

**IN THE EMPLOYMENT COURT  
WELLINGTON**

**[2011] NZEmpC 143  
WRC 31/11**

IN THE MATTER OF      an application for interim injunction to  
prevent lockout

BETWEEN                NZ MEAT WORKERS & RELATED  
TRADES UNION INC  
Plaintiff

AND                      CMP RANGITIKEI LIMITED  
Defendant

Hearing:                31 October 2011  
(Heard at Marton)

Appearances: Simon Mitchell, counsel for plaintiff  
Glenn Jones, counsel for defendant

Judgment:             1 November 2011

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**JUDGMENT OF CHIEF JUDGE G L COLGAN**

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[1]      The question for urgent decision now is whether current and future notified lockouts of union members at CMP Rangitikei Limited's meat processing plant should be restrained by injunction until the lawfulness of lockouts, both past and current, can be determined substantively.

[2]      These proceedings were filed last Friday, 28 October 2011, and an urgent hearing allocated during a telephone conference call with counsel later that afternoon. The defendant had until two hours before yesterday morning's hearing to file documents in opposition to the plaintiff's application which it did.

[3]      This judgment does not determine substantively the rights and obligations of the parties and the lawfulness of the lockouts. It has been brought on for hearing

urgently and evidence on affidavit alone has been considered by the Court. There has been no opportunity for any of the usual elements of a trial including the filing of a statement of defence, disclosure of the relevant documents between parties, cross-examination of witnesses, or considered legal submissions. This judgment determines only what is to happen about the lockouts until the substantive proceedings can go to trial and be decided by judgment or otherwise settled.

[4] In those circumstances, the Court applies three tests in deciding whether to grant interlocutory injunctive relief. The first is whether the plaintiff has established an arguable case of unlawfulness of the lockouts. Second, and if so, the Court must determine where the balance of convenience will lie before trial. Will it be more just that the current lockouts are permitted to continue when they may ultimately be found to have been unlawful or, on the other hand, will it be more just that the defendant is restrained from locking out its employees now but where it may be able to establish that this has been lawful all along? Finally, the remedy of injunction being discretionary, the Court must stand back from the detail of the first two tests and determine whether the overall justice of the case at this stage requires that an injunction be issued.

[5] CMP Rangitikei Limited (CMPRL) operates a meat processing plant at Greatford near Marton. Among its workforce are members of the NZ Meat Workers & Related Trades Union Inc (the Union) and others who are not members of that or any other union. CMPRL and the Union are parties to a collective agreement which expired on 30 September 2011 but continues to have effect because the parties are bargaining collectively for a new collective agreement.

[6] In an effort to progress the bargaining and to persuade the Union and its members to accept CMPRL's proposed terms and conditions of employment, the company has resorted to locking out union members since 19 October 2011. It has been able to maintain production, or at least a temporarily sufficient level of production, using existing non-union labour and by using a growing number of employees who were formerly union members but have decided, in the circumstances, to sign individual employment agreements with CMPRL under which they are now working.

[7] It is really only the current and prospective lockouts of union members with which the Court is now concerned. Lockouts which have occurred before now cannot, of course, be restrained prospectively by injunction although they may be the subject of claims for damages and/or penalties if they are found to have been unlawful. For this reason, I will concentrate on the relevant events leading to the current, prospective and notified lockouts.

[8] On 25 October 2011, CMPRL notified the Union that it proposed to lock out its members from 4 am yesterday, 31 October 2011, although this advice was given in writing to the Union again, on Friday 27 October 2011 and differed slightly from that given two days previously.

[9] The notification dated 25 October 2011 states:

1. All members of the Union employed at CMP Rangitikei Greatford Plant who are as at the date of this notice covered by the collective bargaining in progress between the Union and the Employer and whose names appear on the Appendix to this notice will be locked out pursuant to Part 8 Employment Relations Act 2000.
2. The lockout will occur at the CMP Rangitikei Ltd Greatford Plant.
3. The nature of the lockout is that the Employer will break the employment agreements of the locked out employees by discontinuing the operation of the current shift pattern of Red, Blue and Night shifts as provided for in clause 8 and Schedule A of the collective agreement expiring 30 September 2011 and discontinue the employment of those employees usually employed on those shifts.
4. The lockout is in support of the employers claim in the collective bargaining for a new collective agreement incorporating a new shift structure and remuneration rates and is done with a view to compelling the locked out employees to accept the Employers proposed terms of employment.
5. The period of notice hereby given is 3 days. The lockout will begin at 0400 hours on 31 October 2011 and will be continuous.
6. The lockout will end when the Union and the locked out employees accept the Employers requirements for a new shift pattern and new remuneration rates and a new collective agreement incorporating those requirements is ratified by the employees.
7. This notice is without prejudice to the validity of the notice of lockout dated 3 October 2011.

