IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2023] NZEmpC 75
EMPC 175/2023

IN THE MATTER OF	an application for an injunction
AND IN THE MATTER OF	an application for an interim injunction
AND IN THE MATTER OF	an application for joinder
BETWEEN	TE WHATU ORA HEALTH NEW ZEALAND Plaintiff
AND	NEW ZEALAND NURSES ORGANISATION INCORPORATED Defendant

Hearing:	22 May 2023 (Heard at Christchurch via Audio Visual Link)
Appearances:	S Hornsby-Geluk and M Vant, counsel for plaintiff P Cranney and K Gawe, counsel for defendant
Judgment:	23 May 2023

JUDGMENT OF JUDGE K G SMITH

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[1] On 16 May 2023, the plaintiff applied for urgent interim orders to restrain a strike planned by its employees who are members of the defendant union employed at Gisborne hospital. The strike is to occur tomorrow, 24 May 2023, between 1.30 pm and 2.30 pm.

[2] The application for urgency was granted and the Court heard argument yesterday.

Preliminary issues

[3] There were two preliminary issues. The first was that the plaintiff filed two further affidavits purportedly in reply to evidence from the defendant and an issue arose about whether they were to be read. In the end potential difficulties over them and their ambit were resolved by Mx Hornsby-Geluk accepting that they should be confined to matters in reply and go no further. The affidavits were accepted and read on that basis.

[4] The second preliminary issue was about the parties to this litigation. Mr Cranney identified a problem in that the union is the only defendant and the relief claimed against it is that it be restrained from striking. It is the plaintiff's employees who are purporting to strike not the union. The criticism was that the Court is being asked to make orders affecting the rights of persons who are not parties to the litigation.

[5] Mx Hornsby-Geluk anticipated this argument because it was signalled during a directions conference. On the morning of the hearing the plaintiff filed a memorandum inviting the Court to join under s 221 of the Employment Relations Act 2000 (the Act) the nurses and care assistants named in the strike notice if the Court thought that was necessary.

[6] The memorandum stopped short of applying to join the employees and attempted to place the onus on the Court to decide who should be parties. As it happened, and perhaps in response to comments from the bench about the memorandum, during argument the plaintiff filed a formal application seeking to join the employees.

[7] The defendant was given an opportunity to respond. Mr Cranney's response was to maintain the position he raised at the outset, that the employees would not be caught by any order made against the union. His supplementary point was that it was not onerous for the plaintiff to have issued the proceedings properly because it had been provided with the list of names of the employees proposing to strike and the issue had been identified previously.

[8] Despite identifying these difficulties the Court was advised that the defendant would abide the Court's decision on the point while noting that it only needed to be addressed if the defendant does not succeed.

[9] I return to this point later.

The strike notice

[10] On 9 May 2023, the New Zealand Nurses Organisation Inc gave notice of a strike at Gisborne hospital on safety and health grounds.[1] The strike is to be a complete withdrawal of labour on 24 May 2023 between 1:30 pm and 2:30 pm that day. The strike notice names 24 nurses and care assistants on whose behalf it was given. They all work on ward 5 at the hospital.

[11] The hospital is an essential service and therefore the strike notice needed to comply s 90 of the Act. The plaintiff's application to restrain the strike does not question the notice's compliance with the Act. The case turns entirely on whether the employees proposing to strike are able to do so on safety and health grounds as provided for by the Act.

The work concerns

[12] Ward 5 at Gisborne hospital admits and treats patients needing acute care. The reason for the strike notice arises because of working conditions in the ward.

[13] On 31 October 2022, a health and safety representative on ward 5, Carole Wallis, wrote to hospital management with concerns about an allegedly unsafe working environment on the ward. Attached to her letter was a formal health and safety recommendation under the Health and Safety at Work Act 2015 (HSWA).[2]

[14] The recommendation listed details of the safety and health matters it raised. Stated briefly, it identified staff shortages leading to nurses working extra shifts, long

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1 The defendant was incorrectly named as the New Zealand Nurses Union in the pleadings but nothing turns on that.

