

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2011] NZEmpC12  
ARC 8/11**

IN THE MATTER OF      an injunction

BETWEEN                UNITE UNION INC  
                                 First Plaintiff

AND                        CANDY SHERMAN  
                                 Second Plaintiff

AND                        SKYCITY AUCKLAND LTD  
                                 Defendant

Hearing:                8 February 2011  
                                 (Heard at Auckland)

Counsel:                Helen White, counsel for plaintiff  
                                 Richard McLraith and Kylie Dunn, counsel for defendant

Judgment:             14 February 2011 16:50:00

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**JUDGMENT OF JUDGE B S TRAVIS**

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[1]      The first plaintiff (“Unite”) and the second plaintiff are seeking a substantive injunction to stop and prevent threatened lockouts by the defendant (“SkyCity”) which they claim are unlawful. They also seek damages for loss of wages caused by what they claim to have been the same unlawful acts.

[2]      As a substantive injunction is being sought, the principles that apply to interim injunction applications, such as establishing an arguable case and determining the balance of convenience, do not apply. The parties agreed to bring this matter on urgently for a substantive hearing in which the relatively uncontroversial facts would be applied to the law to ascertain whether or not the defendant’s actions, or threatened actions, amounted to an unlawful lockout.

[3] The Chief Judge, in a minute following a telephone conference callover held on 3 February 2011, determined that affidavit evidence would be the basis of the substantive hearing and if any deponent was required for cross-examination, notice of that intention should be given and copied to the Court as soon as possible. In the event Ms White, counsel for the plaintiffs indicated at the commencement of the hearing that she wished to cross-examine the deponent of the sole affidavit filed by the defendant, Claire Walker, SkyCity's Employee Relations Manager. This was opposed on the basis that no notice had been given and Ms White then withdrew her application.

[4] During his final submissions Mr McIlraith, on behalf of the defendant, advised the Court that as he saw the plaintiffs' case developing it amounted, in substantial part, to an attack on Ms Walker's credibility and, as she was present in Court, he offered to make her available for cross-examination notwithstanding the lack of earlier notice. Ms White took instructions and sought the opportunity to cross-examine Ms Walker who was then called for that purpose. The viva voce evidence she gave will form part of my factual findings.

### **Factual findings**

[5] Except where otherwise indicated these findings are based on admitted allegations in the pleadings and unchallenged affidavit evidence.

[6] Unite is a union registered under Part 4 of the Employment Relations Act 2000 (the ERA). The second plaintiff is a member of the first plaintiff and an employee of SkyCity. SkyCity owns and operates a casino, several restaurants and bars, a hotel and a convention centre in Auckland. It employs approximately 3,300 employees across its Auckland Operations. Unite has between 750 and 800 members who are employees of SkyCity. The Service and Food Workers Union Nga Ringa Tota Inc (the SFWU) also has between 280 and 300 members employed by SkyCity. The SFWU was served with the pleadings and although it says its members are affected by the defendant's actions and that it supports the plaintiffs' position, it does not wish to seek leave to appear or be represented and was content to abide by the Court's decision.

[7] Unite and SFWU were parties to a collective agreement which expired on 31 December 2010 (the CA). It covered all waged and many salaried employees who were members of either union, employed at SkyCity's Auckland site. This included the second plaintiff, Candy Sherman, a supervisor and a dealer in what is described as the "Table Games" area. The unions initiated bargaining for a new collective agreement on 10 November 2010 and the first bargaining meeting took place on Monday 15 November. Three managers, including Ms Walker, attended that meeting on behalf of SkyCity. At that stage the unions had a bargaining team of approximately 14 which included Ms Sherman.

[8] The uncontroverted evidence is that, although the union bargaining team contained people from various areas across SkyCity, the majority of its members worked in Table Games. The union team included four union officials who were not SkyCity employees, eight representatives from Table Games, one representative each from the property solutions department, the finance department and the security department. There were no representatives from housekeeping, cleaning services or the gaming machines department all of which included a large number of union members.

[9] Michael Treen, the National Director of Unite, was the senior member of the union bargaining team and has provided an affidavit in support of the plaintiffs' application. According to Ms Walker's uncontradicted evidence at the first bargaining meeting, Mr Treen stated that they should schedule a mediation for early December as the unions intended to take industrial action on 1 January 2011, one of SkyCity's busiest days. The negotiating teams continued to meet approximately weekly for the remainder of the year.

[10] The unions and their members commenced strike action from 12.30am on 1 January 2011, some 30 minutes after the collective agreement expired. This took the form of meetings of union members which were scheduled for two hours, at 4.30am, 8.30am and 12.30pm. Some 259 employees participated in strike action from 1 January although many were on strike for less than two hours. On each occasion it was predominately employees from Table Games who participated in the strike action. They were accompanied by a picket of Unite officials.

