Unique “health and safety” strike in hospital upheld by Employment Court, 23 June 2023

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Strikes most commonly relate to bargaining for a collective agreement. However, the Employment Relations Act 2000 (the Act) also provides that strikes are lawful where the striking employees have reasonable grounds for believing that the strike is justified on the grounds of safety or health. Such “health and safety” strikes are comparatively rare.

In a recent judgment, the Employment Court considered an application by Te Whatu Ora Health New Zealand (Te Whatu Ora) for urgent interim orders to restrain an intended “health and safety” strike by nurses and care assistants at Gisborne hospital: *Te Whatu Ora Health New Zealand* v *New Zealand Nurses Organisation Incorporated* [2023] NZEmpC 75. The intended strike itself was unique in that employees planned to withdraw their labour from working conditions they believed were unsafe for a total of 1 hour, and then return to those exact same working conditions.

The issues in this case did not arise from any question of the strike notice’s compliance with the Employment Relations Act. Rather, the issues specifically concerned whether the employees intending to strike in the proposed way were lawfully able to do so on health and safety grounds.

Background to the Strike

On 9 May 2023, New Zealand Nurses Organisation Incorporated (NZNO) gave notice of a strike at Gisborne hospital on safety and health grounds. The strike notice named 24 nurses and care assistants who all worked on ward 5 at Gisborne hospital. The reasons for the strike notice arose because of the alleged working conditions in ward 5.

The background of the health and safety concerns regarding ward 5 was extensive.

In October 2022, a health and safety representative wrote to Gisborne hospital management listing concerns and recommendations about an allegedly unsafe working environment on ward 5. Those concerns included staff shortages leading to nurses working extra shifts, long shifts of 12 hours, stress, fatigue and care rationing. Among other things, the letter recommended that the bed numbers in ward 5 be reduced from 25 to 20. The letter was accompanied by a separate endorsement by all or most of the nurses working on ward 5.

In November 2022, Gisborne hospital responded. The hospital acknowledged instances of short staffing on ward 5 and replied to the concerns raised, advising that it would continue to recruit and deploy staff in accordance with monitoring and resource allocation systems, and develop the role of support assistants. The hospital also implemented several management-related tools and steps to manage the risk of short staffing on the ward, such as using a traffic light system enabling staff to display their current status hospital-wide, introducing daily operations meetings, and making recruitment for qualified nursing staff a high priority. The hospital did not agree that reducing the bed numbers in ward 5 from 25 to 20 would be a solution. In its view, the reduction could not be implemented and would just spread the problem elsewhere in the hospital.

In December 2022, the health and safety representative on ward 5 issued a provisional improvement notice under the Health and Safety at Work Act 2015 to Gisborne hospital in relation to ward 5. That improvement notice was accompanied by supporting material from nursing staff identifying the effects of the staff shortage.

Gisborne hospital requested that the provisional improvement notice be reviewed by WorkSafe. That review was still underway by the time of the Employment Court's decision.

Interim Injunction Application

The Court's starting point was the well-established principles applying to applications for an interim injunction. Under those principles, the Court may make an order for an interim injunction stopping a strike where the plaintiff (Te Whatu Ora) establishes a serious question to be tried, and where the balance of convenience is considered, and overall justice has been assessed to favour the plaintiff.

The first step was therefore whether there was a serious question to be tried, and in particular whether it was strongly arguable that the intended strike was unlawful.

Under s 84 of the Act, the lawfulness of an intended safety and health strike depends not only on whether the striking employees believe the strike is justified on the grounds of safety or health; they also need reasonable grounds to support that belief.

The Court referred to previous case law which stated that intending strikers must, if challenged, "*establish a reasonably founded belief that by striking … risks to safety or health will be eliminated or at least lessened or, arguably, that safety or health will be enhanced by striking …*". Further, s 84 "*does not define the class of persons whose safety or health may be saved or improved by the strike … So, for example, in the hospital context … questions of patient safety or health have been held to be covered by s 84 even where the safety or health of the staff on strike has been in issue.*"

Te Whatu Ora claimed there was a strongly arguable case that the strike was unlawful because the relevant employees did not have reasonable grounds for believing the strike was justified on the grounds of safety or health. Te Whatu Ora sought to argue that justification under s 84 further requires "*an immediate and significant risk*" that was not present in the circumstances.

Interpreting s 84, the Court did not accept that an assessment of "*an immediate and significant risk*" was necessary. The Court made it clear that what is required under s 84 "*is reasonable 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*".

The Court further found the evidence provided by the striking employees went "*a considerable distance towards establishing safety and health grounds under s 84* ". The Court referred to evidence of 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 … generally being ground down*".

However, the Court drew attention to one unusual aspect of the specific circumstances of the intended strike action. In typical "health and safety" strike cases, labour is withdrawn and does not resume until the safety risk is reduced or removed entirely. However, in this case, the strike notice provided that the employees would withdraw their labour for one hour, and then return to the same work they considered to be unsafe and unhealthy for themselves and patients.

Considering how s 84 applied to this unique feature of the intended strike, the Court stated that s 84 should not be interpreted in a way "that would prevent employees from withdrawing their labour on the grounds of concern 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".

The Court went on to say that, in view of the background leading up to the intended strike, it could be argued the intended strike was designed "*to force the hospital's hand and to circumvent a review of the need for reduced bedding through withdrawing labour*".

The Court held that Te Whatu Ora's case that the strike was unlawful under s 84 was only weakly arguable.

Turning to the balance of convenience, the Court noted that the short duration of the strike along with the fact that an agreement covering the provision of life-preserving services was in place supported the employees' position. Additionally, Gisborne hospital had 14 days' notice under the strike notice to make contingency plans. The Court acknowledged there was an "*element of symbolism*" to the intended strike, as there would not be an immediate fix to the safety and health problems, but ultimately considered the balance of convenience favoured the employees.

Upon finding that the overall interests of justice did not favour granting the application, the Court dismissed Te Whatu Ora's application for urgent interim orders to restrain the intended strike.

Comment

This case presents a unique example of an already uncommon form of strike action — employees striking on safety and health grounds by withdrawing labour for a short period, before returning to the same working conditions that the employees claim are unsafe.

The Court clarified that an "*immediate and significant risk*" is not a requirement for a lawful strike on grounds of safety or health. Rather, the 2 key tests are whether the striking employees have a belief that the strike is justified on the grounds of safety or health, and whether the employees have reasonable grounds to support that belief.

The decision also means that a strike on the grounds of safety or health will not be unlawful simply because it cannot result in immediate and lasting change in relation to the working conditions. In effect, a symbolic attempt to draw the employer's attention to unsafe and unhealthy working conditions can be as good a reason for the withdrawal of labour as striking until the risk is reduced or removed.

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