2 Under sch 2, pt 1, cl (a) and (f).

shifts of 12 hours, stress, fatigue, care rationing (which I assume means making selective decisions about providing health care across patients admitted to the ward), concerns over patient safety and work-related pressures.

[15] Five recommendations were made to the hospital relating to advertising for staff, improving the timing of providing contracts for job applicants, working smarter to reduce workloads and to free up beds, patients being admitted to their "domicile" ward and reducing the number of beds from 25 to 20 to match staffing levels.

[16] Ms Wallis' letter was accompanied by separate endorsement by all or most of the nurses working on ward 5. That material included forms completed by some staff identifying limits of safe practice and concerns.

[17] The hospital responded on 4 November 2022. It acknowledged instances of short staffing on the ward and responded to the areas of concern raised by Ms Wallis. Of the recommendations made all were addressed in some manner except for reducing bed numbers in the ward. The hospital did not agree that reducing the bed count from 25 to 20 would be a solution but, instead, considered that would spread the problem elsewhere in the hospital. The response was that it was better to continue to recruit, deploy staff in accordance with monitoring and resource allocation systems and to develop the role of support assistants.

[18] Kathryn Mather, the Interim Group Manager Medical and Surgical Services, explained how the hospital was managing staff concerns about ward 5. The processes described were said to be established to manage the risk of short staffing on the ward on an ongoing and "day-to-day" basis. Several tools were mentioned:

(a) Variance response management. This is a set of agreed tools and processes used when there is a mismatch between patient demand and care hours. Patient demand considers the acuity and volumes of patient's care hours and considers staff numbers, skill mix and bed availability. Decisions can be made across the whole hospital in real time and staff can be allocated to where the need is greatest.

(b) Using a variance indicator score, which was described as a set of electronic questions (indicators) and colours that enable ward/unit staff to display and communicate their current status hospital wide—informing acuity-based resource allocation. This system enables staff to provide weighted scoring on issues that, in their professional judgment, affect their ability to provide appropriate care such as care rationing, staff and skill mix and missed breaks.

(c) A daily operations meeting to discuss needs across all areas and provide patient and staff coordination for inpatient areas and the emergency department. This meeting considers staffing levels, patient numbers, and expected admissions and discharges including patient retrievals or transfers and service reductions are discussed.

(d) Electronic tools assisting with determining staffing demand across the hospital, one of them being "Hospital At A Glance". This tool uses traffic light colours to show at a glance which areas of the hospital are well staffed and where additional resource is required. It updates regularly and was described as providing real time information regarding admissions, discharges, staffing numbers, sick leave and the impact this has on the capacity available to meet patient care requirements. The hospital also uses hours per patient day data as a standardised tool measuring the total care requirements for patients based on acuity and diagnosis-related groups. The evidence was that this tool is available to allow staff to be reallocated between wards.

(e) Additional assistant staff have been recruited and are deployed to support qualified nursing staff with recruitment continuing as part of a strategy to bring people into the organisation.

(f) Recruiting for qualified nursing staff is ongoing and was described as a high priority. An agreement has recently been negotiated with an agency to provide locum nurses and to assist with recruitment.

(g) Regular "check-ins" occur on ward 5 where senior staff check in on and speak to staff in the ward.

[19] Despite the description of these management-related tools and steps taken the hospital acknowledged it has staff shortages on ward 5 and elsewhere. The hospital accepted that every day it has to make calls about which area has the greatest need to support patient care. The hospital accepts it needs more nurses and is actively recruiting for them but the evidence was that filling the vacancies takes time. Nevertheless, the hospital considers that its steps, and the approach it is taking to deal with the problems, ensures that it manages demand with capacity as best it can and that staff and patients remain safe while further resource is being sought.

[20] On 20 December 2022, Ms Wallis issued a provisional improvement notice under s 69 of the HSWA to the hospital in relation to ward 5. The improvement notice was accompanied by supporting material completed by nursing staff working on the ward. The purpose of the supporting material was to identify the impacts of the staff shortage.