[11] The strikes of the members of the unions working in Table Games occurred on every shift after 1 January although the number of employees taking strike action and the length of the strikes fluctuated. On some occasions, Table Games employees were on strike for as little as 15 minutes, some were on strike for a longer period of time. The Table Games employees did not advise managers how long they would be on strike for each occasion and this created significant inconvenience for those managers. These strikes of the Table Games employees have become known as the “short duration strikes”.

[12] Throughout the period since 1 January there have been employees in departments other than Table Games who have taken different types of strike action, but Ms Walker claims that the strike action has been largely limited to Table Games. She compiled a table which summarised the strike action from 1 to 28 January 2011 across various areas at SkyCity, which shows that 465 employees have participated in strike action at least once since 1 January and of those, 352 were from Table Games.

[13] Ms Walker has accepted that Mr Treen has been “very upfront” throughout, regarding the strike action. He had indicated the strikes would commence on 1 January at the first November meeting. He also referred to targeting the Chinese New Year period, which is 2-17 February 2011 and the Rugby World Cup period between 9 September until 23 October. These are expected to be two of SkyCity’s busiest times. Ms Walker has expressed her wish that the collective agreement had been settled prior to Christmas to avoid the 1 January strike and the hopeful wish that a new collective agreement would be negotiated well before September 2011.

[14] There has been only one meeting for collective bargaining so far this year, on 21 January. SkyCity put forward an offer of a three percent increase in pay rates for each of the next three years. The offer was rejected by the unions. The unions have not advised why SkyCity’s offer was rejected or what they would be prepared to accept in its place.

[15] At the 21 January meeting Ms Walker asked that as the strike action had been largely limited to Table Games, were there issues specific to those employees which

could be discussed? Mr Treen responded that the unions declined to address Table Games issues in that forum and that the strike action would intensify and spread to other departments unless SkyCity agreed to all 60 of the union claims in the bargaining.

[16] Ms Sherman in her affidavit states that the bargaining is at an impasse. Ms Walker does not agree. She expressed the hope that, after the industrial action over the Chinese New Year period has ceased, the parties would be able to get back to the bargaining table and make some real progress perhaps with the assistance of a mediator.

[17] Ms Walker considered the range of responses open to SkyCity given the current escalation of strike action. She considered the possibility of lockouts and, because this is a significant step for an employer to take given the message it would send to the workforce, this was not something that she took lightly. She initially considered locking out all of the union members until they accepted SkyCity's last offer in the bargaining but decided this was an overly robust step to take at this stage. This was particularly so as the majority of the approximately one thousand union members covered by the CA had decided not to participate in strike action and Ms Walker wanted to respect that decision. Because the strike action had been largely confined to Table Games employees, and those employees made up a large majority of the union bargaining team, she considered that the Table Games employees must have had a considerable influence over the bargaining and that putting pressure on them would be an effective way of moving the bargaining forward. She therefore decided to impose a lockout confined, to Table Games employees who took part in the short duration strikes, as to lock them out for the remainder of their shifts would be a commensurate response which would, hopefully, get bargaining progressing. She therefore arranged for the limited number of Table Games employees taking short duration strike action to be locked out, commencing this action on 22 January 2011.

[18] From that date SkyCity has purported to lockout the Table Games strikers on each occasion they have engaged in a short duration strike. They each received a form letter (the purported lockout notice) on return to their duties that states:

SKYCITY Auckland advises you that you are not to return to work until your next rostered shift.

The reason that you are not to return to work until the above time is to compel acceptance of terms of employment or compliance with a demand from SKYCITY. Namely, to accept SKYCITY's offer of a wage increase of 3% each year, for a three year collective agreement. This is SKYCITY's current offer in bargaining with the Unite Union and the Service & Food Workers' Union Nga Ringa Tota.

You will not be paid for this period.

You are not to carry out any duties for SKYCITY during this period.

Please feel free to contact me or a member of the HR team to discuss the above.

[19] Up until receipt of the purported lockout notice Ms Sherman's industrial action consisted of leaving in the middle of her shift. She would hand over to another worker and sign out. She would then leave her post for anything from 15 minutes to several hours. When she came back, she would resume her duties and sign back in.

[20] On 22 January 2011 she did this at 9am and when she came back at 9.15am her manager gave her the purported lockout notice. On each occasion the Table Games employees took short duration strike action they were also given similar letters. Because of these letters those Table Games employees who were taking industrial action started doing so at the end of their shift to avoid losing pay. This was less effective because it is quiet at the end of shifts.

