IN THE EMPLOYMENT COURT
CHRISTCHURCH

CC 26/07
CRC 29/07

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	SOUTHERN LOCAL GOVERNMENT OFFICERS UNION INC Plaintiff
AND	CHRISTCHURCH CITY COUNCIL Defendant

Hearing: 12 and 13 November 2007
(Heard at Christchurch)

Court: Chief Judge G L Colgan
Judge B S Travis
Judge C M Shaw

Appearances: P D Lawson, Advocate for Plaintiff
S L Hornsby-Geluk, Counsel for Defendant

Judgment: 29 November 2007

JUDGMENT OF THE FULL COURT

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[1] The plaintiff union has claimed that the actions of the defendant city council, in purporting to lock out eight of its employees during negotiations for a new collective agreement, were unlawful. One aspect of the purported lockout was the suspension of standby duties with a corresponding suspension of standby allowances. The union contends that as a result of a change in the definition of lockout in the Employment Relations Act 2000 the observations of the full Court in *Witehira v Presbyterian Support Services (Northern)* [1994] 1 ERNZ 578 that a reduction in work corresponding to a reduction in pay can constitute a lockout, are no longer good law. The change in the wording of the statute and the effect it may

have on the *Witehira* decision were the principal grounds for the Employment Relations Authority ordering the employment relationship problem to be removed to the Court and for a full Court to have been convened to deal with the matter.

[2] The union also claims that if the council's actions amounted to a lockout it was unlawful as it related to a dispute and not to bargaining.

Background facts

[3] The council employs eight animal control officers who are also known as dog control officers (DCOs). They are members of the union and their terms and conditions of work are set out in a collective agreement (CA). They work a 4-week roster cycle: 2 weeks on a shift of 5 days per week, Monday to Friday, between 8.30am and 5pm each day; followed by a week when they work 7 days, Monday to Sunday, between 9.30am and 6pm each day. This is described as the "*standby shift*" because the two DCOs on that shift are required to be on standby to respond to after hours calls between 6pm and 8.30am from the Monday they commence the standby shift through to the following Monday morning. On the fourth week of the cycle they work an ordinary shift, except that they are rostered off on the Monday and Tuesday of the week and work only 3 days to compensate for having worked 7 days the previous week. That roster has operated since 2001.

[4] All DCOs are required to start and finish work in the field each day and are provided with a motor vehicle and technology that enables them to operate continuously away from the work base. They start their working days by logging on to electronic instructions from home and drive directly to the day's first job; they finish their working days likewise. They are required to take meal and refreshment breaks in the field.

[5] As a result of negotiations with the union in 2001 it was agreed that the amounts that would have been paid as penal payments for overtime or as allowances for tea money, residential phone, first aid qualifications and the like, under the previous collective arrangements, would be totalled up into a standby allowance. This was calculated over a 4-week roster cycle and then divided by seven and paid to

those DCOs as a standby allowance on each night of the roster cycle that they worked a standby shift. At the time of the events in question this had been recalculated from the amount shown in the relevant collective agreement (the CA) and set at the rate of $104.61 per day while on standby.

[6] These arrangements were reflected in the CA, which provided that in addition to their salary the DCOs would receive a daily payment of $101.07 gross per person for each day while on standby. The CA then stated that the following payments and allowances would not be applicable to DCOs:

> … *penal payments, cash handling allowance, residential telephone allowance, standby allowances (other than that specified in this variation), tea money, meal allowance, first aid allowance, qualification allowance, and overtime for call-outs whilst on standby.*

[7] The primary role of DCOs is to receive and investigate requests for service usually relating to dogs that are misbehaving, but occasionally they have to deal with wandering stock. Generally, after hours call-outs are in respect of "*priority 1*" matters where human safety is involved, for example a dog attacking or rushing at people or stock wandering on the road. The two officers rostered to be on standby work together to manage any call-outs. There would typically be fewer than two call-outs in a night so a DCO would on average have to respond seven times in the week that he or she is on standby.

