IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2011] NZEmpC 148
CRC 23/11

IN THE MATTER OF	an application for an injunction to restrain a lockout
BETWEEN	SERVICE AND FOOD WORKERS UNION NGA RINGA TOTA INCORPORATED First Plaintiff
AND	PUBLIC SERVICE ASSOCIATION TE PUKENGA HERE TIKANGA MAHI INCORPORATED Second Plaintiff
AND	PACT GROUP CHARITABLE TRUST Defendant

Hearing: on the papers - submissions received 4 November and 8 November 2011

Appearances: Tim Oldfield, counsel for first plaintiff
Catherine McNamara, counsel for second plaintiff
Nic Soper, counsel for defendant

Judgment: 17 November 2011

JUDGMENT OF JUDGE A A COUCH

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[1] Under the Employment Relations Act 2000 (the Act), 14 days notice is required of any intention to strike or lockout workers in an essential industry. The industries declared to be essential include the operation of a "residential welfare institution". On 20 October 2011, the defendant purported to lock out employees in a range of its operations without notice. The principal issue in this case is the extent to which those employees were involved in the operation of a residential welfare institution and therefore entitled to notice of any lockout. Another important issue is

the extent to which the reasons for a proposed lockout, and what is required to end it, must be communicated to affected employees.

[2] The matter came before Chief Judge Colgan on 21 October 2011 as an urgent application for an interim injunction. After hearing counsel for all parties, he issued an interim injunction restraining the defendant from locking out any of its employees who are members of the first and second plaintiff unions without the 14 days notice required by s 91 of the Act. The parties subsequently agreed that the substantive hearing of the matter should be conducted on the papers with evidence in the form of affidavits and submissions by memoranda.

Legislation and Issues

[3] Strikes and lockouts are governed by Part 8 of the Act. Broadly speaking, such industrial action is lawful where it relates to collective bargaining in which the parties are involved. There are, however, some additional conditions which apply in certain circumstances. Section 91 provides:

> **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.

[4] The term "essential service" is defined as being a service specified in Schedule 1 of the Act.[1] That schedule includes in Part A:

> **14** The operation of a residential welfare institution or prison.

[5] The case for the plaintiffs is that the defendant is engaged in the operation of residential welfare institutions which, by definition, are essential services. Accordingly, the defendant may not lock out its employees without 14 days notice given in accordance with s 91.

[6] The plaintiffs' second cause of action is that the lockout notices issued by the defendant were not sufficiently clear.

[7] The defendant says that the facilities it operates and the services it provides do not amount to a residential welfare institution and that it is therefore free to lock out its employees without notice.

[8] The defendant also says that s 91 does not apply because the proposed lockout would not have affected the public interest as required by s 91(2).

Facts

[9] The relevant facts are very largely undisputed.

[10] The defendant provides support to about 800 people with intellectual or other disabilities or those recovering from mental illness. Those services are provided in Otago, Southland and the West Coast of the South Island. The defendant's programmes and services are funded under numerous headings by the Ministry of Health and the Ministry of Social Development.

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[1] Section 5.

[11] The defendant currently has 327 employees whose employment is relevant to this matter. They are engaged in four positions. I was provided with a very detailed position description for each role but they are very largely generic and aspirational. The essential nature of each role appears to be:

(a) Community Support Worker – providing support to people with mental illness or an intellectual disability who live in their own homes within the community. The worker is mobile and provides clients with assistance in maintaining and improving their independent living skills.

(b) Supported Accommodation Support Worker – providing practical support services to clients who live in accommodation provided by the defendant. The worker is directly involved with the clients and is responsible for supporting their emotional, physical and personal well-being.

(c) Supported Accommodation Service Co-ordinator – co-ordinating the day to day provision of services by support staff to provide a home for clients in supported accommodation.

(d) Activity Support Worker – assisting clients with intellectual disabilities to acquire and maintain skills which will enable them to participate in the community and fulfil their ambitions. The work is done with individuals or small groups of clients.

[12] The defendant is contracted to provide services which are described as supported accommodation, supported independent living, daytime services and support for people living in their own homes.