[21] Ms Walker accepted that the lockouts have put pressure on union members particularly by causing them to take their strike action at or near the conclusion of their shifts when the gaming tables are not as busy. The lockout notices have resulted in a change therefore to the way the Table Games employees were going on strike. She claims that this was not her main objective but that her main objective was to place pressure on appropriate people who have taken an interest in and were able to influence, the bargaining. She claims that her intention was that the employees who were locked out would convey a wish to accept the wage increase to the bargaining team. The reference in the purported lockout notice to the wage increase was an attempt, she says, to bring the focus back to what, she confirmed in

unchallenged oral evidence, was the main issue in the bargaining, namely the amount of the pay increase. Ms Walker says that she considered that at this stage of the bargaining there was a good chance of getting a new collective agreement concluded if agreement could be reached on the pay increase. She says her intention was that the lockouts would have compelled the locked out employees to use their influence to get that offer accepted.

[22] Ms Walker was not cross-examined on this part of her affidavit evidence, nor on her wording of the lockout notice which she wrote and which has been used in that standard form in response to short duration strikes in the Table Games area. Approximately 50 letters have been sent out since 22 January. None have been sent since these proceedings were commenced on 2 February.

[23] Late in the week ending 4 February, Ms Walker put up a notice to all staff headed up “**Bargaining Update – Union Negotiations**” and which commenced with the words:

We have received questions from a number of people both union and non-union members about the status of the collective bargaining process with the unions. Hopefully the following addresses most of these, but let your manager know if you have any further questions.

[24] It then sets the following questions which it then answers:

- Q. When did the company last meet with the unions?**
- Q. What offer has the company made to the unions?**
- Q. What was the union’s response to the company’s offer?**
- Q. I am a union member – when will I get my next wage increase?**
- Q. I understand that the company has trespassed Mike Treen, is that correct? Why?**

[25] The final question and answer are relied upon by the plaintiffs as a “smoking gun” which demonstrates the true motive for the purported lockouts and I set them out in full:

- Q. Why are staff who go on strike being sent home for the rest of their shift?**
- A. Many union members in the Table Games department have been taking industrial action for more than 3 weeks now. The unions

have told us that this industrial action is going to increase, particularly over the Chinese New Year period which traditionally is a busy time for the Table Games department.

For our non-union team members and our managers, the industrial action has meant working additional hours, delayed breaks or missing breaks altogether and dealing with confused and frustrated customers.

We really appreciate your commitment to ensuring the best possible experience for our customers and therefore, in the face of increasing industrial action we will use all of the tools available to us, including sending some of our striking union members home for the remainder of their shift without pay.

Clare Walker  
Employee Relations Manager

[26] The plaintiffs allege through Ms Sherman's affidavit that the effect of this question and answer meant that the employees who engaged in short duration strikes would be sent home for the rest of their shift but, because it did not say that SkyCity was doing this to compel them to take its offer, the only reason for the lockouts was that the short duration strikes were causing difficulties. This is a matter which I shall develop when dealing with the submissions.

[27] In cross-examination Ms Walker accepted that her answer set out above was an explanation of why the staff were being sent home but it was only part of the reason that they made the decision to start locking out the Table Games union members. She accepted that the short durations strikes were having a real impact on SkyCity's business and causing disruption to customers and staff. This was particularly difficult at Chinese New Year which was a very busy time. She also accepted that having the short duration strikes occur at the end of a shift rather than in the middle was much easier to manage.

[28] In answer to questions from the Court Ms Walker confirmed that the intended audience of the notice was all of the employees. She said the reason she did not make express reference to matters such as the three percent increase in her answer was that she understood her update communications to employees should not stray into bargaining matters and should be kept at a level so they were easily understood by all the staff including those who were not directly involved in the bargaining. The notice, she said, was intended to update staff and to explain SkyCity's position

and where they were in the bargaining. It was made on the assumption that the staff who were not on strike were reasonably happy with the offer that had been made.

[29] I found Ms Walker to be a credible witness who was not shaken in cross-examination and who answered truthfully and responsively.

[30] The plaintiffs have also claimed that other forms of pressure on other union members, specifically security guards, have been exercised by the defendant when the security guards engaged in short duration strikes. They were allegedly threatened with a stoppage of overtime. Because the defendant did not assert that this was a lockout, the lawfulness of that action is being challenged only in the Employment Relations Authority. It is however, said by the plaintiffs to be relevant because it demonstrates that the defendant is motivated by an attempt to control the type of industrial action, rather than by compelling acceptance of its preferred collective agreement.

[31] Ms Walker was cross-examined at some length about this matter. She confirmed that management staff had erroneously advised security officers that they would not be offered overtime if they participated in short duration strikes. When this was brought to her attention she corrected the managers who were instructed to withdraw that advice. She was unaware of any security officers who had actually been deprived of overtime but she fairly accepted that while the advice was current it would be a disincentive to security guards striking if they thought they were going to lose overtime. She confirmed the advice SkyCity's solicitors had given to Unite's solicitors that no unlawful discrimination had occurred in fact. Aspects of this matter have apparently been discussed in mediation, an area into which the Court cannot stray.