[8] Between 1994 and 1996 the council provided animal control services for the Banks Peninsula District Council (the district council) in what was described as the "*inner basin area*" comprising the Lyttelton and Mount Herbert wards. No issue was raised by the DCOs as to the performance of these additional duties. After 1996 the district council took back responsibility for the animal control services within its area. In 2005 a decision was made by the Local Government Commission that in 2006 the district council would be disestablished and its territory merged into the Christchurch City Council. Approximately 8 months prior to amalgamation, at the request of the district council, the defendant agreed to provide these services again in the inner basin area. An interim agreement was reached between the defendant and

DCOs to provide them a temporary call-out fee as that area was not part of the defendant council's district. The interim arrangement provided that the payment would cease on 31 March 2006, which, in the event, was after amalgamation which took place on 6 March 2006. The allowance continued to be paid until April 2006. Under this interim arrangement the DCO's covered the inner basin area and attended priority 1 call-outs while on their "*standby shift*".

[9] Following amalgamation and the termination of the interim arrangement the DCOs continued to service the inner basin area as part of their job description.

[10] Mark Vincent, the team leader animal control, gave evidence that when the interim arrangement came to an end it was agreed that any issues about additional payments would be dealt with later as part of the issue of coverage for the rest of Banks Peninsula, in the negotiations for the CA. The union had not been consulted about the interim arrangements entered into between Mr Vincent and the DCOs in 2005 and early 2006. The union first became involved when the additional payment under the interim arrangement was terminated in April and the DCOs were still required to carry out the additional work.

[11] On 2 May 2006 the union initiated bargaining with the defendant for the renewal of the CA. The parties agreed that rather than putting forward a log of claims, each put forward a list of issues to be addressed in the bargaining in a process known as "issues-based bargaining". In the list of the union's issues for negotiation in the CA the following item appears:

> ***Dog control***
>
> *Members have raised issues with the call out arrangements.*

[12] Angela Watson, an organiser for the union, gave evidence that the union had informed the council that it wished to address issues relating to the standby terms and conditions and she wanted to ensure that the provisions relating to public holidays appropriately reflected the legal requirements. She believed that she also indicated that the DCOs found that the standby allowance did not compensate them properly for the actual extra hours they worked in the inner basin area. The council

understood that the DCOs were seeking an increase in the standby allowance on the basis that it had not kept pace with other rates of pay and because they were now required to service a larger geographical area.

[13] Because of the complexity of some of the DCO's issues it was agreed, during the negotiations for the CA in August 2006, that they would be discussed outside of the main bargaining area and by a small working party. Issues relating to rangers and parking building officers were also agreed to be dealt with in the same way. The union would be represented on the working parties as would the managers of the relevant units who would then have the opportunity to provide input into the discussion. Various documents generated during the negotiations show that this process was intended to deal with the issues relating to the DCOs.

[14] Ms Watson met with the DCOs to clarify the issues they wished to raise and sought to meet with the management of the council, but no working party meetings occurred.

[15] After the amalgamation, the council continued to use the services of a contractor who had been previously engaged by the district council to service the area around Akaroa and what were described as the "*outer bays*". That contract came to an end in October 2006. By this time Mr Vincent had formed the view that the number of call-outs in the extended area was not significant and could effectively and safely be covered by the council's existing resources.

[16] He then had discussions with the DCOs and advised them that they were expected to take over the servicing of Akaroa, initially as an interim arrangement for him to be able to monitor the impact of the additional service and to make adjustments in resources if needed. The DCOs considered they should receive an increase in the standby allowance to account for the additional area covered, especially because of the additional travel if they were required to attend incidents around Akaroa. This was raised in weekly team meetings. Mr Vincent's evidence was that it was agreed the issue should be "*parked*" and dealt with in the negotiations for the new CA.

[17] It appears the DCOs did service Akaroa after October 2006, although somewhat reluctantly. The DCOs contacted the union and raised an issue as to whether they could be required to cover the Akaroa and outer bays area as part of their existing standby arrangements without any additional payment. This was the first time that the union had become involved in this issue. Ms Watson met with the DCOs on 29 November 2006 and then arranged to meet Mr Vincent on 5 December.

[18] On Friday 1 December 2006, Ms Watson emailed a letter to Mr Vincent to explain what was to be discussed at the 5 December meeting. In that letter she referred to the work that had been earlier performed in the inner basin area for an additional allowance and the unhappiness of the DCOs who were now expected to do the work without any additional allowance after amalgamation. The DCOs were also concerned that they would be expected to perform the outer bays work with no additional resources or money and the suggested short term interim arrangement was regarded as unacceptable "*especially on a health and safety basis*." She stated that nothing had been agreed to by the DCOs regarding the additional work and there were concerns about taking it on. She therefore gave notice that from 5pm on Tuesday 5 December 2006, the standby DCOs would no longer deal with after hours call-outs for Akaroa.

