

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2011] NZEmpC 137
CRC 23/11**

IN THE MATTER OF a without notice application for an interim
injunction prohibiting a lockout

BETWEEN SERVICE AND FOOD WORKERS
UNION NGA RINGA TOTA INC
First Plaintiff

AND PUBLIC SERVICE ASSOCIATE TE
PUKENGA HERE TIKANGA MAHI INC
Second Plaintiff

AND PACT GROUP CHARITABLE TRUST
Defendant

Hearing: 21 October 2011

Appearances: Timothy Oldfield, counsel for first plaintiff
Catherine McNamara, counsel for second plaintiff
Barry Dorking, counsel for defendant

Judgment: 21 October 2011

Reasons: 21 October 2011

REASONS FOR JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] These are the reasons for prohibiting, by interim injunction, the locking out of employees of the defendant by their employer.

[2] The without notice application for these orders was made to the Court at about midday today. The lockout had begun yesterday. I was not satisfied that the application had to be heard so urgently that the defendant should not be entitled to the present and advance arguments. In these circumstances, counsel for the defendant was sent copies of the proceedings and participated in a telephone conference call hearing which began at 4 pm today. This is the last working day

before a long weekend and it is important that an interim position be established until the parties (and, in particular, the defendant) is able to present fully its case in opposition to interlocutory relief.

[3] For that purpose, the orders for interim injunction made will continue until modified or set aside by the Court and there will be a telephone conference call with a Judge on the first working day after the long weekend, Tuesday 25 October 2011, at 12 noon to determine the future of the proceeding.

[4] I was satisfied that the plaintiff has arguable causes of action of lockout illegality, that the balance of convenience favours restraining lockout action, and that the overall justice of the case also so requires for the following reasons.

[5] There is no dispute that the lockout of employees who are members of the two unions purportedly took place without any notice, let alone 14 days' notice as the unions contend was required.

[6] The work of the employees includes supporting service users with mental health issues in residential facilities including those service users who have been detained under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003. The defendant operates such residential facilities throughout the southern region of the South Island. The unions and the employer have been engaged unsuccessfully for some months in collective bargaining and some limited strike action began recently following 14 days' notice given by the unions to the employer.

[7] The unions' case is that notice of both strike and lockout action is required between these parties pursuant to ss 90 and 91 of the Employment Relations Act 2000 and, in particular, pursuant to Part A of Schedule 1 to the Act, because the defendant is engaged in "the operation of a residential welfare institution or prison". The defendant says that its residential facilities are not in the nature of a prison and that the phrase "residential welfare institution" should be interpreted to be prison-like.

[8] It is, however, arguable for the plaintiffs that the phrase “a residential welfare institution” is self-explanatory and should not be read down in its scope to be, in effect, a residential welfare prison. Some of the persons in such residential facilities are detained compulsorily under legislation which arguably has some of the characteristics of imprisonment in any event. Further, it is difficult to reconcile, as being essentially similar, the notions of a “welfare institution” and of a “prison”. A residential welfare institution is arguably for the purpose, or at least the predominant purpose, of the welfare of its residents, whereas a prison is, or is at least predominantly, for the protection of the community and the punishment and rehabilitation of offenders.

[9] Although the defendant seeks to rely in its argument that it does not operate residential care facilities upon a determination of the Employment Relations Authority in *Guardian Healthcare Ltd v NZ Nurses Organisation and Service and Food Workers Union Inc*,¹ I think that to the extent that the cases are analogous, *Guardian Healthcare* may not have been decided correctly. The judgments of this Court in *Timata Hou Ltd v Service and Food Workers Union Nga Ringa Tota Inc*² and, in particular, *Healthlink South Ltd v National Union of Public Employees Inc*³ are arguably more persuasive that facilities of the sort at issue in this case do amount to residential welfare institutions. Although not determinative of the case, Mr Dorking for the defendant acknowledged that it was somewhat surprising that Parliament may have omitted intentionally to cover such institutions by its reference to residential welfare institutions in cl 14 of Part A of Schedule 1 to the Act.

[10] I am satisfied, although more by inference than evidence, that the proposed lockout will affect the public interest including public safety or health. The public and the communities served by the defendant have an interest in the secure and proper treatment of its members who are impaired mentally including, in particular, those who have been detained compulsorily under law on this ground. The locking out of employees responsible for the fulfilment of these obligations to the

¹ WA 79/06, 12 May 2006.

² [2010] NZEmpC 38.

³ CEC 34/93, 8 July 1993.

community will affect the public interest. On its face, there is a risk to the public interest, including health and safety, in such a lockout.

[11] In addition, the plaintiffs must have an arguable case that the (“proposed”) lockout relates to bargaining of the type specified in s 83(b) of the Act. I accept that this condition precedent to the requirement to give notice is satisfied. The evidence is that the purported lockout is a reaction to the employees’ low level strike action which, in itself, relates to bargaining for a collective agreement. The lockout notices include express reference to accepting the employer’s offers in bargaining. A sufficient relationship between the purported lockout and the bargaining is established, at least at an arguable case level.

[12] The plaintiffs also have fall-back arguments which I have found reach the arguable case threshold. These include that the lockout notices which are in evidence do not make it sufficiently clear to the intended recipients of them who is to be locked out or what is required to be done by them to alleviate the lockout. Section 91(3)(e) requires a lockout notice to specify the names of the employees who will be locked out. No such information is specified on the lockout notices given to employees and to the unions that are before the Court.

[13] The balance of convenience favours the restraint of an arguably unlawful lockout where the illegality is failure to comply with statutorily required notice as in this case.

[14] The other feature which affects both the balance of convenience and the overall justice is that when the unions recently inquired of the defendant whether it considered that notice of a strike was required, the defendant’s response was in the affirmative although, it might be said, it also hedged its bets. The unions’ strike action was, accordingly, on notice as the unions apprehended the employer said it should be. It would not be just if the defendant, having intimated to the plaintiffs that their strike action must be subject to notice, should be permitted to lock out employees without notice where the statutory requirements are the same.

[15] The period of the prohibition upon locking out is relatively short. It covers a long weekend and the matter will be able to be back before the Court almost immediately after that. The Court's interlocutory orders do not, of course, prohibit lockout. If the defendant wishes to do so, that is open to it if the legislation, and s 91 in particular, is complied with.

[16] For the foregoing reasons, I was satisfied that the interests of justice require that the defendant now cease to lock out its employees and that it should be restrained from locking out such employees otherwise than in accordance with the requirements of s 91 of the Act.

[17] The orders of the Court which may be sealed (the plaintiffs not having provided draft orders) are as follows:

The plaintiffs having given undertakings as to damages and in reliance on those undertakings, the Court directs that until further order of the Court, the defendant is to cease forthwith its lockouts of employees who are members of the first and second plaintiffs and is not to lock those employees out otherwise than in accordance with the requirements of s 91 and any other relevant provisions of the Act.

[18] Any party may have leave to apply on short notice to the other parties to set aside or modify these orders.

[19] There will be a telephone directions conference with a Judge at 12 noon on Tuesday 25 October 2011 at which time further directions for the conduct of this proceeding will be given.

[20] The parties are referred to urgent mediation with a view to not only settling the issues between them in this proceeding, but assisting them to resolve their collective bargaining.

[21] Costs are reserved.

GL Colgan
Chief Judge

Reasons for Judgment signed at 5.50 pm on Friday 21 October 2011