IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 146/10
5287815

	BETWEEN	PAUL CHIVERS and 30 OTHERS Applicants
	A N D	FOODSTUFFS SOUTH ISLAND LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Peter Cranney, Counsel for Applicants Neil McPhail, Advocate for Respondent
Investigation Meeting:	30 April 2010 at Christchurch
Determination:	15 July 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants (the applicants) are all both members of the National Distribution Union (the Union) and employees of the respondent (Foodstuffs).

[2] The Union and Foodstuffs are in negotiation for a new collective agreement. On 10, 12, 13 and 14 November 2009, Foodstuffs suspended the applicants, then deducted wages from them in respect of the period of suspensions in reliance on s.87 of the Employment Relations Act 2000.

[3] Section 87 allows an employer to suspend a worker for the duration of a strike. The Union says that, in the instant case, these purported suspensions (as the Union refers to them) are unlawful because they did not occur during the currency of a strike. They occurred either after strike action had ceased or before it commenced.

[4] The Union, through its solicitor, protested Foodstuffs' action. Foodstuffs justified its position by, inter alia, claiming that the applicants were *party to a strike* and therefore covered by the effect of s.87 of the Act.

[5] The Union resists that proposition and applies to the Authority for remedies, including arrears of wages in respect of the allegedly unlawful deductions, penalties for each of those deductions and costs.

[6] The essence of the decision that the Authority is asked to make in the present case concerns the meaning of the expression *strike* as that concept is defined by s.81 of the Act. It is Foodstuffs' position that the stop work action being undertaken by the applicants created stoppages which were indiscriminate as to both a start and a finish. In consequence it was available to it to suspend pursuant to s.87 of the Act because, in effect, the practical reality was that the applicants were striking workers within the meaning of that section, from the point at which they resolved to take this indiscriminate stop work action to the point at which they resolved to cease that indiscriminate action. It follows that, in Foodstuffs' submission, the strike starts at the point at which a resolution of the Union's members decides to take the indiscriminate action and it ceases at the point at which the same members resolve to cease that indiscriminate action.

[7] In contradiction to that, the Union says that whatever the difficulties of capturing the start and finish of strike action, it is essentially a practical issue, and whatever the resolution of the members might be, all strikes, whatever their nature, have a start and a finish that is discernible by observation and it is within the parameters of that start and finish that it is available to an employer to suspend in terms of s.87 of the Act and not otherwise. In essence, the Union says that the start and finish of a strike is a discernible phenomenon which is able to be assessed by appropriate observation.

Issues

[8] It will be useful for the Authority to traverse the evidence that it heard on this matter which essentially is not contested but which in one particular respect anyway, may help to explain why Foodstuffs formed the view that it did.

[9] Next, the Authority needs to consider the law, including the statutory framework provided by the Employment Relations Act 2000.

The evidence

[10] In preparation for the hearing, an agreed statement of facts was filed which helpfully traverses the factual matrix from the point at which the Union made stop work resolutions until the suspensions were lifted by Foodstuffs on 14 November 2009. That agreed statement of facts identifies that, at stop work meetings held at the end of July 2009, a resolution was put to members of the Union and duly carried which provided for strike action to take place for one hour at the end of the day shift and one hour at the beginning of the afternoon shift, the site delegates to decide on which day or days this strike action would take place.

[11] The essence of this resolution was that workers on day shift gave up their work (and therefore their pay) for the last hour of their scheduled shift, and workers on the afternoon shift (who commenced immediately after day shift) gave up the first hour of their working shift. In consequence, the Union felt that the effect of this proposed stoppage would have the maximum effect on the employer in terms of inconveniencing it, but the least effect on the members because, in effect, the impost of the stoppage would be shared by two shift groups, 50% each in effect. The Union also felt that allowing the site delegates to determine what day or days a stoppage would take place on would also add to the benefit to be gained from the stoppage because of the element of surprise.

