**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA43/2011**

**[2011] NZCA 177**

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| BETWEEN | NEW ZEALAND FIRE SERVICE COMMISSION<br>Applicant |
| AND | JEFFREY REGINALD MCCULLOCH<br>First Respondent |
| AND | BOYD GORDON RAINES<br>Second Respondent |
| AND | NEW ZEALAND PROFESSIONAL FIREFIGHTERS UNION<br>Third Respondent |

Hearing: 19 April 2011

Court: Ellen France, Randerson and Wild JJ

Counsel: G C Davenport for Applicant
P Cranney for Respondents

Judgment: 10 May 2011 at 3:30 PM

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**JUDGMENT OF THE COURT**

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**A The application to extend the time to appeal is granted.**

**B The application for leave to appeal is dismissed.**

**C The applicant must pay costs to the respondents as for a standard application on a Band A basis with usual disbursements.**

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**REASONS OF THE COURT**

(Given by Randerson J)

## Introduction

[1] The applicant (the "Fire Service") seeks leave under s 214 of the Employment Relations Act 2000 ("the Act") to appeal against a decision of the Employment Court. In that decision, Chief Judge Colgan held that the Employment Court had exclusive jurisdiction to hear and determine proceedings between the Fire Service and the respondents, the New Zealand Professional Firefighters Union ("the Union") and two of its officials.[1]

[2] Initially, the Fire Service issued proceedings in the High Court alleging tortious conduct by the respondents arising from a ban on Union members from applying for and accepting "acting up" positions offered by the Fire Service. In brief, acting up refers to operational firefighters filling temporary vacancies in the command structure of the Fire Service which involve managerial or supervisory roles. This occurs on the understanding that the employees will revert to their operational roles after a period of time usually measured in weeks or a few months. The Fire Service alleges that two employees accepted acting up positions offered to them despite the Union ban and that the two employees were later intimidated by the respondents into relinquishing those positions.

[3] The respondents were successful in the High Court in obtaining a stay of the proceedings on the footing that the Employment Court has full and exclusive jurisdiction to hear and determine a proceeding founded on tort which results from or is related to a strike.[2] The decision was based on the High Court's conclusion that s 99 of the Act applied so as to give the Employment Court exclusive jurisdiction to determine the dispute. The argument in the High Court and in the Employment Court involved essentially two questions:

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1 *McCulloch v New Zealand Fire Service Commission* [2010] NZEmpC 160.

2 *New Zealand fire Service Commission v* McCulloch HC Auckland CIV-2009-404-1088, 20 October 2010 per Lang J upholding the conclusion on jurisdiction of Associate Judge Bell in his judgment of 10 May 2010 (2010) 7 NZELR 433), but ordering a stay rather than striking out proceedings as the Associate Judge had done.

(a) Whether the conduct of the respondent amounted to a strike within the meaning of s 81 of the Act; and

(b) Whether in terms of s 99(1)(a) of the Act, the "proceedings resulted from or are related to" a strike.

[4] The contention by the Fire Service is that the conduct of the respondents does not amount to a strike and that, even if the conduct does amount to a strike, the proceeding does not result from or relate to that strike. The respondents' contention is that the imposition of the ban does amount to a strike but they will, in due course, submit that the strike was lawful on health and safety grounds.[3] If so, the respondents contend they are entitled to immunity from suit under s 99(3)(a) of the Act.

[5] The application for leave to appeal was filed out of time and the Fire Service seeks an extension of time in that respect.

**The questions of law the Fire Service seeks to argue on appeal**

[6] Section 81 of the Act relevantly provides:

> **Meaning of Strike**
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> (1) In this Act, **strike** means an act that–
>
> (a) is the act of a number of employees who are or have been in the employment of the same employer or of different employers–
>
> (i) in discontinuing that employment, whether wholly or partially, or in reducing the normal performance of it;
>
> ... and
>
> (b) is due to a combination, agreement, common understanding, or concerted action, whether express or implied, made or entered into by the employees.

[3] Relying on s 84 of the Act.

[7] Mr Davenport for the Fire Service submitted there were three questions of law arising from the decision of the Employment Court in relation to s 81. The form in which these questions are put by the Fire Service is not appropriate since they are expressed in the form of leading questions which suggest the answers. However, the essential focus of Mr Davenport's argument is that the Employment Court erred in determining the acts of the respondents were aimed at "reducing the normal performance" of the employment of firefighters by the Fire Service. He submitted that expressing an interest in an acting up position is entirely voluntary; there is no obligation on the part of the Fire Service to accept any application; if accepted, the new position represents a different employment from that in which the firefighter is normally engaged; and the normal employment of the firefighter concerned remains as it was previously.

[8] Mr Davenport also submitted that the Judge had erred in taking a broader view of the scope of the term "employment" used in s 81 and that there was no evidence in terms of s 81(1)(a) of any "act of a number of employees".