[32] At the start of the Chinese New Year period, some of Unite's members went on strike from 8pm on Wednesday 2 February until 8pm on Thursday 3 February. Ms Walker's uncontroverted evidence is that approximately 125 Table Games employees participated in the strike action. She could not give any clear indication of the total number of employees who went on strike but claimed that the Table Games employees were by far the largest group. She claimed there was only a

handful of employees from other areas who went on strike and this evidence remained uncontroverted.

## **Statutory provisions**

[33] The following statutory provisions were relied upon by counsel:

- Section 82 of the Employment Relations Act 2000, which defines a lockout, insofar as is relevant in this case, provides:

### **82 Meaning of lockout**

(1) In this Act, **lockout** means an act that—

(a) is the act of an employer—

...

(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.

...

- Section 83, the relevant portion of which reads as follows:

Participation in a strike or lockout is lawful if the strike or lockout—

(a) is not unlawful under section 86; and

(b) relates to bargaining—

(i) for a collective agreement that will bind each of the employees concerned;

- Section 85 provides that lawful participation in a lockout does not give rise to the proceedings for a grant of an injunction or for breach of an employment agreement (ss 85(1)(b) and 85(1)(c)(i)).
- Section 86 provides that participation in a lockout is unlawful if it occurs in certain circumstances including those now set out:

**86 Unlawful strikes or lockouts**

(1) Participation in a strike or lockout is unlawful if the strike or lockout—

...

- (c) relates to a personal grievance; or
- (d) relates to a dispute;

- Section 87 provides that where there is a strike the employer may suspend the employment of an employee who is a party to the strike in certain circumstances.
- Section 96 deals with an employee's liability for wages during a lockout, which insofar as it is relevant in the present case, provides:

**96 Employer not liable for wages during lockout**

(1) Where any employees are locked out by their employer, those employees are not entitled to any remuneration by way of salary, wages, allowances, or other emoluments in respect of the period of the lockout, unless the employer's participation in the lockout is **unlawful**.

[emphasis added]

**The claim**

[34] Paragraph 14 of the amended statement of claim states:

The plaintiffs allege the lockout of the table games strikers is unlawful in that it does not fall within the meaning of lockout contained in s 82(1)(b) and is not lawful pursuant to s 83 of the Employment Relations Act 2000.

[35] The plaintiffs go on to allege in their pleadings that the stated purpose of the purported lockout notice was not the true intention. They allege the true intention was to discourage the Table Games strikers, and other union members, from engaging in short duration strikes part way through their shifts. In *Spotless Services*

*(NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc (No 2)*<sup>1</sup> the Court of Appeal found that the definition of a lockout in s 82 contains two elements<sup>2</sup>:

They can be described as the factual element and the mental element. The factual element consists of an act of discontinuing an employment or breaking an employment agreement or otherwise behaving as listed in s 82(1)(a). The second or mental element is doing so with a view to compelling any employees, or to aid another employer in compelling any employees, to accept terms of employment or comply with any demands made by the employer: see s 82(1)(b) of the ERA.

[36] Ms White in her submissions accepted that, on the face of it, the purported lockout notice met the definition of a lockout in s 82 as it makes a demand and states that the demand is done with a view to compelling the employees to accept the three percent pay increase.

[37] Ms White then relied on another passage from the *Spotless* case, which became central to the arguments of both counsel.

[39] For there to be a lawful lockout, the employer's demand under s 82(1)(b) must be linked to the particular lawfulness ground it asserts under either s 83 or s 84. In addition, the justification under s 83 or s 84 must be the dominant motive for the lockout: see *Southern Local Government Officers Union Inc v Christchurch CC* [2007] ERNZ 739 ... at para 51. Thus, where the lockout is said to be lawful under s 83, the dominant motive must be to further collective bargaining.

[38] In the present case s 84, which deals with health and safety grounds for strikes and lockouts, has no application.

[39] The key words relied on by the plaintiffs are that the dominant motive in this case was not to further collective bargaining but that the real motive was to control and discourage a particular form of industrial action.

[40] Ms White referred to a number of cases which used the dominant motive test to determine the lawfulness of strikes and lockouts, the first apparently being *NZ Labourers, etc IUOW & Ors v Fletcher Challenge Ltd & Ors*.<sup>3</sup> There the issue was whether a union directed "black ban" was directed at a demarcation dispute and thus

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<sup>1</sup> [2008] NZCA 580, [2008] ERNZ 609.

<sup>2</sup> At [37].