[10] The notification dated 27 October 2011 states:

1. All members of the Union employed at CMP Rangitikei Greatford Plant who are as at the date of this notice covered by the collective bargaining in progress between the Union and the Employer and whose names appear on the Appendix to this notice will be locked out pursuant to Part 8 Employment Relations Act 2000.
2. The lockout will occur at the CMP Rangitikei Ltd Greatford Plant.
3. The nature of the lockout is that the Employer will break the employment agreements of the locked out employees by discontinuing the operation of the current shift pattern of Red, Blue and Night shifts as provided for in clause 8 and Schedule A of the collective agreement which expired on 30 September 2011 and discontinue the employment of those employees usually employed on those shifts.
4. The lockout is in support of the Employer's claim in the collective bargaining for a new collective agreement incorporating a new shift structure and remuneration rates and is done with a view to compelling the locked out employees to accept the Employer's proposed terms of employment.
5. The period of notice hereby given is the period between the time of service of this notice and the commencement of the lockout, being a period no less than 3 days. The lockout will begin at 0400 hours on 31 October 2011 and will be continuous.
6. The lockout will end when the Union and the locked out employees accept the Employer's proposed terms of employment and a new collective agreement incorporating those terms is ratified by the employees.
7. This notice is without prejudice to the validity of the notice of lockout dated 3 October 2011.

[11] Last Friday, also, the Union filed a claim in the Employment Relations Authority about the employer's communications with employees during bargaining which, although a separate matter, is of course not unrelated to the Union's proceedings in this Court. Counsel advised me at the hearing yesterday that the Employment Relations Authority has not responded to the filing of that claim as yet, despite an application for urgency and when and how it will be dealt with remain uncertain at this stage.

[12] Following the first notification of lockout on 3 October 2011, the parties sought to resolve their collective bargaining differences in mediation but this was unsuccessful. In these circumstances, I did not direct the parties to further mediation

at that stage last Friday although it appeared that an application for facilitated bargaining had not been considered by either party, or the Union in particular, until that possibility was raised by the Court. Whether such an application is made to the Employment Relations Authority and how expeditiously it might be able to be dealt with is a matter for the parties and the Authority.

[13] CMPRL's current position in collective bargaining is that it has prepared a form of collective agreement in terms that suit it and has presented this to the Union for its agreement. The Union has not agreed to many of the employer's proposed terms so the company's proposed collective agreement has not been put to union member employees for ratification. Following a meeting at Taupo late last week, the employer has made some further concessions but these have not (yet at least) been considered, let alone accepted, by the Union and its members.

[14] Because the proceedings in this Court do not concern the merits of the parties' positions in bargaining, it is unnecessary to summarise the numerous changes to current terms and conditions of employment that the company seeks except to acknowledge that these appear to be significantly disadvantageous to current employees who are members of the Union. The employer says that economic factors necessitate these changes. However, the employer is entitled in law to engage in hard bargaining including by locking out employees if the legal requirements of this industrial action are met.

[15] The Union's grounds of challenge to the lawfulness of the lockouts so notified, as set out in the statement of claim, are as follows.

[16] In relation to the 25 October 2011 notification, the Union says that it purports to require employees to both accept terms of employment and to comply with demands made by the employer and is accordingly in breach of s 82(1)(b) of the Employment Relations Act 2000 (the Act). Next, the Union says that the requirements set out at para 6 of the notice to end the lockout are not clear and the terms of employment that are required to end the lockout are not the same as the demands made by the employer to end the lockout. Third, the Union says that the notification specifies a period of notice at para 5 but this is incorrect because service

of the notification was effected on 25 October 2011 and the lockout was to commence on 31 October 2011. Finally, in relation to this first notice, the Union says that it purports to be without prejudice to the employer's notice of 3 October 2011 (which gave notice of a lockout commencing at 4 am on 19 October 2011), so that the 25 October 2011 notice is not a lawful notice of lockout and the employees cannot know whether they are locked out by this notice or the 3 October 2011 notice.

[17] In relation to the 27 October 2011 advice of lockout there are three grounds of challenge to its lawfulness. The first is that it is said to require employees both to accept terms of employment, and to comply with demands made by the employer, and is, accordingly, in breach of s 82(1)(b) of the Act. Second, the Union says that the requirements set out at para 6 of this notice to end the lockout are not clear and the terms of employment that are required to end the lockout are not the same as the demands made by the employer to end the lockout. Finally, the Union says that this 27 October 2011 notice purports to be without prejudice to the notification of lockout given on 3 October 2011 (in respect of a lockout commencing at 4 am on 19 October 2011), so that it is not a notice of lockout and employees cannot know whether they are locked out by this notice or by the lockout notice of 3 October 2011.