[21] The hospital's response was to request that the provisional improvement notice be reviewed by WorkSafe. That request for a review was made on 23 December 2022.[3] The review has not been completed, but I was advised at the hearing that WorkSafe was meeting with the plaintiff on 22 May 2023.

[22] In the time since the provisional improvement notice was issued the bed numbers in ward 5 have not reduced. It remains an outstanding issue said to cause health and safety concerns for staff and patients justifying the strike notice being given.[4]

Life preserving services

[23] Schedule 1B to the Act is a Code of Good Faith for the Public Health Sector. It applies to the plaintiff and its employees and unions whose members are its

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3 Under HSWA, s 79.

4 And since the hearing I have been advised that WorkSafe's review will be completed this week.

employees. Under the code employers during industrial action are to provide for patient safety by ensuring that life preserving services are available to prevent a serious threat to life or permanent disability.

[24] After the strike notice was issued the plaintiff and defendant entered into an agreement for union members to supply life preserving services during the strike. That agreement provides for a minimum number of nurses to be available on call within ten minutes if required.

Interim injunction principles

[25] The principles to apply to this application are not disputed. They were authoritatively stated in *NZ Tax Refunds Ltd v Brooks Homes Ltd* where the Court of Appeal said:[5]

> The approach to an application for an interim injunction is well established. The applicant must first establish that there is a serious question to be tried or, put another way, that the claim is not vexatious or frivolous. Next, the balance of convenience must be considered. This requires consideration of the impact on the parties of the granting of, and the refusal to grant, an order. Finally, an assessment of the overall justice of the position is required as a check.

[26] Subsequently the Supreme Court, in reviewing the litigation, stated that the merits of the case (in so far as they can ascertained at the interim injunction stage) have been seen as relevant to the balance of convenience and the overall justice of the case.[6]

[27] In *Tasman Pulp and Paper Co Ltd v New Zealand (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 is essentially a summary judgment, the relative strengths and weaknesses of the parties' cases are more relevant to the overall justice of the case.[7]

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

6 *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60 at [6].

7 *Tasman Pulp and Paper Co Ltd v New Zealand (with exceptions) Shipwrights etc Union* [1991] 1 ERNZ 886 (LC) at 898.

[28] I proceed on the basis of those principles.

A serious question?

[29] Mx Hornsby-Geluk submitted that there is a strongly arguable case that the intended strike is unlawful because the employees proposing to withdraw their labour do not have reasonable grounds for believing that the strike is justified on the grounds of safety or health as required under s 84 of the Act. Section 84 reads:

> **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.

[30] Mx Hornsby-Geluk relied on *Service and Food Workers Union Nga Ringa Tota Inc v Spotless Services (NZ) Ltd*.[8] In that decision the Court held that two separate tests must be established to cause a strike to be lawful under s 84. In that case s 84 was important to the defendant's lockout notice but it was common ground that the same principles apply to strikes. The section was discussed as follows:[9]

> Section 84 provides exceptions to the otherwise more complex and technical requirements of legality of a lockout set out in ss83 and 86. In summary, s84 permits unions and employees to participate in a strike, and employers to participate in a lockout, if the relevant persons have reasonable grounds for believing that the strike or lockout is justified on the grounds of safety or health. Two separate tests must be established to cause a strike or lockout to be lawful under s84. In reverse order to that in which they appear in the section, but sequentially, first, the person or persons locking out or striking must have a belief that the strike or lockout is justified on the grounds of safety or health. The second requirement is that the person has reasonable grounds to support that belief. So, if challenged, an intending striker or locker-out must establish a reasonably founded belief that by striking or locking out, risks to safety or health will be eliminated or at least lessened or, arguably, that safety or health will be enhanced by striking or locking out. As has been noted previously in cases affecting it, s84 does not define the class of persons whose safety or health may be saved or improved by the strike or lockout action. So, for example, in the hospital context, as this case is, questions of patient safety or health have been held to be covered by s84 even where the safety or health of the staff on strike has been in issue. Arguably, also, *"safety"* at least may extend beyond the safety of animate persons and include the safety of inanimate objects or of systems….

