IN THE EMPLOYMENT COURT
AUCKLAND

[2010] NZEMPC 78
ARC 71/10

IN THE MATTER OF	application for interlocutory injunction to prevent lockouts
BETWEEN	SERVICE AND FOOD WORKERS UNION NGA RINGA TOTA INC Plaintiff
AND	RENDEZVOUS HOTELS (NZ) LIMITED Defendant

Hearing: 22 June 2010
(Heard at Auckland)

Appearances: Timothy Oldfield, Counsel for Plaintiff
Glenn Jones, Counsel for Defendant

Judgment: 22 June 2010

ORAL JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] The question now for decision is whether the defendant should be restrained by interlocutory injunction from locking out some of its employees who are members of the plaintiff union (SFWU).

[2] Because this is an application for interlocutory injunctive relief, until the substantive proceeding can go to trial, three tests are applicable. First, the plaintiff must establish that it has a serious question or questions for trial. Next, if so, the Court must assess where the balance of convenience will lie between the parties during that period. In practice that means whether it is more just that the plaintiff should have the advantage of an interim injunction in the event that the defendant is eventually successful or, on the other hand, whether the plaintiff should be held out of that interim advantage if it is later established that it would have been entitled to

this. The third test is for the Court to stand back from the detail of the first two tests and assess, as best it can, where the overall justice lies between the parties. This is a broad discretionary consideration on applicable principles.

[3] Because the application has been heard urgently and the only evidence before the Court is on untested affidavits and because full legal submissions have not been able to be developed, the judgment does not determine the question between the parties finally or authoritatively. That said, the reality in employment relations litigation is that interlocutory relief is very often de facto the final position, especially where injunctions governing strikes and lockouts are concerned. So the Court must take a robust and realistic approach to such applications for interlocutory relief and, of course also, one that assists the parties to settle in bargaining a new collective agreement of which the lockout and the proceedings addressing its lawfulness, are incidental. The outcome of such proceedings inevitably affects the parties' strategic strengths in the bargaining process and the Court must be conscious of this in determining what is the law and how it is to be applied.

[4] Because it will be important in this case, it is worth noting also that interlocutory injunctive relief addresses current and future conduct but not, where it is able to be isolated, past unlawful conduct that has ceased. The remedy for such past events is in damages or other remedies in substantive proceedings. So, for example, although not an issue in this case, if a party undertakes to the Court not to repeat or engage in arguably unlawful conduct in the future, the Court will be unlikely to subject that party to an injunction where its solemn undertaking is accepted. Injunction is not a remedy for past events alone.

[5] Lockouts of employees began last Thursday 17 June 2010 as a consequence of the following communication from the general manager of the Rendezvous Hotel in Auckland to the union:

> **TAKE NOTICE THAT:**
>
> 1 All members of your Union employed at Rendezvous Hotel Auckland (**Employer**) who are as at the date of this notice on strike in support of the collective bargaining between the Union and the Employer **are hereby locked out** pursuant to Part 8 Employment Relations Act 2000.

2. The nature of the lockout is that the Employer is discontinuing the employment of the said striking employees from 17 June 2010 until further notice or conclusion of the bargaining.

3. The lockout is only in respect of employees who are or were on strike on 17 June 2010. Any of your members who were not party to the strike are not locked out.

4. The locked out employees are not permitted to enter the Employer's premises for the duration of the lockout without specific permission from the Employer.

[6] In its substantive proceedings the SFWU has two causes of action against the employer.

[7] The first is that there is no lockout in law because the defendant has not specified a demand with which the plaintiff or its members can comply and/or has not specified terms of employment for them to accept. In this way the plaintiff says that the purported lockout does not relate to collective bargaining and so is unlawful under s 83 of the Employment Relations Act 2000 (the Act).

[8] The second cause of action is an alternative or fall-back position and asserts that even if the employer's demand of employees, in support of which it is locking them out, is to accept terms of employment proposed by the company, these are incapable in law of acceptance being contrary to or inconsistent with s 54(3)(b) of the Act. The plaintiff says that the terms and conditions of employment that the company seeks to have union members accept in the form of a collective agreement, do not include an employee protection provision (EPP) as required by s 69OJ of the Act.