<sup>3</sup> (1989) ERNZ Sel Cas 424.

constituted an unlawful strike in terms of s 234(1)(c) of the Labour Relations Act 1987, which provided that a strike or lockout would be unlawful “if it concerns” demarcation issues. This section is the ancestor of s 86 of the ERA. The employee union in that case had argued that the strike action was to further a dispute of interest which in those days was a way of describing bargaining for a collective arrangement. A full Court of the Labour Court held<sup>4</sup>:

In approaching our assessment of these two conflicting perspectives, we bear in mind that it is possible for different parties to the same strike to have different motives for striking and even for the same parties to strike for mixed motives. It is therefore necessary to consider carefully whether the ban in this case may not have been a strike in its origins related to a dispute of interest but in its application concerning demarcation issues ...

When the law of torts has to deal with mixed motives, the technique is to ascertain the dominant motive. For a comprehensive exposition of this topic reference can be made to *Crofter Hand Woven Harris Tweed Co v Veitch* [1942] 1 All ER 142, and especially to the speeches of Lord Wright at 166 and Lord Porter at 172, 174.

[41] The full Court surveyed a number of previous cases including *Hancock & Co Ltd v Wellington Hotel etc IUOW & ors*<sup>5</sup> which had to determine what the real reason for the industrial action was by choosing between lawful and unlawful motivations. The full Court in *Fletcher Challenge* concluded, in the passage cited by Ms White, that the question was<sup>6</sup>:

[W]e ask ourselves what, on the facts, was the real nature of the strike action in Auckland, what was the real cause of the strike there and what was the substance of the matter? What according to the dominant motive of the parties to the strike, was the strike about?

[42] In the *Christchurch City Council* case cited by the Court of Appeal in *Spotless* the full Court confirmed the importance of the dominant motive test and considered it was as applicable to lockouts as strikes because the relevant wording of the two sections is identical<sup>7</sup>. That was a case in which the Court had to consider whether the dominant motive of the Council in locking out the particular employees was to persuade or encourage them to agree on the terms of a new collective or

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<sup>4</sup> At 505-508.

<sup>5</sup> [1987] NZILR 613.

<sup>6</sup> At 510.

<sup>7</sup> *Southern Local Government Officers Union Inc v Christchurch City Council* [2007] ERNZ 739 at [51].

whether it related to a dispute about their existing terms and conditions of employment, a matter proscribed by s 86(1)(d) and which would have rendered the lockout unlawful. The Court found that the dominant motive was to progress negotiations for a collective agreement and the lockout had succeeded in bringing the parties to a successful conclusion of the bargaining. It therefore found that the lockout was not unlawful under s 86 and related to bargaining, in terms of s 83<sup>8</sup> (para [53]).

[43] Mr McIlraith then cited *SCA Hygiene Australia Ltd v Pulp and Paper Industry Council of the Manufacturing and Construction Workers Union Inc*,<sup>9</sup> a permanent injunction case decided before the Court of Appeal's decision in *Spotless*. There Judge Shaw, after canvassing earlier cases, including *Christchurch City Council*, stated:

[37] I am of the view that the dominant purpose test has added a gloss to the meaning of the words of ss 83 and 86 which goes beyond the plain meaning of the text of those sections and does not serve the purpose of the enactment.

[38] The purpose of Part 8 of the Act in relation to the legality of participation in strikes is discernible from ss 83 to 86. Apart from the grounds of safety or health in s 84, the lawfulness is dependant upon the extent to which the action relates to bargaining for a collective agreement. It is not lawful while the collective agreement is in force (except in very limited circumstances) and can only occur once bargaining is well underway. Strike or lockout action is a tool only to be used in respect of bargaining.

[39] The Act requires the Court to decide whether the strike or lockout action relates to collective bargaining or to one of the matters listed in s 86. Where there are two matters to which the action may relate I conclude that the approaches taken in *Hancock* and in the *NZ PSA case* amount to a workable test that reflects the words of the statute. To establish whether the industrial action relates to collective bargaining, the question is whether there is a real causal relationship between the action and the bargaining. Rather than applying an abstract test which does not appear in the sections, essentially the decision is a matter of fact about what is the motivation for the action.

[40] If this test is applied, I accept Mr France's submission that there should be no distinction between the meaning "relates to" in ss 83 and 86. The use of the same words in each section is a strong indication that they

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<sup>8</sup> At [63].

<sup>9</sup> [2008] ERNZ 301.

should be interpreted the same and this is consistent with the purpose of the sections.

[41] I conclude that for participation in a strike to be lawful under s 83, the Court has to find as a matter of fact that it relates to collective bargaining in the sense that collective bargaining must be the cause of the strike or be specifically related to the strike action.