[12] It was this package that the Union members accepted, and it was this package that was in place when Foodstuffs elected to suspend the applicants in November 2009. However, evidence from Paul Watson, the South Island Secretary of the Union, was to the effect that he had generated a discussion paper earlier on which had been acquired by Foodstuffs. That discussion paper referred to a quite different stoppage proposal known to aficionados as *snappies*. Snappies are strikes which are called essentially on a random basis at the behest of site delegates acting on a general authorisation so to do from Union members in general meeting. Foodstuffs' evidence was that this concept was particularly troubling to it because it lacked any element of warning, therefore made it impossible for it to plan its business to cope, even in a limited way, with the withdrawal of labour. I am satisfied on the evidence before the Authority that Foodstuffs genuinely believed that the stoppages it was being subjected to were snappies, although they were not, and that that belief coloured Foodstuffs' response to the strike action.

[13] I am satisfied that the strike action Foodstuffs was subjected to were not snappies because, as I have already identified, the Union had resolved on a different package by the time the strikes actually took place. In particular, the strikes which actually took place could be differentiated from snappies on two bases: first, because the Union resolved the ambit of the strike action, viz one hour at the end of day shift and one hour at the beginning of afternoon shift; and second, because there was a subsequent resolution of the Union at meetings on 4 November 2009 to empower site delegates to make decisions about which days strikes would take place. However, whether the strikes, strictly speaking, are snappies or not, is neither here nor there. The law applies to snappies in exactly the same way as it applies to other forms of strike, and even if I were to have concluded that the particular nature of the stoppages in the present case were snappies, my decision would still be the same.

[14] Mr John Mullins, a senior manager with Foodstuffs, gave evidence to the Authority about Foodstuffs' process. As I intimated above, Foodstuffs thought it was dealing with snappies and that prospect was *of particular concern* to Foodstuffs precisely because of the random nature of the strike action. Foodstuffs decided that it would suspend as a response and critically Mr Mullens, in his evidence, said that Foodstuffs considered Union members would be in *an ongoing strike, even if work did not stop continuously*. The company then prepared suspension notices in anticipation of the stoppages taking place, and issued them to the applicants, on 12 November 2009. Contemporaneously with that, by a letter between Foodstuffs' representative and counsel for the Union, Foodstuffs sought an end to the strike action by a rescinding of the Union's resolutions on the subject. Although those resolutions were not rescinded, Foodstuffs lifted the suspensions because it felt *it had made its point.*

The law

[15] Foodstuffs says that the law defines *strike* very widely indeed and that the effect of human ingenuity may well be to enlarge the courses of action which the law includes within the concept of strike. In that regard, Foodstuffs relies on the Employment Court decision in *New Zealand Airline Pilots' Association IUOW v. Air New Zealand Ltd* [1991] 1 ERNZ at 1001. I am referred particularly to the dictum in that judgment as follows:

> *I cannot think of any reason why the Court should refuse to recognise as a strike concerted action of a kind that has not come before it in the past … the statutory definitions have been left deliberately wide in recognition of the almost infinite capacity for ingenuity that has been exhibited by those engaging in strikes and lockouts.*

[16] Foodstuffs says that the resolution which the Union passed amounted to a strike within the meaning of s.81 of the Act and thus triggered Foodstuffs' rights to access the suspension provisions in s.87 of the Act until the strike was ended, that is, until the resolution was rescinded.

[17] I am referred to cases which have held that where workers place a condition on their continuing in employment, such a state of affairs is *itself a refusal to work*: *Northern Road Transport Drivers' Industrial Union of Workers v. Mobil Oil New Zealand Ltd* [1980] ACJ295.

[18] Further, Foodstuffs referred me to *New Zealand Labourers' Union v. Fletcher Challenge Ltd* [1988] 1NZLR 520. That case, it is said, is authority for the proposition that, by passing their resolution, the Union members effectively announced an intention not to fully perform their employment obligations at some point in the future, but that constituted a strike and thus the employer was allowed to suspend.

