**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA439/2011**
**CA481/2011**
**[2011] NZCA 595**

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| BETWEEN | NEW ZEALAND PROFESSIONAL FIREFIGHTERS UNION<br>Appellant |
| AND | NEW ZEALAND FIRE SERVICE COMMISSION<br>Respondent |

Hearing: 18 August 2011

Court: O'Regan P, Glazebrook and Wild JJ

Counsel: P Cranney and A Connor for Appellant
G C Davenport for Respondent

Judgment: 29 November 2011 at 11.30 am

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**JUDGMENT OF THE COURT**

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**A** **The application for leave to appeal is granted. Leave to appeal is granted on the two questions of law set out at D below.**

**B** **Leave to appeal is granted in relation to the subsidiary issue of whether the granting of compliance orders is precluded by s 85 of the Employment Relations Act 2000 in relation to lawful proposed strike action. Leave to appeal is declined in relation to all other subsidiary issues.**

**C** **Costs on the application are to lie where they fall.**

**D** **The appeal is allowed. The questions of law are answered as follows:**

***Question 1:*** **Was the Employment Court right to hold that it had power by way of compliance order to order the Union and its members not to undertake strike action pursuant to notices of strike action issued on 16 and 30 June 2011 (the proposed strike action)?**

***Answer:*** **No.**

***Question 2:*** **Was the Employment Court right to hold that, even if it had no power to issue an injunction or a compliance order, it nonetheless had the power to prevent the proposed strike action?**

***Answer:*** **No.**

**E** **Costs for a standard appeal on a band A basis and usual disbursements are awarded to the appellant on the appeal.**

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**REASONS OF THE COURT**
(Given by Glazebrook J)

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## Introduction

[1] The New Zealand Professional Firefighters Union (the Union) seeks leave to appeal against a decision of the Employment Court.[1] The proposed appeal concerns whether a compliance order should have been made against the Union and its members which had the effect of delaying otherwise lawful strike action.

## Background

[2] In December 2010 the New Zealand Fire Service Commission (the Commission) and the Union agreed on a process for collective bargaining (the Bargaining Process Agreement or the BPA). The relevant parts of the BPA, signed by the parties' representatives, include the following clauses:

> **4. BARGAINING PRINCIPLES**
>
> Bargaining will be undertaken in good faith. The parties to the bargaining commit:
>
> (a) To conducting the bargaining in an orderly, effective and efficient manner, and in accordance with this Agreement.
>
> …
>
> (i) To not undermining or doing anything that is likely to undermine the bargaining, or the authority of the other party to the bargaining.
>
> …
>
> **10. PROCESS TO APPLY WHERE AGREEMENT CANNOT BE REACHED**
>
> (a) If agreement cannot be reached in the course of bargaining the parties will discuss ways to address this, including consideration of the extent to which setting aside the point of disagreement could still leave the parties with an overall settlement agreement sufficient to meet their joint interests.
>
> (b) If bargaining ceases to make progress then the parties will, prior to giving notice of, or taking, industrial action, attend mediation providing that the mediation can occur within a reasonable timeframe (a reasonable timeframe would

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[1] *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission* [2011] NZEmpC 80.

normally be considered to be 14 days). The parties will agree on the mediation service and mediator to be used, and on the issues to be discussed.

…

**11. APPLICATION OF THIS AGREED PROCESS FOR COLLECTIVE BARGAINING**

(a) This agreed process shall bind the parties to this agreement.

(b) Where a party believes there has been or may be a breach of this agreed process or of the obligations of good faith set out in the Employment Relations Act, or any applicable Code of Good Faith issued pursuant to the Act, the party shall, wherever practicable, notify the other party of their concerns at an early stage so as to enable the defaulting party to remedy the situation or provide an explanation for the action or inaction in question.

…

[3] By May 2011, the parties had not reached a collective agreement. It was thus agreed that the Commission's proposed collective agreement would be put by the Union to a vote of its members. The Commission's draft collective agreement was rejected by the members, the results of the vote being announced on 14 June 2011.