[9] The relevant background to the present position is as follows. The parties are in bargaining lawfully for a collective agreement. On 26 May 2010 the employer made an offer of settlement (albeit not in writing) comprising six proposals. Summarised, these were that, in return for reducing a number of current collective entitlements of employees affecting transport allowances, medical insurance, sick leave, and other terms and conditions, there should be a two year collective agreement incorporating a pay increase of 1.5 per cent. This was interpreted by the union negotiators to be an offer of a wage increase with no back dating. It was

rejected by union members at what was called a ratification meeting on 2 June 2010. In addition to rejecting the employer's offer, union members voted to go on strike.

[10] Although the union's case is that the employer's offer of 26 May 2010 was taken to and rejected by a "ratification" meeting of employees, that is very probably not a correct categorisation of that meeting. Mr Oldfield accepts that this is so. Ratification is of an agreement constituting a collective agreement reached between negotiators in bargaining which is for acceptance or rejection by union members to be bound by it. What was taken to the union members on 27 May 2010 were some principal proposals for settlement which were rejected. They were not, however, a collective agreement settled between the parties for ratification. Such an agreement would have had to have included in it, by operation of law, an EPP which the parties acknowledge now was not present and has not yet been negotiated or settled.

[11] It is, nevertheless, permissible and not uncommon for important proposals in bargaining to be taken by union negotiators to a meeting of potentially affected employees for indicative response so that the negotiators will have a mandated position in the ongoing bargaining, either to move to a settlement on agreed terms or to reject proposals made. It was that latter position that prevailed in late May despite the description of the process as ratification.

[12] Strike action was to take place on 16 June 2010. That day, the union's organiser, Lynette Slade, e-mailed the defendant's representatives advising that the pay rise would be acceptable if there were no "claw backs". The union's position was that the term of a collective agreement should be one year and not two as proposed by the defendant. Although union members were willing to take strike action, this had been withheld in the hope that the employer would reconsider its position. The defendant's response, sent at 4.32 pm on 17 June 2010, was the notice of lockout earlier set out.

[13] A lockout is defined by s 82 of the Act as follows:

> **82 Meaning of lockout**
> (1) In this Act, lockout means an act that—
> (a) is the act of an employer—

(i) in closing the employer's place of business, or suspending or discontinuing the employer's business or any branch of that business; or
(ii) in discontinuing the employment of any employees; or
(iii) in breaking some or all of the employer's employment agreements; or
(iv) in refusing or failing to engage employees for any work for which the employer usually employs employees; and

(b) is done with a view to compelling employees, or to aid another employer in compelling employees, to—
(i) accept terms of employment; or
(ii) comply with demands made by the employer.

(2) In this Act, to lock out means to become a party to a lockout.

[14] There seems little doubt that the discontinuation of the employment of employees meets one of the definitions of a lockout under subs (1)(a). The plaintiff's first cause of action turns on compliance with subs (1)(b). The plaintiff says that it and its members cannot know what they must do to bring the lockout to an end and, in particular, whether the lockout has been done with a view to compelling employees to accept terms of employment or to comply with the employer's demands and, if either or both, what those terms of employment and/or demands are.

[15] Also relevant is s 4 of the Act which deals with the statutory requirement of parties such as these to deal with each other in good faith. Under s 4(1A)(b) these parties are required "to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative". Section 4(1A)(c) is also relevant. This subsection states:

> … requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—
> (i) access to information, relevant to the continuation of the employees' employment, about the decision; and
> (ii) an opportunity to comment on the information to their employer before the decision is made.

[16] These statutory requirements reinforce the plaintiff's position that the defendant has not communicated sufficiently clearly to the union and employees about its intention in proposing to lock them out and, in particular, to comply with

s 82(1)(b) by specifying what it seeks to have them do and, by implication, how a lockout can be avoided or ended.

