restricted to the four identified in the former section, but almost identical causation language as used in s 73(3) now appears in s 99(3) of the Act. This suggests that immunity was to continue for economic torts associated with a legal strike. That is the sole concern of the sub-section.

[45] The Court was not referred to any indication in the Act or in extrinsic materials which would suggest that Parliament intended s 99(3) to broaden the scope of the bar to include not only tort proceedings resulting from or related to participation in a lawful strike, but also to proceedings "in respect of picketing related to a strike or lockout" – the language used in s 99(1)(b) and s 99(2)(b).[11] I note that the Employment and Accident Insurance Legislation Select Committee received submissions as to the transfer of the picketing jurisdiction to this Court. This step appears to have been taken with due deliberation, yet there is no indication there or elsewhere that s 99(3) would be limited as is now contended for by Unite.

[46] Turning to purpose, as already indicated, Mr Cranney submitted that the protection from tort proceedings in respect of picketing where there was a legal strike, was an aspect of the statutory immunity which was enacted for legal strikes and lockouts.

[47] He said that any issues that arose with picketing where there was a legal strike would be dealt with under statutes dealing with offences. In short, he said illegal picketing was now a matter for the criminal law, contrary to the previous position at common law where civil remedies were also available.

[48] There is no doubt that there are a range of statutory provisions that can be utilised where illegal conduct occurs.[12]

[49] The question, however, is whether Parliament intended when enacting s 99 to preclude consideration of any tortious claim in *any* court where illegal picketing has occurred in conjunction with a legal strike.

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11 The only variation being in s 99(2)(b) where the reference is to "any picketing", which is not material for present purposes.

12 For instance, Summary Offences Act 1981, ss 3 and 21; Trespass Act 1980, s 4; and for more egregious conduct provisions of the Crimes Act 1961 such as ss 42, 86, 87 and 270.

[50] For present purposes, I consider it is inherently unlikely that Parliament intended to create a statute-bar for all such tortious actions without saying so. This is for the following reasons:

a) The ability to apply for injunctive relief, including a *quia timet* order, is longstanding. It would have required a compelling reason to proceed as is now advocated by Unite.

b) No satisfactory reason for introducing an outright bar on civil proceedings in any court has been given.

c) This Court already possessed a full and exclusive jurisdiction to exercise injunctive relief for illegal strikes and lockouts; it is apparent that it was also thought appropriate for the Court to be able to exercise a similar jurisdiction with regard to picketing without limitation.

d) If the sub-section was to be read as contended for, then, were illegal picketing to occur by way of trespass, an employer would need to call the police, wait for them to arrive, have them warn picketers to leave, and then arrest them if they did not. The focus could only be on past conduct by way of a prosecution. No preventable step by way of applying for an injunction could be taken. Nor could any claim for damages based in tort be pursued where, for example, picketers damaged property – whether that of an employer or of a third party.

e) I accept the submission of Mr Oldfield, that the civil self-help remedy is more desirable in terms of effectiveness.

f) But more important, its availability would be more likely to ensure that an employment-related issue was not escalated to a criminal one unnecessarily. It can be inferred that Parliament recognised this given the context of ongoing employment relationships, as well as the wide-ranging provisions of the Act which regulate those relationships as to bargaining, strikes and lockouts.

g) I also take into account the important principle that should be recognised in a free and democratic society that citizens are not to be denied access to the courts, save in rare and appropriate circumstances and then only pursuant to explicit statutory language.[13] As I have indicated, the effect of the construction urged by Unite is that an employer such as Wendco would never have the ability to make a tortious claim in respect of illegal picketing in any court. In the absence of express language relating to picketing, it is inherently unlikely that Parliament intended to abolish this option via the introduction of s 99(3).

[51] In short, having regard to text and purpose, I consider it to be arguable that s 99(3) relates only, as it says, to tortious proceedings which result from or are related to participation in a strike or lockout; it does not relate to tort actions involving picketing which is related to a strike or lockout.