[4] On 16 June 2011, the Union issued notices of intention to strike, the strike to occur on 1 July 2011. The Commission requested withdrawal of the notice so that mediation could occur. It contended that mediation was required under cl 10(b) of the BPA before a strike notice could be issued. The Commission threatened interim injunction proceedings.

[5] The Union reacted by filing proceedings on 17 June 2011 before the Employment Relations Authority (the Authority) for a determination that the proposed strike was lawful. These proceedings were removed to the Employment Court.

[6] After a directions conference in the Employment Court, mediation between the parties occurred on 23 and 30 June 2011 but the 16 June strike notices were not withdrawn (the strike that was intended to commence on 1 July 2011 did not,

however, go ahead). Further strike notices were issued on 30 June 2011, with the intended strike to commence on 16 July 2011.

[7] The Commission filed a counterclaim in the Employment Court on 4 July 2011 seeking declarations of illegality and an injunction restraining the strikes. During the hearing on 5 July 2011 in the Employment Court, the Commission sought and obtained leave to amend the counterclaim to seek a compliance order requiring the Union and its members to comply with the BPA.

**The Employment Court decision**

[8] Chief Judge Colgan defined the case as turning on whether members of the Union were entitled in law to begin strike action by giving statutory notice of it without first having attempted to settle new terms and conditions of employment in mediation. In his view, the case focused on the content and effect of the BPA, a statutorily recognised document.[2]

[9] As to the interpretation of the BPA, Chief Judge Colgan said that "by use of equivocal, even confusing, language, the parties (primarily the Commission whose drafting this was) have made [the crucial issue of the timing of mediation] unclear".[3] The Chief Judge, however, determined that the intention of cl 10(b)[4] was that, after bargaining ceases to make progress and before a party gives a statutorily-required notice of strike or lockout, it must attend mediation with the other to attempt, in good faith, to settle their differences in the bargaining.

[10] The Chief Judge rejected the Union's argument that, if strike action is lawful as defined by the Act, the Court cannot prohibit its occurrence. In its argument before the Court, the Union relied on the express provisions of ss 85, 99 and 100 of the Act.[5] The Chief Judge held that s 99 is inapplicable because the proceeding, in both the claims and counterclaims, was not founded on a tort as required by s 99(3). He also considered that s 100(3) was not engaged, at least in respect of the

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2 Employment Relations Act 2000, s 32. This is set out in the Appendix at [49] below.
3 At [23].
4 Set out at [2] above.
5 These sections are set out (respectively) in the Appendix at [53], [57] and [58] below.

Commission's claims to a compliance order. Section 85(1)(c) refers to actions or proceedings including compliance orders being unavailable where there is lawful participation in a strike or lockout, but the Chief Judge considered that this was also inapplicable because the proceeding addressed notice of strike action which is not the same as a strike,[6] and there had not yet been "participation in a strike" as s 85 requires.

[11] Even if, contrary to his conclusions, any or all of these sections applied to the proceedings before the Court, the Chief Judge did not consider that these provisions should be interpreted so as to bar a remedy in this case. He said that it would run counter to the scheme of the Act to permit a union (or an employer in respect of a lockout) to act egregiously in bad faith and in breach of its solemn commitments to act in good faith in respect of the bargaining and/or strike or lockout action. The Chief Judge referred to a number of sections in the Act which he considered, individually and together, emphasised and promoted the benefits of mediation in collective bargaining and in parties themselves determining how problems are to be addressed.[7]

[12] The Chief Judge considered that the issues in the case should be viewed as ones of collective bargaining conduct rather than assessed through a strike legality lens. Looked at in this manner, he held that the parties' agreement about how difficulties in collective bargaining were to be addressed was enforceable by way of a compliance order. He said, "it is not a case of constraining a right to strike but, rather, holding parties to their agreement that this right will be postponed for a period in the interests of good faith dealing and for the better prospect of achieving a collective agreement".[8]

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6 *Heke v Attorney-General in respect of the Department of Corrections* [1998] 1 ERNZ 583 (EC) at 586.