[17] It has long been the position that strikes and lockouts in employment are weapons of last resort. They inflict economic harm on the person or persons subject to them. The scheme of the legislation is, whilst allowing them to occur in specified circumstances, nevertheless to provide alternative means of achieving agreements and settlements short of the infliction of economic harm by strikes or, in this case, lockouts. It follows that employees proposed to be locked out, or locked out, should be given sufficient information to enable them to avoid such a consequence or to bring it to an early end if it has begun. I accept that the plaintiff has an arguable case that the defendant's communications about the lockout have been deficient in these circumstances. But that position has now been rectified by the defendant's e-mail of 20 June 2010 so that any further lockouts will not be unlawful on this ground.

[18] Even if, by the lockout or otherwise, the employer may have persuaded the union and its members to agree to the terms proposed by the company, this could and would not have been the end of bargaining. That is because, as the plaintiff says, the parties must agree to an EPP that both meets the minimum legislative requirements for such a provision (as these have been defined in case law) and as is agreed between them. The parties' expired collective agreement, which remains in effect by statute, may not contain an EPP under s 69OJ as the Act requires.

[19] A strong inference of the employer's contemporaneously stated motivation in purporting to lock out its staff, is that it was seeking to persuade those staff, who took strike action on 16 June 2010 and may have intended to do so subsequently, not to strike. That inference arises because of the terms of the lockout which only applied to those employees who took strike action. That is reinforced by the evidence that a number of employees engaged in the collective bargaining did not intend to, and did not take, strike action and were not subjected to the lockout. By the defendant failing to seek to persuade non-striking employees, who were nevertheless engaged in bargaining, to accept its terms of employment or other demands, it is strongly arguable that the employer's demand was that strike action should cease.

[20] The defendant opposes the application for interlocutory injunction on all grounds advanced in support of it. More particularly, it says that the employer's last offer to the union of 26 May 2010 was rejected by union members who responded with a picket of the hotel on 16 June and a strike starting on 17 June 2010. The defendant's human resources manager, Chloye Chen, says that "The defendant decided to lock out the striking employees with a view to persuading them to accept our last offer."

[21] Although this is only an interim hearing at which the evidence has not been tested, I have to say that I am sceptical that this was the defendant's motive or at least its predominant motive as its case would have it. That is because of the illogicality of that stance when compared to the terms of the written notice locking out the employees. Only employees on strike or proposing to go on strike were locked out. The evidence is that this was not the whole of the unionised workforce. Logically, if the company had indeed sought to persuade acceptance of its offer by locking out employees, it would not have locked out only a selected portion of that group, those who were on strike or intending to strike.

[22] The terms of the notice of lockout are more consistent with an intention to persuade strikers, actual or potential, from undertaking that activity. Both motives, that is acceptance of the terms, and to comply with a demand to cease and desist from striking, would constitute the necessary motivational element of a lawful lockout. However the difference between them highlights the union's and the employees' justifiable concern that they were not aware of what it would have taken to have averted or cancelled the lockout. The terms of the lockout notice would have indicated naturally that a cessation of strike action would have brought about a cessation of the lockout. Now, however, the employer says that acceptance of its proposed terms in bargaining was the objective of the lockout.

[23] There is an arguable case that the union and the employees ought to have had it made clear to them what they needed to do to avert, or to have the employer cease, the lockout. That is consistent with the Court's approach taken as long ago as 1985

in *NZ Timber Industry Employees' IUOW v Carter Oji Kokusaku Pan Pacific Ltd*[1] in its interpretation of the then applicable predecessor to s 82(1)(b) of the Act. There, at page 312, the Court held:

> … if the action of the employer in locking out non-striking workers is clearly and obviously with the view to apply pressure on striking workers then, in the absence of strong evidence to the contrary, the employer has discharged its obligations under this section.

[24] The requirement for a "clear and obvious" appreciation of the motive of the employer must have been strengthened by the enactment of s 4 of the Act referred to earlier.

[25] It is significant, also, that the employer did nothing from its awareness of the union's rejection of its offers in bargaining on or shortly after 2 June 2010 until strike action commenced, whereupon the lockout was imposed almost immediately. That would tend to confirm, also, that the lockout was intended as a reaction to the strike action and that this, rather than a wish to compel the employees to agree to the employer's offer, was the real motivation for the lockout.

