

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2023] NZEmpC 157
EMPC 330/2023**

IN THE MATTER OF an application for declarations and an
injunction under Part 8 of the Employment
Relations Act 2000

AND IN THE MATTER OF an application for an interim injunction

BETWEEN WHAKARONGORAU AOTEAROA NEW
ZEALAND TELEHEALTH SERVICES LP
Plaintiff

AND NEW ZEALAND PUBLIC SERVICE
ASSOCIATION TE PŪKENGĀ HERE
TIKANGA MAHI INCORPORATED
First Defendant

AND NEW ZEALAND NURSES
ORGANISATION INCORPORATED
Second Defendant

Hearing: 15 September 2023 (by telephone)

Appearances: J Harrop and A Shieh, counsel for plaintiff
P Cranney and D Allan, counsel for defendants

Judgment: 15 September 2023

Reasons: 19 September 2023

REASONS FOR JUDGMENT OF JUDGE KATHRYN BECK

[1] On 15 September 2023, I made the following order:

... that an interim injunction be issued restraining the defendants' notified strike action for 3 pm on Friday, 15 September 2023, in relation to the roles of Emergency Teletriage paramedic, Emergency Teletriage nurse and EMHR clinician.

[2] When I made those orders, I indicated that reasons would follow. This judgment outlines those reasons.

[3] The plaintiff is Whakarongorau Aotearoa New Zealand Telehealth Services LP. It provides telehealth services to the public through numerous phone lines.

[4] The defendants, New Zealand Public Service Assoc: Te Pūkenga Here Tikanga Mahi Inc and New Zealand Nurses Organisation Inc, are unions representing approximately 300 (150 each) employees of Telehealth.

[5] The parties have been bargaining for a new multi-union collective agreement since March 2023. On 6 September 2023, the defendants each notified the plaintiff of a strike scheduled to take place on 15 September 2023, commencing at 3 pm and continuing for 24 hours.

[6] Between 8 and 11 September 2023, the plaintiff was in correspondence with Te Whatu Ora – Health New Zealand in relation to the impact of the strike notices and contingency planning.

[7] On 12 September 2023, a representative of the plaintiff emailed the defendants, identifying the employees engaged in the Early Mental Health Response (EMHR) team who the plaintiff considered were providing life preserving services under sch 1B cl 3 of the Employment Relations Act 2000 (the Act). Schedule 1B of the Act sets out a “Code of good faith for [the] public health sector” (the Code). The plaintiff proposed that those employees rostered to work would continue to provide life preserving services. The plaintiff also requested an urgent meeting.

[8] Between 12 September and the morning of 13 September 2023, correspondence was exchanged between the parties in which the defendants disagreed that the particular employees noted were engaged in life preserving services. The defendants also noted that the plaintiff was out of time in terms of seeking to discuss a plan in relation to life preserving services;¹ however, they agreed to meet with the

¹ Such a request must be made by the close of the day after the date of the notice of industrial action, see sch 1B cl 12(4) of the Employment Relations Act 2000.

plaintiff. On 13 September 2023, the parties met but were unable to agree on a contingency plan for life preserving services. The discussions continued the following morning. However, an agreement was unable to be reached at that time. The plaintiff then took steps to issue these proceedings.

[9] The plaintiff initially applied for an interim injunction preventing the approximately 300 employees covered by the strike notices from undertaking strike action. By the time this matter was heard, the plaintiff had reduced the scope of its application to only apply to a total of 34 staff. The relevant staff are in three categories:

- (a) Emergency Triage nurses at all levels of seniority;
- (b) Emergency Triage paramedics at all levels of seniority; and
- (c) EMHR nurses/clinicians at all levels of seniority.

[10] By the time this matter was heard at 12.30 pm on 15 September 2023, a contingency plan for life preserving services had been agreed in relation to both areas of work by Emergency Triage nurses and paramedics and EMHR nurses/clinicians.

The law

[11] The Court has jurisdiction to determine proceedings issued for the grant of an injunction to stop a strike under s 100 of the Act. The applicable principles are uncontroversial.