[18] Section 91 of the Act provides materially:

**91 Lockouts in essential services**

- (1) No employer engaged in an essential service may lock out any employees who are employed in the essential service—
  - (a) unless participation in the lockout is lawful under section 83 or section 84; and
  - (b) if subsection (2) applies,—
    - (i) without having given to the employees' union or unions and to the chief executive, within 28 days before the date of commencement of the lockout, notice in writing of the employer's intention to lock out; and
    - (ii) before the date specified in the notice as the date on which the lockout will begin.
- (2) The requirements specified in subsection (1)(b) apply if—
  - (a) the proposed lockout will affect the public interest, including (without limitation) public safety or health; and
  - (b) the proposed lockout relates to bargaining of the type specified in section 83(b).
- (3) The notice required by subsection (1)(b)(i) must specify—
  - (a) the period of notice, being a period that is—

- (i) no less than 14 days in the case of an essential service described in Part A of Schedule 1; and
  - (ii) no less than 3 days in the case of an essential service described in Part B of Schedule 1; and
  - (b) the nature of the proposed lockout, including whether or not it will be continuous; and
  - (c) the place or places where the proposed lockout will occur; and
  - (d) the date on which the lockout will begin; and
  - (e) the names of the employees who will be locked out.
- (4) The notice must be signed either by the employer or on the employer's behalf.

[19] All but one of the Union's challenges to the lawfulness of the lockout notice assume that a statutory notice of lockout must be given by the employer and that the contents of such notice or notices must meet the legal requirements described in the statute and confirmed in case law. As a matter of statutory interpretation and on the facts presented, however, I do not consider that the Union has an arguable case that the employer is required to give formal notice of lockout in an essential service. That is because, although it is engaged in "[t]he holding and preparation of sheep, cattle, goats, pigs, or deer for slaughtering, the slaughtering of such animals, and the subsequent processing of their meat and smallgoods for the domestic market or the export market,"<sup>1</sup> s 91 ("Lockouts in essential services") requires not only that the employer be so engaged but, also, that "the proposed lockout will affect the public interest, including (without limitation) public safety or health ...".<sup>2</sup>

[20] Not only is there no reference in the evidence filed in support of the application for injunction to this statutory requirement that notice be given, but such evidence as there is points to the absence of any public interest, including public safety or health. The meat processing plant is continuing to operate. Even if its production is reduced and the defendant's operations are affected economically, it is difficult to categorise this as an adverse effect to the public interest including public safety or health. Nor can the undoubted economic burdens of the lockout upon affected union members constitute an adverse effect to the public interest which is the interest of the public or community in general, that is beyond the immediate parties to the dispute.

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<sup>1</sup> Part B(1) of Schedule 1 to the Act.

<sup>2</sup> Section 91(2)(a).

[21] When this proposition was put to him, Mr Mitchell for the Union argued that Parliament could not have contemplated such an uncertain qualification being placed upon a clear and longstanding requirement to give notice of lockout (or strike) action in essential industries or services as defined. However, both the conjunctive requirements of s 91(2) and the consequent need of parties considering striking or locking out to assess the effect of these actions on the public interest, is clear. So, too, is the need for care in making that assessment and the possibility that employers or unions relying on an absence of adverse public interest effects may be subjected to challenges such as this in the Employment Court. But it is not a novel proposition about the meaning of the statute: it was considered in relation to strikes in *Golden Bay Cement, A Division of Fletcher Concrete and Infrastructure Ltd v New Zealand Merchant Service Guild*<sup>3</sup> and as recently as a week or so ago in relation to lockouts in *Service and Food Workers Union Nga Ringa Tota Inc v PACT Group Charitable Trust*.<sup>4</sup>

[22] I accept, as Mr Jones for the defendant conceded, that while, at the outset of lockout action on 19 October 2011, there may possibly have been some public interest (including animal welfare) considerations, by the time of the start of yesterday's lockout these would have disappeared, even if they had existed a fortnight or so ago. It is also, of course and as the company did in this case, open to an employer to give advance notification (including, but not limited to, written notification although not formal notice under s 91) of proposed lockout action which will enable any potential adverse public interest effects to be addressed and/or negated by the time of the commencement of the lockout action. The same may apply to proposed strike action under s 90(2).