[19] On 5 December Ms Watson met with Mr Vincent and Joseph Tonner, the employment relations advisor to the council. Ms Watson said that at the meeting she asserted that there were sound health and safety reasons for the DCOs to refuse to respond to outer bays call-outs as part of their standby shifts. She also put the case forward that even if there was not a health and safety problem, this was additional work beyond that which the standby shift daily allowance covered. She said the council rejected both these arguments. At the conclusion of the meeting she advised them that the DCOs would not respond to after hours call-outs to the outer bays, effective from 5pm that day.

[20] In the meantime the wider union membership had given the council notice of a 3-hour strike commencing at 11am on Friday 8 December 2006, and a further 24-hour strike commencing at 11am on Thursday 14 December 2006. Although we

were not given specific evidence about this industrial action, we assume that it was in relation to the bargaining for the new CA.

[21] Mr Tonner concluded that the unilateral action of the union in notifying the council that the DCOs would refuse to perform any after hours call-outs to Akaroa frustrated the ongoing discussions that had been occurring and pre-empted the bargaining process. He decided that given the "*apparent impasse*" that had been reached, the council therefore made the decision to lock the DCOs out of after hours work, pending settlement of the CA negotiations.

[22] On 7 December 2006 the council delivered a notice of lockout to all the DCOs (but not to the union) in the following terms:

> …
>
> ***Notice of lockout.***
>
> *This is a notice of lockout and is issued to all Dog Control officers employed by Christchurch City Council who are members of the Southern Local Government Officers Union. The lockout relates to bargaining for a collective agreement between the Southern Local Government Officers Union and Christchurch City Council.*
>
> *You are hereby given notice that as from 5pm on Friday the 8th December the Council will cease to engage you on standby outside of your ordinary working hours between 6pm and 8am Monday to Friday, and between 6pm and 8am on Saturdays, Sundays or public holidays. This notice is issued in terms of the definition of a lockout as set out in section 82(1)(a)(iv) of the Employment Relations Act, specifically:*
>
> > *"[the act of an employer]* in refusing or failing to engage employees for any work for which the employer usually employs employees."
>
> *The lockout will remain in force until further notice or until settlement of the current bargaining between Southern Local Government Officers Union and Christchurch City Council has been reached.*
>
> *You are required to garage Council vehicles at the Council's premises outside of normal working hours for the duration of the lockout.*
>
> …

[23] On the following day the union queried the scope of the lockout notice which was to take effect at 5pm on that day. It expressed the view that it appeared that the standby allowance applied to the work being carried out during the Saturdays and Sundays and asked whether the council intended to pay the daily standby payment on the Saturdays and Sundays for DCOs working that part of the standby roster. Mr

Tonner responded by email saying that the lockout was to cover all standby activities between 6pm and 8am, Monday to Sunday, that no standby payments would be made during the lockout and that the lockout did not affect normal working hours.

[24] In response, the union indicated that it disagreed with the council's interpretation of the CA and said that the DCOs would not be performing the Saturday and Sunday day shifts for the duration of the lockout. Instead all DCOs would work Monday to Friday on the "*normal shift*".

[25] The council did not accept that the DCOs were entitled to refuse to perform the Saturday and Sunday work. When the DCOs who were supposed to have worked on the Saturday and Sunday shifts (but did not) came to work on the following Monday morning, they were turned away as the council's view was that they were not rostered to work on those days.

[26] The parties met on the Monday afternoon and agreed, without prejudice, to amend the terms of the lockout so that the DCOs were required to work Mondays to Fridays only during the period of the lockout and those who were supposed to have worked the Saturday and Sunday shift were advised that they could return to work from the Tuesday and their salaries would not be docked even though they did not work the Saturday and Sunday shifts.