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8 *Service and Food Workers Union Nga Ringa Tota Inc v Spotless Services (NZ) Ltd* [2007] ERNZ 479 (EmpC).

9 At [15].

(emphasis original)

[31] That test was approved of by the Court of Appeal.[10]

[32] Counsel advanced the proposition that justification under s 84 requires an immediate and significant risk.[11] A further submission was that it must be established by the employees that the risks to safety or health to which the anticipated strike relates will be eliminated or lessened by the strike action or, alternatively, that safety or health will be enhanced. On this analysis a direct nexus was needed between the risk and the action taken.

[33] This submission was developed by reference to several cases in which the Court held that strike action is an extreme step and that the justification under s 84 requires "an immediate and significant risk". Mx Hornsby-Geluk referred to *Lyttelton Port Company Ltd v Rail and Maritime Transport Union Inc*.[12] In that case the Court had observed that the assessment made by employees must be real and not far-fetched and must be sufficiently serious as to justify participation in a strike.

[34] In *Lyttelton Port Company* the Court had considered s 28A(5) of the now repealed Health and Safety in Employment Act 1992. The Court at that time considered the section of the Health and Safety in Employment Act did not authorise an employee to refuse to do work that, because of its nature, inherently or usually carried an understood risk to the worker's health and safety, unless that risk had materially increased beyond the understood risk.[13]

[35] I do not agree that the test in s 84 requires an assessment of an immediate and significant risk. In *Spotless Services (NZ) Ltd* the Court of Appeal made obiter comments about s 84 that are apposite.

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10 *Spotless Services (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2008] NZCA 580, [2008] ERNZ 609 at [46].

11 Derived from *Tranz Rail Ltd v Rosson* WC 30/03 30 September 2003 (EmpC) at [22]–[23].

12 *Lyttelton Port Company Ltd v Rail and Maritime Transport Union Inc* [2014] NZEmpC 236, [2014] ERNZ 800. Other cases mentioned to support the proposition were: *Lyttelton Port Company Ltd v The Rail and Maritime Transport Union Inc* [2016] NZEmpC 179 at [31]; and *Port of Napier Ltd v Rail and Maritime Transport Union Inc* [2007] ERNZ 826 (EmpC).

13 *Lyttelton Port Company Ltd v Rail and Maritime Transport Union Inc* [2014] NZEmpC 236, above n 12, at [32].

[36] The Court of Appeal acknowledged that the burden of proof under s 84 is on the party asserting justification and thus the lawfulness of the proposed action.[14] The Court endorsed the approach generally taken by this Court that requires it to be shown first that the person locking out or striking believes that the strike or lockout is justified on the grounds of safety or health. The second requirement is that the person must establish a reasonably founded belief that by striking or locking out, risks to safety or health will be eliminated or least lessened or, arguably, that safety or health will be enhanced by striking or locking out.[15]

[37] The Court of Appeal observed that s 84 does not define the class of persons whose safety or health may be saved or improved by this action. It is not only the safety of the employees themselves which may be pointed to as justifying a strike. It approved *Counties Manukau DHB v PSA* and the proposition that, arguably, safety at least may extend beyond the safety of animate persons and include the safety of inanimate objects or of systems.[16]

[38] The Court of Appeal did not refer to an imminent risk or danger in its assessment of s 84. For that matter, the comments in *Lyttelton Port Company* did not endorse in the way submitted the reference to immediate and significant risk.[17] In that case the Court stated that the focus must be on s 84 which specifically provides for a health and safety justification to strike.[18] It was in the context of evaluating the sufficiency of the evidence that the view was expressed that the evidence did not establish there would be an immediate and significant risk to the union's members in order to take the step of striking.

[39] To interpret safety and health in s 84 as argued for by counsel would add a gloss to the section elevating the significance of the concern in some way involving concepts like immediacy of harm. What is required under this section is reasonable

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14 *Spotless Services (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc,* above n 10, at [46] and s 85(2).