7 The sections referred to by the Chief Judge were ss 3(a), 3(a)(v), 3(a)(vi), 4(1)(b), 4(1A)(b), 31(c), 32(3)(b), 143(a), 143(b), 143(c), 143(d) and 144(2)(e).

8 At [26].

[13] The Chief Judge considered that a compliance order was the appropriate and preferable remedy to an injunction.[9] That was because it is the remedy created by the legislation including for breach of good faith obligations. He considered that the consequence of making compliance orders would not be to prevent strike action from taking place, but, rather, to delay it and to enable the parties to continue to make progress in collective bargaining.

[14] Chief Judge Colgan acknowledged that the parties had recently attended mediation and made some progress in their collective bargaining. He did not, however, consider that to be effective compliance with cl 10(b) of the BPA. He said that "[a]s a matter of good faith, the Union should be held to the process to which it agreed".[10] The Chief Judge said that the recent mediation had not only been overshadowed by the Employment Court proceedings but by notice of strike action that the Chief Judge was satisfied should not have been given before mediation first took place.

[15] Thus, pursuant to s 137(1)(a)(ii) of the Act,[11] the Court issued a compliance order directing the Union to comply with cl 10(b) of the BPA. In particular, the Court ordered the Union to attend mediation (within 14 days of the date of the judgment)[12] on the issue or issues in dispute between the parties in collective bargaining before the Union or its members give notice of strike action. Pursuant to s 137(2), the Union and its members were ordered to cease acting (forthwith)[13] in reliance on notices of strike action issued on 16 and 30 June 2011.

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9 Following removal of the proceedings from the Employment Relations Authority to the Employment Court, the Chief Judge held that the power to order compliance is available in law: *Credit Consultants Debt Services NZ Ltd v Wilson (No 2)* [2007] ERNZ 205 (EC) at [10].

10 At [29].

11 This provision is set out in the Appendix at [59] below. The Chief Judge did not specifically identify which section of the Act had been breached.

12 Pursuant to s 137(3) of the Act.

13 Pursuant to s 137(3) of the Act.

**Aftermath of Employment Court decision**

[16] On 21 July 2011 the parties attended mediation without any strike notices in place. The same day new strike notices were issued and Union members commenced strike action on 5 August 2011.

**Grounds of proposed appeal**

[17] Leave to appeal against Chief Judge Colgan's decision is sought on the following questions:

(a) Was the Employment Court right to hold that it had power by way of compliance order to order the Union and its members not to undertake strike action pursuant to notices of strike action issued on 16 and 30 June 2011 (the proposed strike action)?

(b) Was the Employment Court right to hold that, even if it had no power to issue an injunction or a compliance order, it nonetheless had the power to prevent the proposed strike action?

[18] The following subsidiary issues are identified in the Union's submissions:

(a) Is the granting of compliance orders precluded by s 85 of the Act in relation to lawful proposed strike action?

(b) Even if compliance orders are not precluded by s 85 in relation to lawful proposed strike action, did the Employment Court erroneously grant the orders because:

(i) the BPA was not breached?

(ii) none of the provisions referred to in s 137(1)(a) of the Act were breached, nor identified as having been breached?

(iii) the Court was required to specify a time "within which" its order was to be obeyed and did not do so?

(iv) the Court had no power to order the workers not to participate in the strikes?

**Union's position**

[19] The Union's submissions on these subsidiary issues are:

(a) The proposed strike action was lawful as defined in s 83 of the Act and compliance orders were therefore precluded by s 85.

(b) Even if compliance orders were not precluded by s 85, the Employment Court erroneously granted the orders because:

(i) The BPA was not breached.

(ii) None of the provisions referred to in s 137(1)(a) of the Act were breached, nor identified as having been breached. Even if the BPA had been breached, mere breach of the BPA does not constitute a lack of good faith, particularly where there is confusing or obscure language and genuine belief that the BPA was complied with.

(iii) The Court was required to specify a time "within which" its order was to be obeyed and did not do so, instead requiring the Union and its members to cease acting in reliance on the notices "forthwith".

