Lightning strike action, 22 January 2019

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Following a recent uptick in strike action and proposed strike action across the country, the Employment Court has found that 30 minutes' notice was a lawful amount of time for the New Zealand Public Service Association (PSA) to give the Ministry of Justice (MOJ) before it commenced "lightning strikes": *Secretary for Justice* v *New Zealand Public Service Association* [2018] NZEmpC 129. In a decision that may be regarded as unhelpful to employers, the Employment Court confirmed that (outside of essential services where the notice period is either 14 or three days) any amount of notice could be lawful provided that each notice satisfied the relevant requirements of s 86A of the Employment Relations Act 2000 (Act).

The case was heard in response to an interlocutory application lodged by the MOJ, which sought a Court order requiring the PSA to give at least 48 hours' notice of such lightning strikes.

Background to strike action

At the time the interlocutory application was heard, the MOJ and PSA were bargaining for the renewal of two collective agreements which had expired on 30 June 2018. A bargaining process agreement was signed which allowed parties to request mediation. However, mediation was not attempted until 29 October 2018.

During the negotiations, Court Security Officers (CSO) had been engaged in various forms of partial strike action, and also lightning strikes. This type of strike amounted to a total withdrawal of labour for one or two hours which had the effect of forcing the evacuation of the general public and Ministry staff from District Courts across Auckland, North Auckland and Christchurch whilst the strike was in effect. The union had given 30 minutes' notice of the strike action. During the 30 minutes' notice, the CSOs in conjunction with other Court staff assisted with the closure of the buildings and the removal of the public.

In response, the MOJ filed a notice of urgent application for various interim injunctions against the PSA.

The orders sought were to restrain the PSA from procuring or encouraging unlawful strike action by CSOs against the MOJ during the bargaining process and to restrain the PSA from encouraging further lightning strikes without providing reasonable notice (being 48 hours' notice, rather than just 30 minutes).

The MOJ argued that receiving only 30 minutes of notice severely restricted its ability to respond to the industrial action appropriately and to make alternative arrangements to keep the courts open.

The MOJ also viewed these forced evacuations of the Courts as a health and safety risk for Ministry employees and the public. In particular, the MOJ submitted that the result of evacuating members of the

public from District Court proceedings meant that people could come into close contact with rival gang members and estranged family.

It also argued that the short notice periods meant that there was no opportunity for the parties to resolve their differences through mediation as required by the bargaining process agreement.

The Court's decision

The Court's decision concerned whether it should issue an interim injunction to stop the strike action. Therefore, the Court had to consider three factors. First, whether there was a seriously arguable case to be tried that the strike action was unlawful. If there is a seriously arguable case of unlawful strike action by the unions and its members, the Court must consider where the balance of convenience lies (that is, whether the risk of doing an injustice to the MOJ by refusing the injunction outweighs the risk of doing an injustice to the union by granting it). Lastly, the Court considers the interests of justice more generally, weighing all relevant factors before deciding whether to issue an injunction.

Legal requirements for notice

The Act sets out the legal obligations on unions when issuing strike notices. In relation to strikes in non-essential services, the Act provides:

> **86 Unlawful Strikes or Lockouts**
>
> (1) Participation in a strike or lockout is unlawful if the strike or lockout —
>
> (ba) occurs in a situation where, —
>
> (i) In the case of a strike, the employee has failed to comply with the notice requirements in section 86A or 93, as the case may be:
>
> …
>
> **86A Notice of Strike**
>
> (1) No employees may strike —
>
> (a) unless participation in the strike is lawful under section 83 or 84; and
> (b) without having given to the employees' employer and to the chief executive notice of the employees' intention to strike; ....

As a result, striking employees must give notice through their union to the employer of their intention to strike prior to the strike taking place. The question in this case centred on how much notice the employees had to give.

The right to strike

With respect to the right to strike the Court said:

> [24] The rights to strike and lockout, so long as they meet the requirements of the statutory provisions, are well enshrined in employment law and protected by the provisions of the Act. The rights to strike and lock out are part of ensuring a balance to the relative negotiating positions of the parties in industrial bargaining. Any step to reduce their effectiveness is not to be taken unless there are sound principled reasons for doing so.

It was in this context that the Court considered whether notice of 48 hours as claimed by the MOJ was required.

The Court examined the health and safety concerns of the MOJ and found them to be "speculative and overstated". The Court noted the evidence provided by the MOJ did not point to any of the possible consequences of the strike action which might endanger public safety as actually having occurred.

Notably, industrial action had been taking place for over a month before the application was made.

The Court held at [23]:

> I do not consider that the inability of the plaintiff to consider its response to make appropriate arrangements to keep the affected courts open is a valid argument that the strikes by the CSOs are unlawful. The whole purpose of the strike action, which is common in other cases as well, is to cause such inconvenience and it is a valid bargaining tool where carried out in accordance with the statutory requirements.

No reasonable or adequate notice required

In terms of the requirement under s 86A for notice before a strike commences, the Court considered that s 86A of the Act did not specify the period of notice required, nor did it require reasonable or adequate notice. Further, if reasonable notice were required then this would cause uncertainty and lead to applications being made to the Court in almost every case to stop a strike.

As the MOJ's application for an interim injunction failed to demonstrate that there was an arguable case, there was no requirement for the Court to assess the balance of convenience. But the Court noted that if there was an arguable case at all, it would have been very weak. In those circumstances, the Court would not lightly set aside the employees' right to strike. The Court noted at [31]:

> To require the defendant [union] and its members to give 48 hours' notice, which is two days, would negate the effectiveness of the actions it is presently taking and reduce the strike action to being merely symbolic.

Similarly, the interests of justice also favoured the union. The Court dismissed the MOJ's application.

Conclusion

In light of this decision, employers cannot assume that they will receive abundant notice from the union before a strike commences. This decision re-affirms that the Act only requires notice before a strike commences but does not specify a time period for notice or that the notice be reasonable. While notice must be given to the employer, there is no requirement to make the employer's life easy by giving plenty of warning. Indeed, the Court has recognised in this case that giving such a warning would make the strike much less effective. Therefore, it is likely that unions will continue to give short notice of strike action as a legitimate tactic to inconvenience employers and improve their bargaining position.

As such, employers who are in bargaining for a collective agreement need to be planning practical responses to lightning strikes on short notice, with a view to minimising disruption as much as possible.