15 At [46].

16 *Counties Manukau District Health Board v Public Service Association* [2002] 2 ERNZ (EmpC) 968.

17 *Lyttelton Port Company Ltd v The Rail and Maritime Transport Union Inc* [2016] NZEmpC 179, above n 12, at [31].

18 At [26].

grounds for believing that the strike is justified on the grounds of safety or health, not that there are grounds for believing that there is an imminent threat to a person's health or safety or anything similar.

[40] The plaintiff did not argue that the defendant's position failed to satisfy the first ground of the test from *Spotless Services (NZ) Ltd*.[19] Its argument turned on the second part of the test, namely that the persons proposing to strike have reasonable grounds to support that belief.

[41] What is noticeable about the evidence is that the plaintiff acknowledges staffing problems about ward 5 (and the hospital more widely) but did not seriously question the employees' concerns for themselves or patients beyond pointing to its management systems designed to try to respond to staff shortages and the obvious pressures that it creates.

[42] The plaintiff considers its work environment is safe but there was no discussion about whether the risks stated by the nurses are mistaken or overstated.

[43] A brief comment was made on the plaintiff's behalf in evidence in reply to the effect that the situation in the ward has been reasonably constant for the past six months, coupled with comments that April was challenging because of school holidays, Easter and Anzac Day and some staff choosing to work on a casual basis over those periods. Responsibly, there was an acknowledgement that staff have felt additional pressure during April for those reasons.

[44] The evidence from the employees painted a different picture. While the hospital took the view that issues arose in October 2022, when it received the recommendation from Ms Wallis, problems were identified as early as August that year and possibly earlier. In August attention was drawn to an inability to provide time critical care and assessments, care rationing was occurring, care assessments were unduly delayed, that the employees' skill mix was unsuitable, patient dignity was compromised in that a patient's hygiene was not addressed in a timely way, meal

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[19] At [30] above.

breaks were not taken, and there was a deteriorating patient requiring an urgent transfer.

[45] In September last year there was a clinical emergency not manageable with existing employees and support and there was an inability to provide timely care assessments, to monitor a patient with behaviour of concern as he required close constant supervision, care rationing, care and assessments unduly delayed and insufficient essential equipment and supplies. Again one of the criticisms raised was that a patient's dignity was compromised because his personal care and hygiene were not attended to in a timely manner, and there was a repetition of concerns about the employees not being able to take meal breaks and/or rest breaks.

[46] That pattern was repeated in other information brought to the hospital's attention and is reflected in the evidence given by the employees.

[47] Christine Warrander, a registered nurse who has worked on this ward for eight years, referred to daily reports listing problems of the sort I have just described. She produced as examples reports from 19 August, 17 September and 10 October which were described as typical days. That evidence described staff shortages, staff being required to work extra shifts, 12-hour shifts causing stress and fatigue, care rationing due to heavy workloads, inappropriate admissions and overflow work from other wards.

[48] From 19 August 2022 the afternoon shift operated with the patients variance indicator system in adverse colour status (in other words the management tool being used by the hospital had not alleviated the problem), care had been reduced to the provision of life preserving services on that day which was agreed by the parties to be not optimal.

[49] Much the same set of circumstances was repeated in Ms Warrander's evidence about what happened on 17 September 2022 on the morning shift.

[50] Ms Warrander describes staff shortages as worsening since December 2022 when the improvement notice was issued. She went onto describe emotional and

mental stress, coming to work anxious about how short staffed the hospital is, her concerns that the pressure of work means she may make a mistake in patient care because she was "beyond exhausted, both physically and mentally". She is not sleeping properly often waking at night going over the previous shift attempting to recall whether all medication and treatment had been given as needed.

[51] Ms Warrander's evidence was that she felt completely burnt out and exhausted but did not feel that she could have time off as that was just going to add to the stress of other staff.

[52] A common theme throughout her evidence was staff being unable to take breaks during shift time including toilet breaks, physical exhaustion, stress, anxiety over not properly caring for patients and concerns about taking steps that might further compromise their health, and to generally being ground down.