[44] Support for Judge Shaw's approach may be found in *Auckland Harbour Board v NZ Harbours IUOW & Anor*<sup>10</sup> where the Court of Appeal interpreted the phrase 'related to', albeit in a slightly different context, to require only "a sufficiently direct connection" between the two matters, stating that "[v]ery often it can only be a question of fact and degree."<sup>11</sup>

[45] As Mr McIlraith submitted, Judge Shaw's objections do have force. Section 83(b) requires only that the strike or lockout "relate to bargaining", not that they dominantly relate to bargaining. Thus it could be argued that the correct test, on the statutory wording in s 83, is whether there is a link between the bargaining and the industrial action, not whether the bargaining was the dominant reason or motive for the industrial action. It is also arguable that if there are two conflicting motives, one of which is unlawful under s 86, because for example, it relates to a dispute, then regardless of whether that was the dominant motive or not, because it related to a dispute, even if only in small part, it would arguably be unlawful under s 86.

[46] If this matter were untrammelled by authority or the Court of Appeal's decision in *Spotless*, I would adopt Judge Shaw's approach which does not require the reading into s 83 or s 86 a requirement of a dominant motive to further the bargaining. In this case, as the plaintiff does not invoke s 86, all that would be needed was an analysis of whether or not the lockout related to the bargaining in any way.

[47] In the present case the lockout was in response to strike action which itself related solely to the bargaining. In a very real sense therefore, regardless of whether there were other motives, even if they were dominant motives, the lockout was a response to a strike which related to collective bargaining. Therefore the lockout

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<sup>10</sup> (1987) ERNZ Sel Cas 178.

<sup>11</sup> At 182.

would be lawful under s 83, irrespective of whether it was clouded by mixed motives. I would then have found the lockouts were lawful under s 83 and dismissed the application. However, I consider I am bound by the Court of Appeal's recent interpretation of the sections.

[48] I also note the somewhat controversial rule of statutory interpretation, that once certain words in an enactment have received a judicial interpretation<sup>12</sup> and that same expression is then re-enacted in later legislation, the legislature must be deemed to be endorsing the interpretation. Here, the re-enactment of the relevant sections, substantially unchanged, could be said to have endorsed the dominant motive test.

[49] For these reasons I must now turn to determine what was the dominant motive and whether that motive was to further the collective bargaining as the Court of Appeal's statement requires.

**Was the dominant motive behind the purported lockout notice to further the collective bargaining?**

[50] Ms White submitted that for an act to be motivated by a desire to "further the collective bargaining" the lockout must be an act that could place pressure on the workers in that bargaining and thus further the employer's cause: in this case to compel acceptance of terms and conditions. She accepted that this is what the lockout purported to do on its face but contended it was open for the Court to consider whether it complied with the s 82 definition, and was therefore lawful, by determining whether or not the defendant's dominant motive was to compel its employees to accept terms of employment or was a demand in the context of s 83 to further bargaining for a collective agreement.

[51] Again she relied on *Spotless*. Although the Court of Appeal did not agree with the Chief Judge's conclusion that an employer's demands must be lawful for a

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<sup>12</sup> In addition to the cases discussed above see *New Zealand Dairy Workers' Union v Open Country Cheese Company Ltd* [2009] ERNZ 275; *Norske Skog Tasman Ltd v Pulp and Paper Industry Council of Manufacturing & Construction Workers Union* AC 42/04, 31 July 2004 and *Dickson's Service Centre v Noel* [1998] 3 ERNZ 841.

lockout to come within s 82(1)(b)(ii) of the Act, because there was no qualifier to the word “demands” and they saw no reason to read one in, they did express, the following view. It is the sections of the Act that follow s 82 and not s 82 itself that deal with whether lockouts are lawful or unlawful. Lawful lockouts are ones which come within ss 83 and 84 and unlawful lockouts are defined (non-exclusively) in s 86<sup>13</sup>. However the Court of Appeal then went on to state:

[40] In the end, there will often not be too much difference between the Chief Judge’s approach and ours. If an employee’s demand is unlawful, then both parties accept (and we agree) that the lockout will be unlawful. This is, however, not because the lockout does not meet the definition of lockout in s 82 as the Chief Judge held. It will be a lockout but an unlawful one because s 83 and 84 could not be interpreted to allow any person, whether a union, employer or employee, to act in a manner that is contrary to the ERA or is otherwise unlawful. Unlawfulness means more than making a demand that a union and/or employees are not obliged to accept. It must mean making a demand that the employer cannot lawfully make or one that an employee cannot lawfully accept.

[52] That passage may also respond to an alternative argument raised in the defendant’s submissions. It relies on s 96(1) as a fallback position. This section, it argues, prevents the defendant from having to pay wages during a lockout “unless the employer’s participation in the lockout is **unlawful**” [emphasis added]. It submitted that as unlawfulness pursuant to s 86 has not been alleged by the plaintiffs, if the Court were to find that under s 83 that the lockout did not relate to bargaining for a collective agreement, it would not be unlawful, but merely not lawful. Therefore s 96 would free the defendant from the obligation to pay any remuneration.

[53] They derived support for that submission from the paragraph in the Court of Appeal’s decision in *Spotless*<sup>14</sup> which states that the onus is on a union to establish that a lockout was unlawful if it contends the employees are entitled to wages.