[12] First, the Court must be satisfied whether there is an arguable case as to the merits of the claim. In a case such as the present, where the interim application will effectively dispose of the defendants' substantive right to strike on the basis of notices already issued, or about to be issued, something more than a barely arguable case is required. In *Tasman Pulp & Paper Co Ltd v NZ (with exceptions) Shipwrights Etc Union*, the full Court observed that where the proposed action is incapable of being deferred without effectively being cancelled so that the grant of the interim relief

effectively becomes a summary judgment, the relative strengths and weaknesses of the parties' cases are more relevant to the overall justice of the case.²

[13] Having dealt with the threshold issue, the Court must then consider where the balance of convenience lies. This is an important consideration that may well determine the grant of an interim injunction.³ It includes consideration as to whether damages would be an adequate remedy to either party if the injunction were to have been wrongly granted or refused.⁴

[14] Finally, it is necessary to make an assessment of the overall justice of the situation following analysis of the first two issues.⁵

Arguable case

[15] The question is whether the plaintiff has established that there is an arguable case that the strikes would be illegal in relation to the particular categories of worker.

[16] This turns on whether the work undertaken by them is an essential service under sch 1 pt A of the Act.

[17] As noted above, the plaintiff now only applies for an interim injunction in relation to three types of workers, being:

- (a) Emergency Teletriage paramedic;
- (b) Emergency Teletriage nurse; and
- (c) EMHR clinician.

[18] It says the employees in these three roles are employed in an essential service, being a service falling under sch 1 pt A of the Act:

² *Tasman Pulp & Paper Co Ltd v NZ (with exceptions) Shipwrights Etc Union* [1991] 1 ERNZ 886 (LC) at 898.

³ *Eng Mee Yong v Letchumanan* [1980] AC 331 (PC) at 337.

⁴ *Mitre 10 (New Zealand) Ltd v Benchmark Building Supplies Ltd* [2003] 3 NZLR 186 (HC) at [79].

⁵ *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90, (2013) 13 TCLR 531 at [12]–[13].

- 10 The operation of an ambulance service for sick or injured persons.
- 11 The operation of—
 - (a) a hospital care institution within the meaning of section 58(4) of the Health and Disability Services (Safety) Act 2001; or
 - (b) a service necessary for the operation of such an institution.
- ...
- 16 The provision of Police emergency response services as defined in clause 3 of Schedule 1C.

[19] Counsel for the plaintiff submitted that because these employees are employed in an essential service, they are required, under s 90(3)(a)(i) of the Act, to give 14 days' notice of strike action.

[20] It is common ground that only eight days' notice was given of the strike action. The plaintiff does not take any issue with other aspects of the strike notice other than the notice period itself. It says the period of notice is crucial to enable such things as agreement on contingency plans under the Code and mediation as contemplated by s 92 of the Act.

[21] Mr Cranney, counsel for the defendants, argued that the services provided by the plaintiff in relation to those roles were not essential services for the purposes of sch 1 pt A of the Act. He submitted that even if some were essential services (which was denied), there was insufficient pleading and information provided by the plaintiff. He said the argument in relation to these roles coming within cls 10, 11 and 16 of sch 1 was weak and, while accepting that the threshold is only that of arguable case, that threshold was not met.

[22] The plaintiff provided position descriptions for each of the three roles, and it is necessary to assess those descriptions against the essential services listed in sch 1 of the Act.

[23] In relation to the Teletriage nurses and paramedics, their position description refers to them working with St John and Wellington Free Ambulance, triaging and deciding the needs of service users and, in some cases, despatching an ambulance or referring them to an emergency department. I consider there is a strong arguable case that they come within cl 10 and possibly cl 11 of sch 1.

[24] In relation to EMHR clinicians, they are responsible for assisting service users who contact the service from police and ambulance services and after-hours services for district health boards (as they then were). They undertake mental health triage and then follow local processes dependent on their assessment of clinical risk. Where appropriate, they ensure that urgent cases are identified and handled appropriately. Accordingly, there is a strong arguable case that they are an essential service under cls 10 and 11 of sch 1.