[27] The following day the parties reached a settlement which ended the lockout and the DCO's actions outlined in the union's letter of 5 December. The interim arrangement was to run for the period ending 31 March 2007 and the DCOs agreed to service the whole of the Banks Peninsula area with a 9½-hour break between periods of duties. The number of call-outs would be reviewed and the council would then determine whether there was a case for paying extra remuneration.

[28] This sensible interim arrangement worked well and during the 3-month period there were only three call-outs to the Akaroa area. The parties continued in negotiations and were able to reach an agreement which did not form part of the new CA but in September 2007 became an agreed variation to the CA. New standby allowances and payments were included in the variation to the CA.

The union's claims

[29] The union seeks a declaration that the defendant's actions were unlawful, an award of compensatory damages for the eight DCOs of $500 each for the loss of the benefit of a vehicle to travel to and from home during the period, and compensatory damages for loss of remuneration of the standby allowance of $104.61 for each of the days.

Can a reduction in work and a corresponding reduction in pay be a lockout?

[30] The answer to this question is one primarily of statutory interpretation and application. As John Burrows QC notes in his textbook Statute Law in New Zealand 3rd edn (2003) at p133, legislation must be interpreted to give effect to its purpose if that purpose is clear and indeed this is required by s5(1) of the Interpretation Act 1999.

[31] A lockout is defined in s82 of the Employment Relations Act 2000 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.*

[32] Apart from stylistic changes and its method of numbering, s82 is virtually identical to its predecessor s62 of the Employment Contracts Act 1991 with the key exception that it omitted the following highlighted words in s62(1)(b) of the 1991 Act:

> *In discontinuing the employment of any employees,* ***whether wholly or partially.***

[33] It is the omission of the words "*whether wholly or partially*" in the 2000 Act which has led the union to contend that the type of action said to be a lockout by the full Court in *Witehira* no longer has that status under the 2000 Act.

[34] The action taken by the employer in *Witehira* and described as a "*technical*" or "*partial*" lockout and which was found not to be a "*lockout*" within the terms of s62, took the form of reducing the plaintiffs' remuneration but required them to perform their usual duties. The full Court examined in detail the history of the legislation from 1894, the relevant case law, both in New Zealand and elsewhere, and the dictionary definitions of the word lockout. There is no need for us to repeat that material in the present case. In addition to the traditional meaning of physically locking out workers from the employer's premises, as contemplated in s82(1)(a)(i), it was noted that the term "*lockout*" had acquired the common law meaning of a refusal to give work to employees (p586). *Witehira* contains a useful table contrasting the acts of employees amounting to strikes with the acts of employers amounting to lockouts (p591) in the 1991 Act. This shows that they do not exactly mirror each other and, in particular, there is no employer counterpart in the definition of a lockout, to the definition of a strike of workers "*reducing their normal output or their normal rate of work*" (which appears as s81(1)(a)(v) of the 2000 Act). The Court observed "*Logically, a reduction in pay would be a close equivalent. It is noticeable by its absence.*" (p591).

[35] In dealing with the history of the legislation it was noted that prior to 1981 an employer locking out employees remained liable for their wages. When introducing a new provision in the Industrial Relations Amendment Act 1981 to deal with this, the then Minister of Labour, the Hon. J B Bolger, said:

> *In the circumstances of a lockout, employers already suffer a loss through a halt in production. There is no need to compound this by requiring them to pay wages, and an amendment will give an effect to this principle, and will*

> *ensure a greater balance in the bargaining strength of the parties*" (1981 NZPD, 2627)

[36] The Court observed that although the lockout was initially seen as a shield and not a sword, nothing was inserted in the statute to limit its use to defensive purposes. The Court went on to state:

> *It was assumed that a lockout would always involve a halt in production and it was thought unfair that employers should bear the double penalty of losing production but still having to pay wages during the currency of a lockout (or for that matter, a strike). Even without relying on these passages from* Hansard *we find it unthinkable that Parliament ever intended that employers could withhold wages without suffering any halt in production. Parliament was concerned to undo a situation in which it thought that employees were having their cake and eating it, that it would be bizarre if it had decided to allow employers to do so instead. It is clear that Parliament intended to bring equilibrium to the situation and not to turn it upside down.* (p592)

[37] The expression "*partial lockout*" was coined in *Paul v New Zealand Society for the Intellectually Handicapped Inc* [1992] 1 ERNZ 65. *Witehira* which, like *Paul*, involved a unilateral reduction of employees' allowances but a requirement that they continue working, overruled *Paul* as bad law. The Court in *Paul* had concluded that this was a deliberate breach of a term of an employment contract and amounted to a breaking of that contract in the form of a partial lockout as envisaged by s62(1)(c) of the 1991 Act. This is not the category of lockout amended in the 2000 Act.