(iv) The Court had no power to order the workers not to participate in the strikes because they were not parties to the proceeding. Compliance orders in any compliance order proceedings can

only be issued against a party or a witness,[14] and there is a statutory requirement that any non-party must before such order is made be first given an opportunity to appear or be represented before the Authority.[15]

**Commission's position**

[20] The Commission supports the Court's conclusion that s 85 did not preclude the Court from granting the compliance orders.[16] The orders sought were about an agreement that required attendance at mediation prior to notice of strike action being issued and were thus about the part of the collective bargaining process that occurred before any issuing of notice of strike action. Further, the Commission supports the Chief Judge's conclusion that the issuing of a notice of strike action is not itself a strike.

[21] In addition, the Commission submits that s 85 does not exist in isolation. It must be interpreted as part of the Act as a whole. The issuing of the strike notices on 16 June 2011 was in the context of collective bargaining. Collective bargaining must occur in good faith. Refusing or failing to do what one has agreed (in this case, attending mediation before issuing notice of intention to take strike action) is not in good faith and was also a failure to comply with the parties' own agreement.

[22] The Commission submits that the BPA was not a contracting out of the Act. Indeed, the Act recognises the parties' own agreements about collective bargaining and good faith. The Act also reinforces the importance of mediation as the "primary problem-solving mechanism".[17] The parties' agreement to attend mediation prior to issuing notice of strike or lockout was consistent with that object.

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14 Section 137(2) of the Act.

15 Section 138(2) of the Act. It is submitted that there is good reason to comply strictly with the limitations on the power to grant compliance orders. If compliance orders are made, draconian consequences flow from a breach of them (including three months' imprisonment, a $40,000 fine, and sequestration of property: s 140(6)).

16 Contrary to the Union's submission at [19](a) above.

17 Section 3(a)(v) of the Act.

[23] The Commission also supports the Court's reasoning with regard to the interpretation of the BPA and submits that the question of whether the BPA was breached[18] is a question of fact inappropriate for determination by this Court. As to whether any of the provisions referred to in s 137(1)(a) of the Act had been breached,[19] the Commission submits that the Court decided to issue a compliance order because there was a breach of the statutory obligation of good faith, which s 137(1)(a)(ii) allows.[20] The Commission also submits that the Court did specify time periods within which the Union and its members were to comply with the orders made,[21] and that there was no confusion about the way in which the time periods were expressed.

[24] As to whether a compliance order could be made against the workers,[22] the Commission submits that a notice of strike action, when it is being issued under the Act, has to be signed by the Union or a representative of the Union.[23] The Union is therefore the correct party to be required to comply with its own agreement that it would attend mediation before issuing notice of strike action. Moreover, these proceedings were commenced by the Union. If the Union considered that any of its members should have been parties to the proceedings, it should have included them in the proceedings from the outset.

[25] For the above reasons, the Commission submits that leave should not be granted on question one.[24] The Commission submits that leave should not be granted on question two[25] as the remarks were obiter.

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18 See the Union's submission at [19](b)(i) above.
19 See the Union's submission at [19](b)(ii) above.
20 Section 137(a)(ii) allows compliance orders to be made where there are breaches of, inter alia, Parts 1 and 3–6 of the Act. Good faith is a requirement of collective bargaining in Part 1 of the Act (ss 3 and 4(4)(a)) and Part 5 of the Act states that relevant matters to consider when assessing good faith dealings include "the provisions of any agreement about good faith" between the parties (s 32(3)(b) of the Act). The parties' BPA required collective bargaining to take place in good faith (cl 4 of the BPA, set out at [2] above).
21 Contrary to the Union's submission at [19](b)(iii) above.
22 See the Union's submission at [19](b)(iv) above.
23 See s 90(4)(a) of the Act, set out in the Appendix at [55] below, which provides that the notice must be signed by a representative of the employee's union on the employee's behalf.
24 Set out at [17](a) above.
25 Set out at [17](b) above.