[52] The practical consequence, as submitted by Mr Oldfield, is that if lawful strikers act together to withdraw their labour, no proceedings founded on a cause of action such as the tort of conspiracy could be pursued against them; or if lawful strikers acted together to refuse to deal with a particular supplier's goods, no proceedings founded on the torts of interference with goods or business relations could be pursued.

[53] Finally, on this jurisdiction point, I find for present purposes that the proceedings brought by Wendco against Unite do not fall within the description of debarred proceedings under s 99(3). I was accordingly satisfied that jurisdiction was established on an arguable basis.

Arguable case

[54] Turning to the question of whether Wendco's case was arguable, I found that it had established the necessary threshold.

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[13] *New Zealand Drivers' Assoc v New Zealand Road Carriers* [1982] 1 NZLR 374 at 390 (CA); *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549 at 555 (CA); and *Spencer v Attorney-General* [2014] 2 NZLR 780 (HC) at [164].

[55] Mr Cranney correctly argued that there were currently no strikes or pickets on foot. The real question was whether there was threatened picketing relating to a strike.

[56] On this topic, Mr Oldfield relied on dicta of Finnigan J in *Leonard and Dingley Ltd v New Zealand Waterfront Workers Union Inc*, where the Labour Court discussed the concept of "threatened strike", in these terms:[14]

> My view of the matter is that what I have heard overall amounts quite clearly to a state of affairs that deserves the description "a threat of a strike", namely there is unease in the port about what will happen tomorrow. Plainly some people regard themselves as under a threat of a strike, and in my view the totality of the evidence makes that a reasonable state of mind.

[57] I agree that these observations provide a suitable approach for analysing the evidence for present purposes.

[58] Mr Michael Treen, National Director of Unite, indicated that there are bargaining difficulties between the parties. Then he said that strike action and picketing were very important rights, and that without these rights collective bargaining could not succeed. This evidence confirmed an intention to maintain strikes and pickets.

[59] He went on to address an issue which had been raised by Wendco to the effect that previous strike notices had not met the statutory form. Mr Cranney confirmed that future strike notices would address these issues. The evidence thereby indicates there is a clear intention to conduct future strikes according to the requirements of the Act.

[60] Mr Gary Cranston, an organiser of Unite who was present at the pickets which occurred at the Dominion Road and Te Atatu Road premises of Wendco, said that the police had attended one of the pickets recommending high visibility vests for the future, advice which he confirmed would be taken. This confirms an intention to picket.

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[14] *Leonard and Dingley Ltd v New Zealand Waterfront Workers Union Inc* [1989] 1 NZILR 919 (LC) at 921.

[61] It is also relevant to note that no undertaking or assurance has been given by Unite that it would not remain off Wendco's properties, when picketing.

[62] For all these reasons I was satisfied, to the necessary level of persuasion, that it was reasonable for Wendco management to consider itself under threat of a picketing which would be related to strike action.

[63] Next, it was necessary to consider whether Wendco had a tortious basis for its concerns. Wendco primarily relied on the tort of trespass. In such a case, a plaintiff must satisfy the Court that there has been an unjustified direct interference with its land; such a claim is actionable per se without proof of actual damage.[15]

[64] A legitimate request was made in the letter from Wendco's lawyer of 25 May 2018 to Unite, and in notices that were sent to staff and displayed for them to view.

[65] Unite contests whether evidence provided by Wendco to the Court in the form of photographs actually shows picketers on relevant drive-through ramps; and argues that the carparks involved are shared with other leasees; and that there was uncertainty as to where the boundaries of Wendco's leased properties in fact lie.

[66] However, Ms Lendich, who could be assumed to be familiar with the areas in question, said it was evident people had stood in the drive-through at the Dominion Road restaurant holding placards, and that they were on the property which Wendco leases. She also stated that the carpark was a common area, controlled together with other property owners on the adjourning road. She stated the picketers did not have permission to be there, and Unite had been specifically warned not to picket on such property. Similar evidence was given in respect of the Te Atatu Road restaurant.