[13] Supported accommodation is provided for persons eligible for a residential care subsidy. Such clients are identified through a needs assessment process and are provided with support 24 hours per day. Supported accommodation is provided in houses or flats in the community. The clients live together essentially as "flatmates"

with support staff present at all times to provide organisation, supervision, guidance, and security.

[14] The defendant provides accommodation for a very small number of people directed to live in supervised premises under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003. The number of these clients is unclear but appears to be only two or three.

[15] The two plaintiff unions and the defendant were parties to a collective agreement which expired on 30 April 2011. In anticipation of that event, they began collective bargaining for a new agreement on 21 February 2011. The parties were unable to agree about several issues. This led to correspondence in which the unions raised the possibility of strike action. This culminated in notice of strike action being given by the first plaintiff on 3 October 2011. That notice was subsequently withdrawn on 5 October 2011, when similar notices of strike action were given by both plaintiffs. Those notices both provided for a refusal by workers to do various types of paperwork from 20 October 2011 onwards.

[16] On 20 October 2011, members of the plaintiff unions were handed notices of lockout when they arrived for work. There were two forms of notice. One was addressed to "Supported Accommodation Service Co-ordinators and Support Workers". The other was addressed to "Community Support Workers". In each case, the notice was directed to members of the plaintiff unions "who will take part in the strike notified by the Union on 3 October".

[17] The lockout of community support workers was to be total. The lockout of supported accommodation workers was to be for one hour per shift for service co-ordinators and half an hour per shift for support workers.

[18] In both cases, the notices reiterated that the lockout was "in respect only of employees who take part in the strike notified by the Union on 3 October 2011. The supported accommodation workers notice then continued:

> Any of your members who are not party to the strike are not locked out, and any striking staff who advise us they will take no further part in the strike will no longer be locked out.
>
> All lockouts will end immediately when we are notified by the Union that they will return to the bargaining table without threats of strike action, or that they will accept our last offer.

[19] The notice to community support workers included a similar passage which, although worded slightly differently, had the same meaning.

Residential welfare institution

[20] The meaning of the term "residential welfare institution" is at the heart of this case. As it occurs in a schedule to the Act, the starting point must be s 5(1) of the Interpretation Act 1999 which provides that "the meaning of an enactment must be ascertained from its text and in light of its purpose".

[21] The immediate text in this case are the three words "residential welfare institution". Mr Oldfield submitted that these words should be given their natural and ordinary meaning. He referred to dictionary definitions:[2]

(a) **Residential** adj. **1** designed for people to live in > providing accommodation in addition to other services > occupied by private houses. **2** concerning or related to residence.

(b) **Welfare** n. **1** the health, happiness and fortunes of a person or group. **2** action or procedure designed to promote the basic physical and material well-being of people in need.

(c) **Institution** n. **1** a large organisation founded for a particular purpose such as a college, bank etc. > an organisation providing residential care for people with special needs > an official organisation with an important role in a country.

[2] Concise Oxford Dictionary 11th ed, 2006.

[22] Drawing on these definitions, the meaning to be given to the expression "residential welfare institution" in the context of Schedule 1 to the Act is a place where accommodation and other services are provided to promote the well being of people with special needs.

[23] This meaning is consistent with the nature of other services declared by Schedule 1 to be essential. They include the operation of ambulance services and hospitals and the provision of pharmaceuticals. The common theme is the continuity of support and aid for those in need of care.

[24] This meaning is also consistent with the purpose of Schedule 1 and ss 90 and 91. Those sections require any notice of a strike or lockout in an essential service to be given not only to the affected parties but also to the chief executive of the Department of Labour[3] who must, in turn, ensure that mediation services are provided to the parties as soon as possible.[4] The purpose of this requirement is to assist the parties to avoid the need for a strike or lockout. This reflects the purpose of the provisions of Part 8 of the Act set out in s 80 which include "to ensure that where a strike or lockout is threatened in an essential service, there is an opportunity for a mediated solution to the problem."

[25] In this context, the purpose of Schedule 1 is to identify those services whose disruption by strike or lockout might cause harm to individuals or inconvenience to the public. The provision of accommodation and caring services to those with special needs is, in my view, such a service.