**Leave to appeal**

[26] The issue of whether the BPA was breached[26] is a mixed question of fact and law. In any event, it concerns the interpretation of a document that relates to these parties only and is in a form that is unlikely to be repeated in the future. It can thus have no wider importance. Leave to appeal is declined on this issue.

[27] It is implicit in the Employment Court judgment that the compliance order was made on the basis of a breach of the obligation of good faith.[27] However, the Chief Judge did not set out explicitly what constituted the breach of the obligation of good faith. We accept the Union's submission that the Court appears to have equated a breach of the BPA with a lack of good faith.

[28] There is merit in the Union's contention that a breach of the BPA by itself could not be a breach of good faith if the Union had genuinely misinterpreted its obligations under what the Chief Judge called an equivocal and confusing document.[28] However, this is a matter very much tied to the facts of this case with no ongoing importance for the parties and no general importance. This Court has said that whether or not there has been a breach of the duty of good faith is a matter for the Authority or Employment Court's overall assessment in the particular case.[29] Leave is declined on this issue.

[29] As to whether the Court specified a time "within which" its orders had to be obeyed,[30] we similarly do not consider that this matter has any ongoing importance for the parties or any general importance. The practical effect of the requirement to

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26 See the subsidiary issue identified at [18](b)(i) above.

27 See ss 4(4)(a) and 32(3)(b) of the Act.

28 See the subsidiary issue identified at [18](b)(ii), the Union's submission at [19](b)(ii) above and [23] of the Employment Court decision, referred to at [9] above.

29 *Christchurch City Council v Southern Local Government Officers Union Inc* [2007] NZCA 11, [2007] 2 NZLR 614 at [46]–[51]. In the s 32 context (that is, the provision of the ERA dealing with good faith in bargaining for a collective agreement), the Court must apply the plain words of subs (1), in light of the matters specified in subss (3)–(5). Earlier decisions of this Court may provide assistance in this regard. See for example *Auckland City Council v New Zealand Public Service Association Inc* [2004] 2 NZLR 10 (CA) at [22] and *Carter Holt Harvey Ltd v National Distribution Union Inc* [2002] 1 ERNZ 239 (CA) at [55].

30 See the subsidiary issue identified at [18](b)(iii) and the Union's submission at [19](b)(iii) above.

cease acting in reliance on the notice "forthwith" was clear. Leave is also declined on this issue.

[30] We consider that the question of whether compliance orders can be issued to prevent strike notices from being relied upon[31] (and the related subsidiary issue of whether the granting of compliance orders is precluded by s 85 of the Act in relation to lawful proposed strike action)[32] is a matter of general importance meriting the attention of this Court. While the fact that the parties attended mediation after the Employment Court decision[33] means that the issue is effectively moot with regard to the 16 and 30 June 2011 strike notices, the issue is still of importance for the future. Leave is granted on this issue.

[31] As to the second question,[34] we consider that this can be read as an alternative basis for the Chief Judge's finding rather than an obiter statement. This issue is also one of such general or public importance as to merit the attention of this Court. Leave is granted on this issue.

[32] The issue of whether the compliance notice could be issued to the workers[35] only arises if there was power to issue the compliance orders. If there was no such power, then the question is moot and leave inappropriate. For reasons we discuss below,[36] the issue does not arise and accordingly leave is declined on this issue.

**The appeal**

[33] The provisions in the ERA relating to strikes and lockouts are set out in Part 8 of the Act. The scheme of the Act with regard to strikes and lockouts is that they are lawful if they are for the prescribed purposes[37] and are not unlawful under s 86. We note in particular that strikes are unlawful if they occur within the 40 day period after

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31 Set out at [17](a) above.
32 See the subsidiary issue identified at [18](a) above.
33 See at [16] above.
34 Set out at [17](b) above.
35 See the subsidiary issue identified at [18](b)(iv) and the Union's submission at [19](b)(iv) above.
36 At [33]–[44] below.
37 Collective bargaining under s 83(b) and health and safety under s 84. These sections are set out (respectively) in the Appendix at [51] and [52] below.

collective bargaining is initiated.[38] There are also notice provisions for essential industries under s 90 (for example, fire brigade workers are unable to strike unless at least 14 days' notice is given).[39]