[19] The Union sees matters somewhat differently. First, it puts the right to strike within the statutory framework of this country and the various international conventions to which New Zealand is a party. It argues that decided cases make clear that only the act itself counts; a conspiracy to strike for instance is no strike at all: *Sorrell v. Smith* [1925] AC 700 (HL), Lord Buckmaster at p.747 said:

> *A threat to do an act which is lawful cannot … create a cause of action whether the act threatened is to be done by many or by one.*

[20] The Union notes further that a threat to strike or a notice of an intention to strike is also not a strike. In *Heke v. Attorney-General* [1998] 1 ERNZ 593, the Court held:

> *The notice of a strike, therefore, is a notification of a future strike and not participation in a present strike or a commitment to participate in a future strike.*

[21] Reference is also made to *Bickerstaff v. Healthcare Hawke's Bay Ltd* [1996] 2 ERNZ 680 which held that the employer could not suspend a worker simply on that

worker giving notice of his intention to strike and *must wait until the strike begins before suspending anyone*.

Determination

[22] The essence of the decision required of the Authority is whether the resolution of the Union to engage in limited strike action as a matter of law constituted a strike. I conclude it does not.

[23] The Authority's reasoning is as follows:

(a) Strikes are prima facie lawful, subject particularly to the limitations on that principle expressed by s86: see for instance *Bickerstaff* pp687-688.

(b) The definition of *strike* in s81 contemplates three elements, an *act*, by a *combination,* to *withdraw labour*.

(c) The Union's resolutions of July 2009 may be properly seen as a *combination* to *withdraw labour* but cannot be seen as an *act*. All the resolutions can be seen to do is to agree to act later in time. A proper construction of the definition of strike must exclude a resolution to agree to hold a strike: *Heke* applied.

(d) In any event, it flies in the face of common sense that an employer may always have the option of treating a resolution to strike as being equivalent to the strike itself.

(e) In *NZALPA v Air New Zealand Limited,* the Employment Court was concerned with the statutory interpretation of a section in the Labour Relations Act and with the actions of officials of NZALPA. It is not, therefore, a helpful guide to the Authority in the present case, which is concerned with a resolution to do an act, not the act itself.

(f) The *Northern Drivers Union* case was concerned with a decision by drivers to observe a *black ban* on taking product from certain valves and their refusal to obey a lawful and reasonable instruction so to do. The Court concluded Mobil was right to determine the

drivers were on strike. The Court held that the black ban had *no significance in law whatsoever* and the original strike by another group of workers who imposed the black ban was itself illegal. It is plain there is a gulf between this situation and the present case, where a union passes a resolution authorizing legal strike action but are suspended outside of the factual parameters of the withdrawal of labour.

(g) The contention that the decision of the Court of Appeal in *NZ Labourers' Union v Fletcher Challenge* is of assistance in the present case is also, the Authority considers, misplaced. This was a case involving proceedings in tort brought against the union by Fletcher Challenge. The Court of Appeal heard an appeal from the High Court where Quilliam J had declined to find a strike present. In seeking to place some reliance on this decision Foodstuffs logic is faulty by drawing the analogy between the various acts of the Union and its officials and the decision simplicitor of a union to resolve to hold a legal strike in the future.

(h) It seems to me plain from the decided cases that a notice of an intention to strike (as in the present situation) is not, in itself, a strike: *Inspector of Awards v Wilsons (NZ) Portland Cement Ltd* [1986] ACJ 812; *Bickerstaff.*

[24] The Authority having determined that the applicants are entitled to relief directs that:

(a) the parties are to confer with a view to establishing the loss sustained by each of the applicants' in respect to arrears of wages because of the suspension of the applicants by Foodstuffs in November 2009, with leave reserved if necessary; and

(b) the parties are to confer on the issue of penalty and seek to reach an accommodation between them on that issue, failing which leave is reserved for the matter to come back to the Authority, in which case submissions strictly on that issue will be sought; and

(c) costs are reserved.

James Crichton
Member of the Employment Relations Authority