[26] That is not the end of the employer's case. It says that even if its notice may not have been clear on 17 June 2010 when the lockout began, it clarified the position for the union by an e-mail sent at 12.16 pm on Sunday 20 June 2010 entitled "Conditions for Cessation of Lockout". Given the time of sending of this e-mail, I do not think it would be fair to assume its effective receipt by the union until the opening of business on Monday 21 June 2010. Nevertheless, by then at the latest, the union had been told by the company that the lockout was undertaken with a view to persuading the employees to accept terms of employment offered by the company on 26 May. The e-mail also confirmed the company's preparedness to negotiate for an EPP in the new collective agreement.

[27] Because this is not a lockout depending for its lawfulness on the giving of formal notice, failure to comply with which will invalidate the lockout, it is open to the employer, as it did by early yesterday morning, to clarify and thereby validate for the future, the lockout of employees. Although this would not legitimise

[1] [1985] ACJ 299.

retrospectively the lockouts beginning on 17 June 2010 and undertaken until, say, 9 am on Monday 21 June 2010, any lockout of employees occurring after that time is now very arguably lawful. This means that it is very likely that the employer is bound to pay those employees unlawfully locked out, and who would have worked but for the lockout, as distinct from any lockouts taking effect after receipt by the union of the information contained in the company's e-mail of Sunday 20 June 2010.

[28] The union's case is that the employer cannot lock out lawfully for the period until a collective agreement is concluded, unless it specifies all the terms of employment that it seeks to persuade the employees to accept.

[29] That cannot be right. Even ignoring the ability of the company to now include the draft provisions of a compliant EPP which would seem to get over the problem raised by the plaintiff, there are two fundamental misconceptions that undermine the submission in practice.

[30] The first is that the duration of the lockouts was not only until "the conclusion of bargaining". There was the alternative given "until further notice". So it did not follow that employees would be locked out until settlement, or even arguably ratification, of a collective agreement. Importantly, also, the Act does not require a lockout's duration to be specified in any event.

[31] The second problem with this argument is that the statute requires only that the employer's motive is to persuade acceptance of "terms of employment". It is not all terms of employment and so may include some but not others. That is what the company now says it seeks, acceptance of some, albeit key, terms of employment. If the employees' negotiators in bargaining concede these demands, then the plaintiff may assume that any lawful lockouts will be lifted and bargaining may then proceed to address any outstanding issues including an EPP that complies with the Act.

[32] Although the plaintiff has been successful in establishing a failure on the part of the defendant to lock out lawfully, that has now been rectified in respect of any prospective lockouts of employees. So it would not be right to prohibit by injunction

such future lockouts as may be undertaken lawfully by the defendant. For these reasons I decline to grant the injunctive remedies sought.

[33] Yesterday morning I directed the parties to urgent mediation with the Mediation Service of the Department of Labour. I am grateful to the Mediation Service for having accommodated that direction at very short notice. Mediation has taken place earlier today and I am advised that even although this addressed some of the issues in bargaining, no settlement was able to be reached. Nevertheless, I urge both parties to continue to use the services of the mediator in an effort to try to resolve their dispute in collective bargaining. For what it is worth, my assessment is that the parties may not be too far from a resolution given the acceptance in principle of a very modest wage increase subject only to whether there are to be any "claw backs" of existing terms and conditions of employment, the duration of the new collective agreement, and subject to agreement on when the wage increase is to begin.

[34] For the foregoing reasons, I conclude that the plaintiff has no arguable case of unlawful prospective lockouts of employees. The very arguably unlawful lockouts that occurred before receipt by the union of the 20 June 2010 e-mail may be dealt with by the employees' claims for damages and/or other compensation.

[35] I decline to make any orders for costs. Each party should meet their own costs without contribution from the other.

GL Colgan
Chief Judge

Judgment delivered orally at 4.34 pm on Tuesday 22 June 2010