[34] The powers of the Authority and the Employment Court are curtailed when it comes to strikes and lockouts by ss 85, 99 and 100.[40] For example, s 85(1)(c)(iii) precludes the granting of a compliance order where there is lawful participation in a strike. The objects section of Part 8 makes it clear that the requirement that a union and employer deal with each other in good faith does not preclude strikes conducted by workers being lawful.[41]

[35] We also note that the only requirement related to mediation in collective bargaining is to require the Chief Executive of the Department of Labour to ensure that mediation services are available as soon as possible once a notice of strike or lockout is received.[42] A party cannot be directed to participate in mediation until proceedings have been filed with the Authority.[43]

[36] It was accepted by the Commission at the hearing of the appeal that an agreement not to strike would be a contracting out of the provisions of the Act (prevented by s 238). It is, however, submitted that an agreement delaying a strike is not a contracting out of the Act. It is further submitted that delaying the giving of one of the preconditions of a lawful strike under s 90 (notice) does not affect the strike.

[37] We do not accept those submissions. We consider that an attempt to truncate or expand the time limits in the strike and lockout provisions must be an attempt to contract out of the Act's strike and lockout provisions and therefore must be forbidden by s 238. For example, if the Commission's argument were correct, then presumably a BPA could introduce a notice requirement for strikes or lockouts where

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38 Section 86(1)(b)(i) of the Act, set out in the Appendix at [54] below.
39 Set out in the Appendix at [55] below.
40 Set out (respectively) in the Appendix at [53], [57] and [58] below.
41 Section 80 of the Act, set out in the Appendix at [50] below.
42 Section 92 of the Act, set out in the Appendix at [56] below.
43 Section 159(2) of the Act.

this is not required by s 90 and thus delay a strike past the 40 day statutory period.[44] We do not consider this permissible. A strike or lockout delayed past the statutory period risks being less effective.

[38] While we accept that a notice of strike is not a strike, the delaying of the giving of a required notice under s 90 purports to contract out of the notice time limits in that section and also effectively achieves the delay of a strike, which again must be a contracting out of the Act. Further, as we have mentioned, s 85(1)(c)(iii) makes it clear that lawful participation in a strike precludes the granting of a compliance order. Even accepting that there is a difference between a strike and a notice of strike, the effect of the compliance order given in this case nevertheless was to delay a lawful strike.

[39] We accept the Union's submission that the words "[l]awful participation in a strike" in s 85 must be taken to include lawful future participation. Otherwise it would always be a matter of timing. As long as an application is made before a strike actually commences, compliance orders would always be able to be granted to stop a strike or lockout. This does not accord with the scheme of the Act with regard to strikes and lockouts.

[40] We also accept the Union's submission that, if BPAs can contain enforceable provisions limiting or delaying rights of strike or lockout, then negotiating over such provisions risks diverting attention from the process for collective bargaining.

[41] Further, the scheme of the Act is clear as to the powers (or lack thereof) of the Employment Court and the Authority with regard to strikes and lockouts. The Employment Court, under s 100, has exclusive jurisdiction to grant injunctions with regard to strikes and lockouts. The Court is obliged to dismiss the proceedings if a strike is lawful under s 83 or s 84.[45] It would be an odd result if exactly the same effect as an injunction could be achieved by way of a compliance order which could be granted by the Authority. The Authority has no compliance jurisdiction regarding

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44 Refer to discussion at [33] above.
45 Section 100(3)(a) of the Act, set out in the Appendix at [58] below.

strikes and lockouts. The Employment Court does have a compliance jurisdiction[46] but this is limited to non-compliance with "any provision of Part 8".[47] We thus accept the Union's submission that the approach taken by the Employment Court in this case, if correct, confers extensive strike-stopping jurisdiction on the Authority, wider in scope than available to the Employment Court.

[42] For all the above reasons, the first question set out at [17](a) must be answered in the negative.

[43] In light of the express provisions of the Act, if the comments summarised at [11] above were intended as an alternative basis for the findings of the Employment Court, this alternative basis must also be in error. The second question set out at [17](b) must also be answered in the negative.