[25] Counsel for the plaintiff argued that the roles also come within the definition of Police emergency response services. However, given the definition of the provision of these services as defined in sch 1C cl 3 of the Act, I was not drawn to the argument that any of these roles fit within sch 1 cl 16. Mr Harrop properly conceded that the submission on this point was not strong.

[26] Accordingly, I am satisfied that there is a strong argument that the employees in the three roles in question are employed in an essential service. Fourteen days' notice was not provided pursuant to s 90(3)(a)(i) of the Act. On that basis, there is an arguable case that the strike in relation to those particular positions is unlawful.

The balance of convenience

[27] The plaintiff submits that the balance of convenience favours the granting of interim orders because if the injunctions are not granted, the plaintiff will face difficulty in managing the provision of essential services.

[28] As already stated above, by the time this matter came before the Court at 12.30 pm, the parties had agreed an appropriate contingency plan in relation to the provision of life preserving services in relation to both the Teletriage and the EMHR roles for the period of the strike.

[29] Despite this, the plaintiff submits that the balance of convenience favours the granting of interim orders because there is public interest in parties having 14 days' notice in order to not only reach agreements in relation to life preserving services, but

also to attend mediation as required by s 92 of the Act.⁶ Mr Harrop says that while the plaintiff accepts that the employees have a right to strike, the requirement to attend mediation before doing so is essential to the public interest. He submits that the lack of notice provided by the defendants has meant that has not taken place.

[30] On the other hand, Mr Cranney, for the defendants, submits that to prevent the workers striking would operate as a summary judgment in relation to these employees and that the proposed strike action is responsible, dignified, moderate, measured, proportionate, appropriate and entirely just. He says that any inconvenience and safety concerns have been addressed by the agreement reached in relation to life preserving services. He further submits that, with the plaintiff having left its application so late, it would be unjust to impose the remedy of what would essentially be a permanent injunction for those workers.

[31] It is correct that the plaintiff has left it very late in the day to assert essential service status and to make this application. It did not approach the unions to discuss a contingency plan for the provision of life preserving services until six days after the service of the strike notice on it. While it is speculative, it is arguable that had it done so earlier, the agreements that were reached this morning may well have been reached at an earlier date.

[32] Had the plaintiff continued with its application in relation to all employees covered by the strike notices, the balance of convenience would not have operated in its favour. However, the plaintiff has refined the scope of the orders sought to workers in relation to which it is strongly arguable that they provide an essential service. While it is finely balanced, the public interest in having access to essential health services is a significant factor which points to the granting of relief.

[33] The requirements in relation to notice for strikes in essential services are mandatory. Once essential service status is established (which I have found to a strong arguable standard), s 90 restricts strikes.

⁶ I note that the parties have agreed to attend mediation and that Mediation Services have been notified.

[34] Mr Cranney pointed out that the defendants themselves did not initially consider the work of the employees to be an essential service. While that may well be the case, it does not detract from the reality that on reviewing the position descriptions which are part of the collective agreement, there is a strong argument that the workers provide an essential service. It is regrettable that the plaintiff did not treat them as such initially, but the public interest of maintaining an essential health service outweighs the inconvenience of the plaintiff's delay.

[35] Further, the impact of the injunction sought is narrow (only 34 of approximately 300 employees). There is no impact on other employees covered by the strike notice. They continue to be able to strike. This also points in the plaintiff's favour.

[36] Accordingly, the overall balance of convenience favours the plaintiff and the granting of an interim injunction.

Overall justice

[37] Standing back and considering the overall justice of the situation, I consider that it also supports the granting of the interim injunction in relation to the particular roles only, to enable the parties to attend a mediation on a date to be determined. That will provide a meaningful avenue for dealing with the issues between the parties.

Conclusion

[38] The Court's formal order was that an interim injunction be issued restraining the defendants' notified strike action for 3 pm on Friday, 15 September 2023, in relation to the roles of Emergency Teletriage paramedic, Emergency Teletriage nurse and EMHR clinician.

[39] Given the short timeframe, the parties were encouraged to confer about the form and content of the notification of the injunction to the affected individuals.

[40] Costs are reserved.

Kathryn Beck
Judge

Reasons for judgment signed at 4.15 pm on 19 September 2023