[68] The evidence submitted by Wendco was not shown to be fundamentally flawed. I was satisfied that Wendco had established the tort of trespass in respect of the two particular incidents it relied on.

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[15] Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) at 9.2.01.

[67] For the purposes of assessing whether there is a threat of picketing elsewhere, I considered that support by Unite for picketing on private property could not be ruled out at any other Wendco restaurant, given the difficult bargaining circumstances which have arisen as described in detail in Mr Treen's evidence.

[68] Mr Oldfield also argued that there would potentially be breaches of s 46 of the Health and Safety at Work Act 2015. That provision imposes duties on persons at a workplace to take reasonable care to ensure that his or her acts or omissions do not adversely affect the health and safety of other persons; and comply as far as such a person is reasonably able with any reasonable instruction given by an entity such as Wendco. He invoked the tort of breach of statutory duty.

[69] The law relating to such a claim is not straightforward.[16] Counsel were unable to refer the Court to any previous example where this tort had been applied to health and safety legislation. Given the conclusions I reached as to the application of the tort of trespass, it was unnecessary for the Court to dwell on this claim further. The health and safety implications, however, were indeed relevant to an assessment of balance of convenience which I will describe shortly.

[70] The claim based on causing loss by unlawful means faced similar difficulties. The evidence of actual loss as a result of the picketing which took place at the Te Atatu Road restaurant suggested that at best sales on the night that the picket took place were "down about $500". No further particulars were given. This evidence was not sufficiently reliable even for interim purposes, or for the Court to draw any inference as to potential further losses.

[71] In summary, Wendco established that it had an arguable case for interim relief on the basis of the tort of trespass.

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[16] As summarised in *Johnston v Shurr* [2012] NZCA 363, at [79]-[80]; appeal allowed in *Johnston v Shurr* [2015] NZSC 82, but not with regard to those principles. See also discussion in *Hally Labels Ltd v Powell* [2015] NZEmpC 92, [2015] ERNZ 940 at [130]-[133].

Balance of convenience

[72] In my oral judgment, I found that there were significant health and safety issues, particularly with regard to drive-throughs and carpark areas.[17]

[73] Ms Lendich deposed that on the two occasions when allegedly illegal picketing had occurred, people were standing in the drive-throughs or across the drive-through access-way at the Dominion Road restaurant, and that at the Te Atatu Road restaurant pickets had proceeded up the drive-through, and had been at the entrance to the carpark. As indicated earlier, Unite denies this. For interim purposes, I accepted Ms Lendich's evidence.

[74] Mr Cranston also stated that there had been "only one minor incident", and that it involved a person who is not a Unite member or an official. It appears that as a result of this, the police were called which led to their recommendation that high visibility vests be worn when picketing. No further details of the incident, however, were given. That there was an incident which apparently required the police to attend must be of concern.

[75] The events in question occurred at night. I accept Mr Oldfield's submission that the presence of pickets, vehicles and pedestrians in combination present a potential significant risk to the personal safety of the individuals involved, including the picketers. The Court's concern must be that pickets which might begin with the best of intentions could degenerate if there are untoward reactions, whether on the part of a picketer or any other person approaching a Wendco restaurant for legitimate reasons.

[76] Mr Cranney submitted that were the Court to issue injunctive relief in respect of a trespass claim, those wishing to picket in shopping malls and airports, for example, would never be able to do so; they would thereby be denied in effect the right to picket. The findings made for the purposes of this interlocutory application should not be regarded as creating a precedent of general application. However, I observe that an essential feature of the common law approach to picketing is that it is lawful

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17 *Wendco (NZ) Ltd v Unite Inc.,* above n 2, at [13].

only insofar as it does not diminish other legal rights. As it was put by Lord Denning in the well known case of *Hubbard v Pitt*:[18]

> Picketing is lawful so long as it is done merely to obtain or communicate information, or peacefully to persuade; and is not such as to submit any other person to any kind of constraint or restriction of his personal freedom.