[44] As the compliance order was not available, the issue set out at [18](b)(iv) relating to whether the order could be given against the workers does not arise.

**Result and costs**

[45] The application for leave to appeal is granted.

[46] The appeal is allowed. The questions of law are answered as follows:

> *Question 1:* Was the Employment Court right to hold that it had power by way of compliance order to order the Union and its members not to undertake strike action pursuant to notices of strike action issued on 16 and 30 June 2011 (the proposed strike action)?
>
> *Answer:* No.

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46 Section 139(1)(a), set out in the Appendix at [60] below.
47 Part 8 of the ERA deals with strikes and lockouts.

*Question 2:* Was the Employment Court right to hold that, even if it had no power to issue an injunction or a compliance order, it nonetheless had the power to prevent the proposed strike action?

*Answer:* No.

[47] As there was mixed success on the application for leave to appeal, costs on that application should lie where they fall.

[48] Costs for a standard appeal on a band A basis and usual disbursements are awarded to the Union on the appeal.

Solicitors:
Oakley Moran, Wellington for Appellant
McBride Davenport James, Wellington for Respondent

## Appendix: the legislation

[49] Section 32(1)(a) of the Employment Relations Act 2000 (the Act) provides:

> **32 Good faith in bargaining for collective agreement**
>
> (1) The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to do, at least, the following things:
>
> (a) the union and the employer must use their best endeavours to enter into an arrangement, as soon as possible after the initiation of bargaining, that sets out a process for conducting the bargaining in an effective and efficient manner; …

[50] Section 80 of the Act provides:

> **80 Object of this Part**
>
> The object of this Part is—
>
> (a) to recognise that the requirement that a union and an employer must deal with each other in good faith does not preclude certain strikes and lockouts being lawful (as defined in this Part); and
>
> (b) to define lawful and unlawful strikes and lockouts; and
>
> (c) to ensure that where a strike or lockout is threatened in an essential service, there is an opportunity for a mediated solution to the problem.

[51] Section 83 of the Act provides:

> **83 Lawful strikes and lockouts related to collective bargaining**
>
> Participation in a strike or lockout is lawful if the strike or lockout—
>
> (a) is not unlawful under section 86; and
>
> (b) relates to bargaining—
>
> (i) for a collective agreement that will bind each of the employees concerned; or
>
> (ii) with regard to an aspect of a collective agreement in respect of which the right to strike or lockout, as the case may be, is

available under a declaration made by the Court under section 192(2)(c).

[52] Section 84 of the Act provides:

> **84 Lawful strikes and lockouts on grounds of safety or health**
>
> Participation in a strike or lockout is lawful if the employees who strike have, or the employer who locks out has, reasonable grounds for believing that the strike or lockout is justified on the grounds of safety or health.

[53] Section 85 of the Act provides:

> **85 Effect of lawful strike or lockout**
>
> (1) Lawful participation in a strike or lockout does not give rise—
>
> (a) to proceedings under section 99 that are founded on tort; or
>
> (b) to proceedings under section 100 for the grant of an injunction; or
>
> (c) to any action or proceedings—
>
> (i) for a breach of an employment agreement; or
>
> (ii) for a penalty under this Act; or
>
> (iii) for the grant of a compliance order.
>
> …

[54] Section 86(1) of the Act provides:

> **86 Unlawful strikes or lockouts**
>
> (1) Participation in a strike or lockout is unlawful if the strike or lockout—
>
> (a) occurs while a collective agreement binding the employees participating in the strike or affected by the lockout is in force, unless subsection (2) applies; or
>
> (b) occurs during bargaining for a proposed collective agreement that will bind the employees participating in the strike or affected by the lockout, unless—
>
> (i) at least 40 days have passed since the bargaining was initiated; and

(ii) if on the date bargaining was initiated the employees were bound by the same collective agreement, that collective agreement has expired; and

(iii) if on that date the employees were bound by different collective agreements, at least 1 of those collective agreements has expired; or …

(f) is in an essential service and the requirements as to notice that are contained in section 90 or section 91, as the case may be, have not been complied with; or

(g) takes place in contravention of an order of the Court. …

[55] Section 90 of the Act provides:

**90 Strikes in essential services**

(1) No employee employed in an essential service may strike—

(a) unless participation in the strike is lawful under section 83 or section 84; and

(b) if subsection (2) applies,—

(i) without having given to his or her employer and to the chief executive, within 28 days before the date of the commencement of the strike, notice in writing of his or her intention to strike; and

(ii) before the date specified in the notice as the date on which the strike will begin.