[53] The theme was repeated by other nurses. One nurse takes medication to help with sleep. Another has got to the point of resigning arising from the concerns she identified.

[54] Carmen West has been a registered nurse since 1986. She has worked on ward 5 since December 2018. She said, without being challenged, that every day the ward is short between two and three nurses but is full to capacity with high acuity, complex medical patients/palliative care patients and COVID patients. She described having little reprieve from the staffing problems on each shift even with the assistance of nurses sent from elsewhere to help manage the workload. She said those nurses sent to assist did not take on a patient load which leaves the care to be managed by two to three registered nurses having between six and 12 patients each.

[55] Ms West referred to trying not to make mistakes but always feeling unsafe about that. She no longer considers the acuity of a patient when delegating workload because there is no point. She described each shift being actively care-rationed, fearing making a pressure-related mistake, and not being supported. Very starkly, Ms West referred to saying to her husband when going home "no one died today, I don't

think I made a mistake". She described a lot of her care being more superficial than it should be.

[56] Coral Clark is an enrolled nurse who has been on ward 5 for 25 years. She described the last year as being the most tiring of her career causing her to stop on many occasions and to reconsider her position. High stress was described and lately it has been common for her to think that a patient's decline in health has been her fault for not picking things up earlier because she was too busy to notice. Like several of the other nurses, Ms Clark referred to not even being able to take toilet breaks or proper meal breaks during her shift because of the demands placed on her. Long shifts, including those of 12 hours, seemed to be common.

[57] Accompanying evidence from Ms Warrander were two letters from house surgeons of the hospital also drawing attention to concerns about staff shortages, the very stressful working conditions, and concerns about the quality of care as well as for the nurses.

[58] That evidence goes a considerable distance towards establishing safety and health grounds under s 84. There is, of course, an unusual aspect to this threatened strike. Other cases have involved a withdrawal of labour until the risk is reduced or removed before work resumes. In this case the employees propose to withdraw their labour for one hour and return to the same work they consider to be unsafe and unhealthy for themselves and patients. When questioned Mr Cranney's response was that the plaintiff is benefitting from the professional sense of duty the employees have to care for patients in an unsatisfactory situation.

[59] I do not think it is appropriate to interpret s 84 in a way that would prevent employees from withdrawing their labour on the grounds of concerns about health and safety simply because immediate and lasting change cannot be affected promptly as a result of the industrial action. Taking such an approach would deprive parties such as the plaintiff's employees of an opportunity to draw attention to unsafe and unhealthy conditions.

[60] Ranged against that assessment of the evidence is the fact that steps have been taken by the hospital to address some of the concerns raised as evident from its agreement to four of the five recommendations proposed and its attempts to monitor and manage the workload. It has not ignored the demand to reduce bed numbers although it has taken the view that it is not able to be implemented; that much is evident in asking WorkSafe to review the provision improvement notice.

[61] Against that background there is potential to argue that the proposed strike is designed to force the hospital's hand and to circumvent a review of the need for reduced bedding through withdrawing labour.

[62] However, the best that might be said of the plaintiff's argument that the employees cannot rely on s 84 is that it is weak.

Balance of convenience

[63] Balance of convenience arguments were said to favour making an order. In summary the factors identified by the plaintiff were:

(a) The strongly arguable case the strike is unlawful.

(b) The potential for serious harm to the plaintiff's staff, patients their families and community.

(c) The nature of the strike, being for an hour in the Gisborne district meaning the plaintiff could not justify moving patients or closing wards in preparation or the clinical risk associated with that action.

(d) Taking steps to close wards or move patients for the duration of the strike has the potential to do more harm than good.

(e) Other districts could not easily provide resources or support given the short duration of the strike.

(f) Staff, and other resources, are diverted for the 14-day period leading up to the strike for contingency planning.

(g) While there is a Life Preserving Services agreement the level of care is undesirable, and the agreed services are less than the hospital wanted.

(h) Other staff required to assist in the ward during the strike do not have the required training or skill to work in this particular department causing potential difficulties.