[38] The Court in *Witehira* held that lawful lockouts under the 1991 Act were those which linked work and pay and that it could not have been intended that employers should be able to require their employees to work while paying them nothing or less than the agreed rate. The Court described this as a unilateral variation of the contract and not a lockout.

[39] The Court also held that the references in s62(1)(b) and (c) to "*discontinuing the employment of any employees*" and "*breaking some or all of the employer's employment contracts*" meant discontinuing and breaking so that no work is done during the discontinuance or breach. That was the *ratio decidendi* of *Witehira* on its facts. The Judges went on to venture an opinion, obiter, that a reduction in work commensurate with the reduction in remuneration might still constitute a lockout. They referred to s62(1)(b) and (c) which dealt with discontinuing employment partially and to breaking some, or all, of the employment contracts and stated:

> *It is perhaps possible for an employer to have a partial discontinuance by saying to the whole, or a part, of its workforce that they are to come to work 4 days a week instead of 5, that they will be locked out on the fifth, and such action would sit quite comfortably within s 72 if they were not paid "in respect of the period of the lockout", that is to say, for the fifth day. Where, however, the lockout is for an indeterminate period in the sense that it is not possible to separate any period during which employees are locked out from any period during which they are not locked out, it seems difficult to suggest that they are then locked out at all.*

[40] The words "*whether wholly or partially*" were not specifically relied on by the Court in *Witehira* to reach the conclusion it did in accepting there could be reduced production and a consequent reduction in pay. In reaching this conclusion the Court did not rely solely on s62(1)(b) which has been amended in the 2000 Act, but also on s62(1)(c) which has not been amended in s82(1)(a)(iii).

[41] As Ms Hornsby-Geluk argued, *Witehira* contemplated not a partial lockout but a total lockout of a limited nature, in the sense that specified work could be suspended, discontinued or reduced and matched by a corresponding reduction of pay for that particular work. To avoid the confusion that appears to have arisen by describing this situation of reduced work and reduced remuneration as a "*partial lockout*", we shall refer to it as a "*technical lockout*".

[42] *Witehira* was applied in *Armstrong v Attorney-General (on behalf of Chief Executive Department of Justice)* [1995] 1 ERNZ 43 (overturned on other grounds in the Court of Appeal), and in *Marsh v Transportation Auckland Corporation Ltd*

[1996] 2 ERNZ 266. That was upheld in the Court of Appeal in *Transportation Auckland Corporation Ltd v Marsh* [1997] ERNZ 532, where the Court of Appeal stated at pp535-536 that the illegal threat of a partial lockout was strictly speaking a threat of a unilateral variation of the employees' conditions of employment. It noted that there was no challenge to the correctness of the *Witehira* decision.

Subsequent legislative history

[43] When the Employment Relations Bill was first introduced to the House, the words "*whether wholly or partially*" had been omitted from the equivalent to s62(1)(b). Our research has been unable to disclose any expression of reasons why these words were deleted, it being simply noted in the Explanatory note that "*Clauses 98 and 99 define the terms* ***strike*** *and* ***lockout****, respectively, and are similar to sections 61 and 62 of the Employment Contracts Act 1991*" (page 17). There was nothing in the Minister's speech introducing the Bill which explained why the words had been deleted.

[44] The report of the Department of Labour to the Employment and Accident Insurance Legislation Select Committee in June 2000 contained the following:

> ***Clause 99 Meaning of lockout***
>
> *Submissions*
>
> *(i) A number of submissions (206, 741, 574) including the NZ Employers Federation submitted that partial lockouts should be lawful and available to employers. The submissions recommended inserting in clause 99(1)(a)(ii) after "employees" the words "whether wholly or partially".*
>
> *(ii) Two submissions (599, 33) sought to amend clause 99 to expressly prohibit partial lockouts.*
>
> *Comment*
>
> *(i)-(ii) It is the policy intent of the Bill not to provide for partial lockouts in the situation described.* (emphasis added)
>
> *Recommendations*
>
> *(i)-(ii) No change is recommended.*