(2) The requirements specified in subsection (1)(b) apply if—

(a) the proposed strike will affect the public interest, including (without limitation) public safety or health; and

(b) the proposed strike relates to bargaining of the type specified in section 83(b).

(3) The notice required by subsection (1)(b)(i) must specify—

(a) the period of notice, being a period that is—

(i) No less than 14 days in the case of an essential service described in Part A of Schedule 1; and

(ii) No less than 3 days in the case of an essential service described in Part B of Schedule 1; and

(b) the nature of the proposed strike, including whether or not the proposed action will be continuous; and

(c) the place or places where the proposed strike will occur; and

(d) the date on which the strike will begin.

(4) The notice—

(a) must be signed by a representative of the employee's union on the employee's behalf:

(b) need not specify the names of the employees on whose behalf it is given if it is expressed to be given on behalf of all employees who—

(i) are members of a union that is a party to the bargaining; and

(ii) are covered by the bargaining; and

(iii) are employed in the relevant part of the essential service or at any particular place or places where the essential service is carried on.

[56] Section 92 of the Act provides:

**92 Chief executive to ensure mediation services provided**

Where the chief executive receives a notice of intention to strike or lock out under section 90(1)(b)(i) or section 91(1)(b)(i), the chief executive must ensure that mediation services are provided as soon as possible to the parties to the proposed strike or lockout for the purpose of assisting the parties to avoid the need for the strike or lockout.

[57] Section 99 of the Act provides:

**99 Jurisdiction of Court in relation to torts**

…

(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.

[58] Section 100 of the Act provides:

> **100 Jurisdiction of Court in relation to injunctions**
>
> …
>
> (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.

[59] Section 137 of the Act provides:

> **137 Power of Authority to order compliance**
>
> (1) This section applies where any person has not observed or complied with—
>
> (a) any provision of—
>
> (i) any employment agreement; or
>
> (ii) Parts 1, 3 to 6, 6A (except subpart 2), 6B, 6C, 6D, 7, and 9; or
>
> (iii) any terms of settlement or decision that section 151 provides may be enforced by compliance order; or
> …
>
> (b) any order, determination, direction, or requirement made or given under this Act by the Authority or a member or officer of the Authority.
>
> (2) Where this section applies, the Authority may, in addition to any other power it may exercise, by order require, in or in conjunction with any matter before the Authority under this Act to which that person is a party or in respect of which that person is a witness, that person to do any specified thing or to cease any specified activity, for the purpose of preventing further non-observance of or non-compliance with that provision, order, determination, direction, or requirement.
>
> (3) The Authority must specify a time within which the order is to be obeyed. …

[60] Section 139 of the Act provides:

> **139 Power of Court to order compliance**
>
> (1) This section applies where any person has not observed or complied with—
>
> (a) any provision of Part 8; or
>
> (b) any order, determination, direction, or requirement made or given under this Act by the Court.
>
> (2) Where this section applies, the Court may, in addition to any other power it may exercise, by order require, in or in conjunction with any proceedings under this Act to which that person is a party or in respect of which that person is a witness, that person to do any specified thing or to cease any specified activity, for the purpose of preventing further non-observance of or non-compliance with that provision, order, determination, direction, or requirement.
>
> (3) The Court must specify a time within which the order is to be obeyed.
>
> …

[61] Section 238 of the Act provides:

> **238 No contracting out**
>
> The provisions of this Act have effect despite any provision to the contrary in any contract or agreement.