[9] The final point which the Fire Service wishes to raise on appeal is that the Employment Court erred in interpreting the phrase "related to" in s 99(1)(a) of the Act.

**The Judge's conclusions**

[10] Chief Judge Colgan's conclusion on the three issues raised by Mr Davenport under s 81 of Act are succinctly summarised in his decision:

> [69] I find, pursuant to s 81(1)(a)(i), that the ban was at least intended to reduce, and depending on the evidence at trial, may have had the effect of, reducing the normal performance of their employment by union member firefighters. That was in the sense that the normal performance of their work by firefighters included submitting expressions of interest for acting-up positions and also agreeing to do so when offered those roles by the Commission. Normal performance of employment was not restricted to the performance only of the incidents of employment that are legal obligations. The phrase and its meaning are broader than that. It connotes the manner in which the employment relationship operates and what the employees do in the course of that relationship. Normality is not to be equated with frequency. The normal performance of employment may include elements that are infrequent and may also include elements that are entirely voluntary

> in the sense that some employees may elect not to perform that aspect of the work on occasion but for reasons other than that their union has imposed a ban on it.
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> [70] The requirement under s 81(1)(b) that the ban was due to a combination, agreement, common understanding or concerted action, whether express or implied, made or entered into by the employees, is also clearly made out. It was a union ban, the work of the collective of firefighter employees and therefore at least a combination or concerted action by them.

[11] In relation to the issue raised about the interpretation of s 99(1)(a), the Judge acknowledged some differences in view by Judges of the High Court in relation to the scope of the term "related to"[4] and the observations of this Court in *Kennedy v Rolling Thunder Motor Company.*[5] However, the Judge concluded that, even adopting a narrow definition of the phrase, the proceedings clearly resulted from or related to a strike for the purposes of conferring exclusive jurisdiction to hear and determine the proceedings under s 99(1)(a) of the Act. The acts of the Union and its officials had the effect of dissuading two employees who had accepted "acting up" positions from continuing in those roles. It was this conduct which laid the foundation of the proceeding in tort issued by the Fire Service.

**Discussion**

[12] In our judgment, the issues raised are mixed questions of fact and law. To the extent they raise questions of fact, we do not have jurisdiction to consider them under s 214 of the Act. We are also satisfied that the questions the Fire Service seeks to raise on appeal do not disclose any seriously arguable question of law. The issues under s 81 have now been the subject of concurrent findings by Associate Judge Bell, Lang J and the Chief Judge of the Employment Court. We find the reasoning of the Chief Judge which we have cited above[6] persuasive. The temporary appointment of any member of the Fire Service to any rank or position higher than his own is specifically authorised by s 66(1) of the Fire Service Act 1975. Although the Collective Employment Agreement between the Fire Service and the Union makes only passing reference to relieving positions, it is common ground and,

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4 *BDM Grange Ltd v Parker* [2005] ERNZ 343 at [54] and *Pain Management Systems (NZ) v McCallum* HC Christchurch CP 72/01, 14 August 2001.

5 *Kennedy v Rolling Thunder Motor Company* [2010] NZCA 582.

6 At [10].

indeed, the Fire Service specifically pleads in its amended statement of claim, that acting up has occurred on a significant number of occasions over a number of years within the operations of the Fire Service.

[13] In these circumstances, the Chief Judge was correct to conclude that the normal performance of the work of firefighters included submitting expressions of interest for acting up positions and agreeing to take those positions when offered by the Fire Service. The Chief Judge was also entitled to conclude that the Union ban was intended to have the effect of reducing the normal performance of their employment by Union member firefighters by requiring them not to apply for acting up positions when offered and also by the subsequent actions of the respondents in dissuading the two employees who accepted acting up positions from continuing in that capacity.

[14] We are also satisfied that it was open for the Chief Judge to conclude that the requirements of s 81(1)(b) were met in that the Union ban amounted to the collective action of firefighter employees and was a combination or concerted action by them.

[15] The authorities relied upon by Mr Davenport are clearly distinguishable on the facts.[7] We accept Mr Cranney's submissions on behalf of the respondents that the collective refusal to undertake that which is a normal incident of employment is of the essence of a strike under s 81(1)(a)(i), even if it does not amount to a breach of contract.[8]

[16] Finally, there was ample material to support the Judge's conclusion that the proceedings resulted from or related to a strike.

**Result**

[17] We grant the application to extend time (since the delay was brief and reasonably explained) but, for the reasons given, we decline leave to appeal.

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7 *Victoria University v Haddon* [1996] NZLR 409; *Port of Napier Ltd v Maritime Union of New Zealand* [2007] ERNZ 826.

8 *Ross v Moston* [1917] GLR 87; *New Zealand Labourers' Union v Fletcher Challenge Ltd* [1988] 1 NZLR 520 at 527.

[18] The applicant must pay costs to the respondents costs as for a standard application on a Band A basis with usual disbursements.

Solicitors:
McBride Davenport James, Wellington for Applicant
Oakley Moran, Wellington for Respondent