[45] The Department of Labour's policy intent was not to provide for "*partial lockouts in the situation described*", but unfortunately the situation is not clearly described in the report. Counsel and the advocate both examined the submissions which were referred to in the report in order to provide some guidance as to the situation described. Ms Hornsby-Geluk submitted that the "*situation*" clearly related to those particular types of lockouts in *Witehira* and *Paul* where the employer reduced the employees' pay but continued to require them to continue performing their full duties. Mr Lawson took issue with that conclusion and contended that the report was not intending to distinguish "partial lockouts" in the nature of those used in *Paul* and *Witehira* from any other partial lockout of a different nature but was instead intending to make all partial lockouts unlawful.

[46] We conclude that the omission of the words wholly or partially does not prevent a technical lockout where the reduction in pay is matched by a corresponding reduction in duties. It would, however, have been helpful if this had been made clearer in the report. Nothing was said in the subsequent debate in the House on the point.

[47] We accept Ms Hornsby-Geluk's submission that the deletion of the words from s82(1)(a)(ii) has not resulted in technical lockouts being rendered unlawful in the sense of falling outside of the definition of lockout and amounting therefore to unlawful unilateral variations. If Parliament had intended such a result by the omission of those words, it would also logically have amended s82(1)(a)(iii), the equivalent to s62(1)(c) of the 1991 Act relied on in part in *Witehira*, as well as s82(1)(a)(iv) which may also authorise a reduction in work rather than a total withdrawal of it. Parliament must have taken into account that the reasoning in *Witehira* was not doubted by the Court of Appeal in *Marsh* which properly drew attention to the inappropriateness of the description of unilateral variation as a "*partial lockout*".

[48] The use of technical lockouts, where the loss of production is balanced by loss of remuneration, appears to still fit within the object of Part 8 (Strikes and lockouts) of the Act as expressed in s80 that certain lawful strikes and lockouts as defined in the Act are not precluded. As the passages in Hansard when the 1981

amendment was introduced demonstrate, the strike and lockout provisions try to achieve a rough balance between loss of production by employers in a lockout and loss of remuneration by employees in a strike.

[49] This is reflected in s96, the successor to s72 of the 1991 Act, by which lawfully locked out employees are not entitled to any remuneration by way of salary, wages, allowances, or other emoluments in respect of the period of the lockout. In *Witehira* the link between the lockout period by an act complying with s62, and the suspension of liability for wages during that period, was seen to allow a reduction in work and a consequent reduction in pay. This is further reinforced in the 2000 Act by the additional restrictions placed on an employer's actions during a strike or lockout to maintain production. The balance has continued to be addressed by Parliament.

[50] We therefore conclude, as did the Court in *Witehira,* that as employees lose remuneration while on strike, employers should lose productivity when locking out. Provided that the reduction in work is properly linked to the reduction in pay and there is no element of an unlawful unilateral variation, remuneration may be abated rateably for the work from which the employees are locked out. Whether such a result has been achieved in the present case or whether the purported lockout does not come within the s82 definition and is therefore an unlawful unilateral variation, will be dealt with shortly.

Lawfulness of a lockout

[51] The relevant parts of s83 of the 2000 Act provide that participation in a lockout is lawful if it is not unlawful under s86 and relates to bargaining for a collective agreement which will bind each of the employees concerned. Under the provisions of s86 material to the present case, participation in a lockout is unlawful if it relates to a dispute. Section 5 of the Act defines dispute as "*a dispute about the interpretation, application, or operation of an employment agreement*". The leading case in determining whether a strike related to negotiation of a collective employment contract rather than a dispute, is *NZ Labourers IUOW v Fletcher Challenge Ltd* (1989) ERNZ Sel Cas 424; [1989] 3 NZILR 129 and the test is one of

dominant motive or dominant connection: see *Dickson's Service Centre Ltd v Noel* [1998] 3 ERNZ 841, 856. We can see no reason why the same test should not apply to lockouts as the relevant wording in the sections is identical.