[77] That obviously includes rights relating to trespass. I also observe there is no other satisfactory alternate remedy which would regulate future conduct; a claim for damages would not be a better alternative in the circumstances the Court was required to consider.

[78] It was submitted that there is also a risk of altercation on Wendco's private property, whether inside or outside its restaurants, for example if members of the public were to be anxious to obtain a Wendco product, and if such persons were to be delayed or obstructed in doing so by picketers. I agree.

[79] I also accepted Mr Oldfield's submission that a health and safety incident could never be compensated adequately with damages, particularly given the statutory bar for seeking damages under the Accident Compensation Act 2001.[19]

[80] Mr Oldfield also argued that persons wishing to use the drive-through to purchase food could have their freedom of movement impacted; as could their freedom of association if using the interior of Wendco restaurants. Also potentially affected are the majority of Wendco's workforce who are not members of Unite and who are entitled to work in accordance with their employment agreements.

[81] Against these factors, I weighed Unite's entitlement to picket, based as it is on rights of free speech and to assemble and protest peacefully. The entitlement to picket peacefully is for these reasons very important. However, I considered that such rights could be exercised beyond Wendco's property, there being no evidence from either party that this cannot occur in respect of any of the 23 restaurants.

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18 *Hubbard v Pitt* [1976] QB 142 CA at 177 per Lord Denning MR.
19 Accident Compensation Act 2001, s 317.

[82] Standing back, I assessed the balance of convenience to be strongly in favour of the grant of interim relief.

Overall justice

[83] Mr Oldfield submitted that looking at the matter overall, overall justice favoured Wendco. I accepted this submission.

[84] The evidence is that relatively short notice of strikes has been given. Although Unite has a statutory right to proceed in this way, pickets have accordingly been difficult to manage. This was because there was an express request that picketers not be present on Wendco's properties; despite those requests, picketing did take place on private property. There was evidence that this also occurred in the past.

[85] I also noted that no undertakings or assurances regarding future pickets were given by Unite. In the circumstances I have just summarised, the absence of these is a matter which had to be weighed into the scales.

[86] I accordingly concluded that overall justice favoured Wendco, and that the application should succeed.

Disposition

[87] There are two comments to make regarding the form of the Court's order.

[88] First, although the evidence focused on two only of Wendco's restaurants, and there is evidence that in two South Island instances picketers remained on public property, it would be artificial to restrict the Court's order to the Dominion Road and Te Atatu Road restaurants. Indeed, that would run a risk that the principles discussed in this judgment might be construed as applying only to those two restaurants and not to others. I considered that there was a prospect of picketers trespassing at other restaurants were interim relief not to be granted. Accordingly, it was necessary to make an order in respect of all 23 restaurants. This will not inhibit or prejudice those picketers who have already determined that they would remain off Wendco property for picketing purposes.

[89] Secondly, there was an indication in Unite's evidence that there was a lack of clarity as to the boundaries of Wendco's properties. I accordingly concluded that Wendco should provide an accurate description of its properties so that those picketing would be clearly appraised of the areas which the interim injunction would relate.

[90] I therefore made orders in the following terms:[20]

> a) Until further order of the Court, Unite Inc (including its officers, employees and agents) are to refrain from being party to or directing, encouraging or inducing its members employed by Wendco to participate in picketing on Wendco's private property, including but not limited to, its drive-throughs.
>
> b) This order is to take effect immediately but it is subject to a condition that Wendco is to provide to Unite by 5.00 pm today a description of its private property in respect of each of its 23 restaurants; a copy of this document is to be filed with the Court.

[91] After announcing these orders, I discussed with counsel whether Wendco's claims should now proceed to a prompt fixture, which I would be prepared to direct. Counsel are to confer and respond to the Court as to the options, later this week.

[92] I reserve costs, which will be timetabled at a later stage of the proceeding.

B A Corkill
Judge

Judgment signed at 4.10 pm on 12 June 2018

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[20] *Wendco (NZ) Ltd v Unite Inc.,* above n 2, at [18].