[23] The scheme of the legislation, so far as strikes and lockouts in essential services are concerned, is now that not only must the employer's operation meet the statutory definition of an essential service, but the proposed strike or lockout must affect the public interest, including (without limitation) public safety or health. So it is possible that there may be a strike or lockout in an essential service but which, because it does not so affect the public interest, does not require formal notice under

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<sup>3</sup> [2002] 1 ERNZ 456.

<sup>4</sup> [2011] NZEmpC 137.

the relevant sections. This appears to have been Parliament's response to the anomalies illustrated by this Court's judgment in *Dickson's Service Centre Ltd v Noel*.<sup>5</sup>

[24] Mr Mitchell also submitted that the defendant, having purported to give formal s 91 lockout notices even if it was not required to do so, should now be held strictly to these. I do not agree that a party mistakenly giving a formal technical notice of a strike or lockout in circumstances where it is not required to do so, should nevertheless be so bound.

[25] So it follows that the plaintiff has no arguable case of challenge to the lawfulness of the lockout action on the basis that the company was required to give notice of lockout or lockouts under s 91 but has failed to do so including by failing to meet the statutory requirements of a notice. That is because the defendant could simply have locked out the employees without notice although, of course, otherwise in compliance with the statute.

[26] This conclusion of no arguable case does not eliminate all of the grounds of challenge brought by the Union but does reduce them in number and force.

[27] The plaintiff's case relies in these circumstances upon whether what has been done or will be done by the defendant meets the definition of "lockout" in s 82 of the Act. This provides:

- (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—

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<sup>5</sup> [1998] 3 ERNZ 841.

- (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.

[28] I accept that the employer's actions and proposed actions amount to a breaking of some or all of the employer's employment agreements under s 82(1)(a)(iii) of the Act and, indeed, the written notifications of the lockouts so describe these actions. They must, however, also be "done with a view to compelling employees ... to accept terms of employment ... or ... comply with demands made by the employer." That appears to be met sufficiently by the provision in each of the lockout notifications that "The lockout will end when the Union and the locked out employees accept the Employer's proposed terms of employment and a new collective agreement incorporating those terms is ratified by the employees."

[29] I do not consider that the plaintiff has an arguable case that because the notifications of lockout to the Union may arguably appear to both require acceptance of terms of employment and to require compliance with demands made by the employer, they are accordingly in breach of s 82(1)(b) of the Act. Although these are specified as alternatives constituting the "view" by which the employer seeks to compel employees to do those two things, it does not follow that the compulsion can only be of one or the other but not both. There is no reason in principle why employees cannot be locked for two or even three more lawful reasons. In any event, the employer's "view" in this case is very arguably to have its demands for the acceptance of terms of employment agreed to by the Union and the employees in any event so that there is, in effect, a single objective.

[30] The other grounds of challenge to the lockout notices rely upon the necessity for formal notice of intention to lock out to be given, a legal proposition in respect of which I have concluded that there is no arguable case.

[31] The plaintiff having failed to establish an arguable case for trial, it is unnecessary for the Court to go on to determine the other two tests for interlocutory injunctions.

[32] Had the plaintiff established arguable cases of unlawful lockout and had the balance of convenience been in its favour, delay in bringing this application before the Court would have counted against the granting of interlocutory relief. The lockout action complained about began on 19 October 2011, some two weeks ago, and even then after more than a fortnight's notification of intention to lock out. Although it may be correct, as Mr Mitchell submitted, that the employer has planned a divide and rule strategy to continue its operations using non-union labour, that strategy has been implemented without opposition from the Union in the form of proceedings to prevent it as have now been brought only very belatedly. It is not without force in the defendant's favour that it would now incur very substantial costs if it were required to revert to previous shift patterns and other terms and conditions of employment as would be the effect of an injunction preventing current and proposed lockout action. Unexplained (as in this case) or inadequately explained delay in seeking interlocutory injunctive relief will often count against a plaintiff in such a case.

[33] In these circumstances, the application for interlocutory injunctive relief is refused.

[34] The defendant has the usual statutory period within which to file and serve a statement of defence, which period will run from 28 October 2011. If the plaintiff intends to pursue its substantive claims in this proceeding, the Registrar should arrange a telephone directions conference to timetable the case.

[35] It is important that the parties now reinvigorate their collective bargaining with a view to settling a collective agreement and ending the unfortunate standoff at this plant. I encourage all parties to resume their bargaining with the assistance of a mediator whom I understand may be available to them at short notice. A copy of this judgment should be sent to the Mediation Service's Chief Mediator for this purpose.

[36] I will not make any orders for costs.

GL Colgan  
Chief Judge

Judgment signed at 1 pm on Tuesday 1 November 2011