[52] Mr Lawson argued that the evidence established that the real reason and dominant motive of the council in locking out the DCOs was not to persuade or encourage them to agree on terms of the new CA, but related to a dispute about their existing terms and conditions of employment and their application to the Banks Peninsula area. Although the way in which parties deal with a disputed term or condition of employment is not determinative of its statutory character, it would have been possible for issues about the increased allowance to have been dealt with under the disputes procedure of the existing CA. However, the union did not approach the matter in that way. There was no dispute that the DCOs' job description and the CA made coverage of the enlarged area of the city council part of their terms and conditions of employment. The claim for an increased allowance was agreed by the parties to be dealt with by the working party in the context of the ongoing negotiations for the CA. The lockout itself was a response to a withdrawal of labour by the DCOs at a time when the union's members employed by the council were taking industrial action in support of the negotiations for a new CA. The parties had agreed that the matter would be dealt with by a separate working party and this is in substance what occurred with the interim arrangement which finally resulted in a variation to the new CA.

[53] In these circumstances we are persuaded that the dominant motive for the actions taken by the council in imposing a lockout of the DCOs, in response to their industrial action, was to progress negotiations for the new collective agreement. In the event, the council's actions succeeded in bringing the parties to an arrangement which enabled a variation to that CA to be negotiated. We therefore find that the lockout was not unlawful under s86 and related to bargaining in terms of s83.

Were the actions of the council an unlawful unilateral variation?

[54] Mr Lawson submitted that the actions of the council took the form of a reduction in remuneration without a corresponding reduction in work and therefore

did not constitute a technical lockout in the sense described in *Witehira*. Three matters were addressed which were said to have made the actions of the council unlawful.

[55] The first was that the notice issued on 7 December 2006 purported to lock the DCOs out of standby duties only from 6pm to 8am each day whereas the CA provided that during the standby shift, DCOs were on standby until 8.30am each day. Mr Lawson submitted that the notices therefore did not purport to lock them out of the remaining half hour of the standby shift, and, because it did not specify what they would be paid or not paid in respect of their standby allowance, the notice was not clear and unambiguous.

[56] This was not an essential industry and no advance notice of lockout was required. The union properly sought clarification of some aspects of the council's action and this was given. The evidence was that the half hour was an omission which would have been addressed by the council, if the interim arrangement entered into on the following Tuesday had not resolved the issue. We are not persuaded that the omission to refer to the half hour would turn what would otherwise have been a lawful lockout into an unlawful unilateral variation.

[57] The second issue was that the DCOs on the standby shift were expected to work their Saturdays and Sundays but would not be paid that part of the daily allowance that related to the penal rates applicable to working on such days. Mr Lawson relied on the evidence that the daily allowance was a composite allowance, not intended just to remunerate the DCOs for being on standby but to incorporate penal rates for working the weekend and standby shifts.

[58] That is certainly the origin of the standby allowance, but the CA provided quite clearly that it was only to be paid when the DCOs were actually on standby. The penal allowance for overtime rates was irrelevant as it had now become a composite allowance linked directly to working the particular shift. As the shifts were not intended to be worked while the lockout operated it was not unlawful to link that directly to a refusal to pay the standby allowance.

[59] There was clearly a reduction in duties which corresponded directly to the removal of the standby allowance and, based on the observations in *Witehira*, once such a linkage is established it would not be unlawful or change the character from a technical lockout to an unlawful unilateral variation. Further, all employees were paid their ordinary salary in full during the period of the purported lockout and the DCOs had refused to work the Saturday and Sunday shifts during its currency.

[60] The third matter relied on by the union is more complex. The union contended that the removal of the benefit to the DCOs of a vehicle to travel to and from home each day, not just for those working the standby shift but also for those working the normal shift, while still requiring the DCOs to perform their normal work, rendered this an unlawful unilateral variation.

[61] Ms Hornsby-Geluk submitted that the DCOs did not have a contractual entitlement to the provision of a motor vehicle and the removal of this entitlement from the previous collective arrangements showed the matter was governed only by the council's policy on motor vehicles. This policy provided that the use of motor vehicles overnight was not a term and condition of employment and was capable of being withdrawn at any time. Mr Tonner's evidence was that the vehicles were provided as a tool of the trade to enable DCOs to perform their work functions and attend after hours call-outs.