[54] Thus counsel for the defendant submit that even if the plaintiffs were successful in establishing that the purported lockouts were not lawful under s 83 that would not discharge the onus of showing that they were unlawful. I find there is considerable difficulty in reconciling that submission with the Court of Appeal’s

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<sup>13</sup> At [37]-[38].

<sup>14</sup> At [77].

statement in paragraph 40 of *Spotless* which states that a lockout could be an unlawful one because ss 83 and 84 could not be interpreted or allow any person to act in a manner that is contrary to the ERA. Purporting to breach the employment agreement by stopping pay because the true motive was merely to prevent disruption, where there was no power under the agreement to send people home when they had taken short duration strike action, would be acting contrary to the ERA on the Court of Appeal's interpretation of ss 83 and 86 and would therefore be unlawful.

### **Does the notice do what it purports?**

[55] Ms White submitted that the question the Court needs to answer is: Is the action taken by the defendant consistent with its stated intention to force compliance with the demand to accept SkyCity's wage offer? She submitted that in deciding SkyCity's true good faith motivation and whether its purported motivation was credible, the Court should consider the following matters.

[56] Ms White then posed a series of rhetorical questions, the substance of which may be summarised as follows:

- If SkyCity was targeting resistant workers why had it not locked out all workers known to be resistant to its offer when they engaged in various strikes?
- If SkyCity sought to place pressure on the bargaining team why not lockout just the bargaining team?
- Why were so few workers locked out because this would not persuade the majority of workers to accept the employee's demands?
- Why did Ms Walker's newsletter not explain the reason why some workers had been sent home?

- Why were those workers not locked out when they completely withdrew labour for 24 hours?
- Why were they not locked out until the end of their shift when the lockout notice once issued could not be avoided by its recipient and it amounted to a punitive reaction to a past event?

[57] Based on these questions, Ms White submitted that the notice had made no lawful demand regarding the recipients' future conduct and therefore did not place any pressure on them to further the bargaining or for the workers to comply with the demand, because the notice reassures them that they can come back to work without meeting the demand. She submitted that therefore the lockout had nothing to do with the furtherance of bargaining but was intended to have the desired and achieved effect of altering the behaviour of the Table Games strikers who, by seeking to avoid loss of pay, moved their strike action to the end of their shifts, when it had less disruptive effect. She submitted the defendant had only taken its action because of, or in reaction to, the short duration strikes, which made avoidance of this industrial action the dominant motive. Ms White further submitted that the defendant had not targeted the class of workers known to be opposed to the employer's offer, but only a class of workers distinguished by their engagement in short duration strikes.

[58] Ms White's submissions also relied on the memorandum of Ms Walker which Ms White claimed clearly showed Ms Walker's true motive was to avoid disruption by attacking this form of strike action.

[59] Ms White also submitted that the pressure placed on the security guards was relevant because it showed the defendant viewed the short duration strikes as particularly disruptive and was motivated to avoid these strikes by use of "all tools available", a paraphrase of the wording contained in the memorandum.

### **Defendant's response**

[60] Mr McIlraith submitted that the lockout letters were not a sham and that they genuinely articulated the reason for the lockout on the part of SkyCity. He accepted

that whilst a change to the pattern of strikes was perhaps a foreseeable consequence of the lockouts, it was not the main reason for SkyCity's decision to take industrial action. He submitted that the demand contained in the lockout notice clearly related to the bargaining, whether because it related to SkyCity's wage offer or because it related to strike action. The lockout in response to a strike, he submitted, was an interaction between the parties to the bargaining, as defined in s 5 of the Act, which states:

**bargaining**, in relation to bargaining for a collective agreement,—

- (a) means all the interactions between the parties to the bargaining that relate to the bargaining; and
- (b) includes—
  - (i) negotiations that relate to the bargaining; and
  - (ii) communications or correspondence (between or on behalf of the parties before, during, or after negotiations) that relate to the bargaining

[61] Mr McIlraith submitted that it was clear that a demand had been made by SkyCity which related to the bargaining, either because it referred to the wage offer or because it related to the strike action and therefore the lockout met the definition under s 82 and was lawful under s 83.

[62] Mr McIlraith, in reliance on Ms Walker's evidence, submitted that the objective of the lockouts was to place pressure on the locked out employees to convey a wish to the negotiators that they wanted to accept the wage increase and that this was clearly a demand related to bargaining. He also submitted that the lockouts were a commensurate response to the limited strike action then being taken and, if a dominant motive were required, the evidence showed that the dominant purpose was to compel acceptance of the SkyCity offer, which related to the bargaining and was clearly lawful.