(i) Drawing staff away from other work runs the risk of a "snowball" effect.

(j) The timing of the strike is one when high pressure might be expected for admissions and discharge of patients.

(k) Deferring admissions or discharge of patients will create backlogs elsewhere.

(l) There will be significant risk to the applicant's staff and the wider health sector in the form of insufficient time in the 14-day lead in to the strike to learn the specialist skills needed for this ward; how that gives rise to a health issue was not stated.

(m) The need to work additional hours for those not on strike.

(n) The inability of private providers to meet patient demand.

(o) General service delivery, contingency planning and production planning within the health sector is under pressure already from the responsibilities that have been assigned to many of the same staff for managing the ongoing implications of Cyclone Gabrielle and COVID-19.

[64] Rounding out these submissions it was argued that if the strike is restrained the impact on the employees on whose behalf the strike notice was given would be minimal. Attention was specifically drawn to the hospital's participation in the provisional improvement notice process being reviewed by WorkSafe as a way to identify in good faith how to progress to a resolution of the current impasse between the Hospital and employees.

[65] Mr Cranney submitted that the balance of convenience favoured declining the application because:

(a) The argument that the strike was unlawful some was at best very weak.

(b) The strike is a minor action of one hour by a very small portion of the plaintiff's workforce.

(c) The strike is responsible, dignified, moderate, measured, proportionate, appropriate and "entirely just".

(d) The matters raised by the strike are serious and genuine and have caused manifest harm to the health, wellbeing and dignity of the employees.

(e) The evidence from the nurses and care providers is consistent and not seriously contested.

(f) There has been ample notice of the intended strike, as required by s 90, and more than enough time to make necessary preparations for the strike.

(g) There is an inequality of power between the employees and the plaintiff and those heavily directly effected in an ongoing way by the health and safety issues.

[66] I start the assessment of the balance of convenience by considering the decision already made about the weakly arguable case the plaintiff has presented. That is an important factor favouring the defendant.

[67] The concerns raised about serious harm to patients identified by Ms Vant in her submissions represents only part of that evaluation. The proposed strike encompasses safety and health factors for the employees concerned but a significant part of the evidence presented by them was deep professional concern about the risks posed to patients by understaffing and over work. While Ms Vant identified that matter as a factor favouring the plaintiff, it equally is able to be seen as supporting the defendant's position (and that of the employees).

[68] Just as equally, the short duration of the strike can support the employees' position. Its shortness, covered by the life preserving services agreement, means that while there will be inconvenience it is not of the manifest sort that was described. The fact that patients cannot be moved in that time does not reflect in any immediate concern that the provision of life preserving services would in some way fall so far below what could be reasonably be expected that it should count against the strike. The reality is that patients will be able to be attended to under the agreement and there are other professional staff in the hospital.

[69] I am also not persuaded that there is much weight in the argument that others in the hospital will be diverted from their tasks to assist in the ward during the one-hour strike. That is effectively what is happening now as services are moved to meet demand and the duration of the strike is modest. I accept Mr Cranney's submission that the hospital has had 14 days to make contingency plans.

[70] It is common ground that the life preserving services agreement does not meet or match preferred levels of clinical care. However, the statutory requirement to enter into such an agreement has been adhered to and the hospital signed it. Despite the hospital's reservations now expressed about it, there is no basis to hold that the agreement is inadequate influencing the balance of convenience.

[71] I have reached the conclusion that although there is an element of symbolism in the employees' decision to withdraw their labour, because there will not be an immediate fix to the problems, the balance of convenience favours them.

Overall interests of justice

[72] Stepping back and weighing up all of these factors as a cross-check, I am not satisfied that it is in the overall interests of justice to grant the application. That conclusion means it is not necessary to decide whether the employees ought to be joined to this proceeding.

Outcome

[73] The application for interim orders to restrain the anticipated strike on 24 May 2023 is unsuccessful and it is dismissed.

[74] Costs are reserved. If they cannot be agreed memoranda may be filed.

K G Smith
Judge

Judgment signed at 4.45 pm on 23 May 2023