[62] The evidence established that between 1993 and 2001, the collective arrangements gave the DCOs the right to have a vehicle to travel between home and their work base, and vice versa, each day. Under the revised work arrangements entered into in 2001, this was no longer recorded in the CA but was part of a new work pattern enabling the DCOs to start and finish in the field without having to physically report to the council's base at the beginning and end of each day. This gave the DCOs the continuing benefit of the use of the council vehicle to travel to and from their work without the need to first travel to the base by way of public or private transport. It also had allowed the council to reduce the number of DCOs from 11 to 8 while maintaining the previous service.

[63] The union contended that as a result of these arrangements, the provision of motor vehicles to travel to and from work had been agreed to be part of the DCOs' terms of employment. In the absence of an express term in the current CA or individual contracts, the question is whether such a term can be implied in fact (as opposed to those implied by law) to which the following criteria apply. As a matter of business efficacy, the term must be reasonable and equitable, be necessary to give business efficacy to the contract, be so obvious that it goes without saying, be capable of clear expression, and not contradict the express terms of the contract: see *Attorney-General v NZ Post-Primary Teachers' Association* [1992] 2 NZLR 209 (CA).

[64] Addressing each of the five criteria set out above we conclude first that it is reasonable and equitable that DCOs be relieved of the costs of transporting themselves to and from a depot ill-served by public transport at the beginning and end of each working day in return for agreeing to provide the council with greater productivity. Next, the arrangement gives the council's statutory animal control obligations business efficacy; it has enabled it to reduce the numbers of DCOs and now to maintain those numbers even after amalgamation. Third, it goes without saying that if the defendant expects DCOs to travel from home to, and return home from, their first and last jobs and has provided them with the vehicles and electronic technology to do so, they must be able to park their individual dog control vehicles at home when not working. There is no suggestion of the DCOs using their dog control vehicles for private purposes. Penultimately, the term is capable of clear expression and, finally, it does not contradict any express term of their contracts. In this regard, there is nothing in the CA or job description that requires DCOs' vehicles to be returned to the council depot at the end of each working day. Although council policy, determined unilaterally, addresses private use (travelling to and from work) of its vehicles, this must yield to contractual provisions, including implied terms where these are established.

[65] Because of the benefits that the provision of motor vehicles provided to the DCOs, in light of relevant previous history, we conclude that the taking home of their vehicles by the DCOs was part of their terms of employment and should not

have been removed in a lockout context unless there was a corresponding reduction in duties.

[66] If the removal of the vehicles had been limited to standby duties it might well have been arguable that there was a linkage between the reduction in duties and the reduction of a benefit. However, the way in which the notice was drafted and the subsequent communications indicated that the motor vehicles were going to be withdrawn from use during ordinary duty hours that were unaffected by the lockout. We conclude withdrawal of this benefit without a corresponding reduction in duties made this an unlawful unilateral variation of contract and not a technical lockout of specified duties with specified reduction in remuneration in the sense approved by *Witehira*.

It therefore follows that the union is successful in this aspect of the claim. The withdrawal of vehicles and the corresponding requirement that the DCOs had to make their own ways to and from the council's depot at all times during the period of the lockout, caused it to this extent to be an unlawful unilateral variation rather than a technical lockout

Remedies

[67] The purported lockout was of very short duration and had little if any impact upon the DCOs. Two of them declined to work the Saturday and Sunday and were fully paid for working the following Monday and Tuesday, even though they did not work on the Monday. It does not appear that the lockout operated long enough to even have any impact as to the withdrawal of the motor vehicles. It was all over by the Tuesday.

[68] The union has failed to establish any basis for a claim for either $500 compensation for loss of use of the motor vehicles, or for the lost standby allowance.

[69] We consider that therefore there should be no monetary awards and restrict the relief to the declaration sought that the actions of the defendant in withdrawing

the motor vehicles without a corresponding reduction in duties was an unlawful unilateral variation of the DCOs' contracts and was not a lawful technical lockout.

Costs

[70] Costs are reserved as requested by the parties, but we express the preliminary view that this was in the nature of a test case and that costs should lie where they fall. If the parties do not accept that view then the first memorandum claiming costs is to be filed and served within 30 days of the date of this judgment with a further 30 days for the memorandum in reply.

B S Travis
Judge for the full Court

Judgment signed at 1pm on Thursday 29 November 2007