[63] Mr McIlraith submitted that Ms Walker's evidence answered Ms White's rhetorical questions. Her evidence, he submitted, showed that it was credible for SkyCity to have targeted both the class and the number of persons it did in its measured and commensurate response to the limited short duration strikes. He submitted that it was not necessary for SkyCity to have locked out the entire

workforce to further its demands of acceptance of its pay offer, thereby leading to a return to the bargaining table, in order to be effective. It therefore did not stretch credibility in the present circumstances for SkyCity to have focussed on the limited number of employees that it did. He submitted that it was both credible and reasonable that SkyCity was hoping and expecting that its demand of the persons who were so central to the bargaining, would further the negotiations for a collective agreement. He also submitted that the lockout response was commensurate with the type of industrial action that had been taken and was not therefore escalating the industrial action. By contrast, he submitted, the plaintiffs' submissions were saying that SkyCity should have locked out more or all of its employees and only then would its lockout have been credible and lawful notwithstanding that such action would have punished more employees and have inflamed the situation at its busiest times of year.

## **Discussion**

[64] Mr McIlraith made the compelling observation at the conclusion of Ms Walker's cross-examination that she had not been questioned about her motivation in issuing the lockout notice. I have set out Ms Walker's reasoning for limiting the lockout to the Table Games employees who took the short duration strike action.

[65] I am not persuaded by Ms White's rhetorical questions that the approach adopted by Ms Walker was not credible, because it was so limited. It was a measured and commensurate response to the limited strike action being taken. It did not escalate matters. It was addressed to the class of employees of whom 352 out of a total of 465 employees had taken strike action, at least once, since 1 January 2011. Eight out of the 14 members of the unions' bargaining team worked in Table Games.

[66] I therefore accept Mr McIlraith's contention that the lockout response to the limited short duration strike action was both credible and reasonable. I am not persuaded that the lockouts were so obviously ineffective so as to lack credibility. It certainly provoked a substantial legal effort on the part of the union in response as these proceedings, in their urgency and thoroughness clearly demonstrate. On its

face it is a lockout notice which relates to bargaining. Ms Walker's uncontroverted evidence about how she came to draft it supports that conclusion.

[67] The 22 January notice does not undermine that conclusion. It was not addressed simply to the striking union members but to all affected employees whether or not they were involved in the bargaining and whether or not they had taken strike action. Whilst it refers to disruption and the steps that might be taken to stop it, the latter was said to be in the face of increasing industrial action.

[68] As Mr McIlraith submitted, the entire context of the questions and answers in the memorandum related to the bargaining process, what had taken place, and repeats SkyCity's offer and the union's rejection of it. All of this related to bargaining. If anything the memorandum confirms that the action taken to send those employees who had taken short duration strikes home, was in the context of bargaining, bearing in mind the very wide definition in s 5 which includes all interactions between the parties and all communications that relate to the bargaining.

[69] The incorrect advice given to security guards about the possible withdrawal of overtime was not a communication from Ms Walker and, on her instructions, was withdrawn. There is insufficient credible evidence from the plaintiffs that those communications to the security guards demonstrate that the dominant motive of the plaintiff was simply to reduce disruption and was not to further bargaining.

[70] I am drawn, particularly from Ms Walker's evidence, to the inescapable conclusion that the intention of the lockouts was to further the bargaining by stressing the demand to accept SkyCity's pay offer, the most central issue in dispute in the bargaining. On Ms Walker's uncontroverted evidence, once the issue of the wage increase was agreed, it was more likely than not that a collective agreement would readily follow.

[71] I accept, based on Ms Walker's honest replies, that the effect of the lockout has also been to reduce the disruption in the Table Games area which is a highly desirable result from the defendant's point of view. However, in the ebb and flow of industrial action, steps taken to weaken the opposition's bargaining position in order

to strengthen ones own, providing they fall within the definition of lawful strikes and lockouts, are expressly permitted by the Act. If strike action or lockout action can be reduced in its impact by the other side's response, that may weaken the party taking the industrial action and persuade it to return to the bargaining table, rather than continue taking industrial action.

[72] I also find that the lockouts could be avoided by the employees accepting the defendant's pay offer or returning to the bargaining table.

### **Conclusion**

[73] For these reasons, I find that the plaintiffs have failed to discharge the burden of showing that the lockout notices were not lawful. To the contrary I find the defendant has proven that they were lawful and related to bargaining in terms of s 83. Such lawful lockouts, as s 85 provides, cannot give rise to proceedings for the grant of an injunction or to any action or proceedings for breach of an employment agreement.

[74] The plaintiffs' proceedings are therefore dismissed.

[75] Costs are reserved and if they cannot be agreed may be the subject of an exchange of memoranda. Because the issue of costs might be addressed as an ancillary matter in the ongoing bargaining for a new collective agreement, I will set no timeframe for the filing and serving of costs memoranda.

B S Travis  
Judge

Judgment signed at 4.50pm on 14 February 2011