[26] For the defendant, Mr Soper focussed on the word "institution". He submitted that "An institution implies a facility where persons are removed from normal community living, rather than facilities that are specifically intended to enable persons to live and function independently without the need for institutional care." This submission reflects the history of the care of intellectually disabled persons in this country. In former times, such people were kept in large facilities which were regimented and often located away from population centres. Those

[3] Section 90(1)(b)(i) and s 91(1)(b)(i).
[4] Section 93.

facilities were undoubtedly "institutions" but the meaning of that word is not confined to such places. As is apparent from the dictionary definition, the essential nature of an "institution" in this context is the provision of care in a residential setting. It does not depend on size or location but rather on the provision of both accommodation and caring services. This sits comfortably with the use of the word "institution" in conjunction with the words "residential" and "welfare".

[27] Both counsel referred me to the few decided cases which have touched on this issue. I am grateful for their doing so but have found those decisions of limited assistance. In *Healthlink South Limited v National Union of Public Employees*[5], Judge Palmer relied on the plain meaning of the words to conclude that a facility providing care for a large number of intellectually and physically disabled people was a "welfare institution". While that conclusion is consistent with the construction I have placed on the words "residential welfare institution" in this case, I accept Mr Soper's submission that the case is largely distinguishable on the facts.

[28] The decision of Chief Judge Colgan in *Timata Hou Limited v Service and Food Workers Union Nga Ringa Tota*[6] is similar. While the reasoning of the decision is consistent with the approach I have taken, the case is distinguishable on the facts.

[29] I was also referred to the determination of the Employment Relations Authority in *Guardian Healthcare Limited v NZ Nurses Organisation and Service and Food Workers Union*[7]. In that case, the presence of the terms "residential welfare institution" and "prison" in the same clause of Schedule 1 led the member to conclude that only penal institutions were intended to be included. I disagree with that conclusion which I note Mr Soper did not seek to rely on.

[30] I conclude that the term "residential welfare institution" in Schedule 1 of the Act should be given the plain meaning of the words used as discussed above.

[31] Applying that meaning to the facts of this case, the operations of the defendant fall into two categories. The places in which supported accommodation is

[5] CEC 34/93, 8 July 1993.
[6] [2010] NZEmpC 38
[7] WA 79/06, 12 May 2006.

provided to clients in receipt of a residential care subsidy are "residential welfare institutions". That is because accommodation and other services are provided there to clients in special need of care. This includes the work done by Supported Accommodation Support Workers and Supported Accommodation Service Co-ordinators.

[32] On the other hand, the services provided to clients by Community Support Workers are not part of the operation of a residential welfare institution. That is because no accommodation is provided.

[33] On the information provided to me in the affidavits, it is unclear where Activity Support Workers provide services to clients. To the extent that they may work with clients in supported accommodation, their work will be part of the operation of a residential welfare institution. Otherwise, it will not.

Public interest

[34] The requirement to give notice of a lockout of employees engaged in an essential service arises only "if the proposed lockout will affect the public interest, including (without limitation) public safety or health".[8]

[35] Mr Soper submitted that, in this case, the lockouts imposed by the defendant did not affect the public interest. As I have found that the proposed lockout of community support workers did not fall within the scope of s 91, I need only consider this issue with respect to the proposed lockout of supported accommodation workers.

[36] The evidence is that all of the defendant's clients in their supported accommodation homes are free to come and go as they please except the two or three who are detained pursuant to court orders. Mr Soper submitted that this means continuity of care is not essential to ensure the safety of the clients or of the public.

[8] Section 91(2)(a) of the Act.

[37] It is also apparent from the notice of lockout given to workers in those homes that they were to be locked out of only a relatively small part of their normal work. Supported Accommodation Service Co-ordinators were to be locked out for the final hour of each shift. In the case of Supported Accommodation Support Workers, the lockout was to be for the final half hour of each shift. In the affidavit sworn by Maria Carr, she says that "other staff cover can easily be arranged" for that half hour. Mr Soper submitted that, in light of this evidence and given that the purpose of the services provided by the defendant to its clients is to assist them in living independently, the absence of support staff during the proposed lockout would not pose any risk to the clients or to the public.

[38] While there is logical force in these submissions, they are directed at the specific issue of public safety. That is only part of the wider issue of the public interest. In her affidavit, Ms Carr repeatedly refers to the provision of "24 hour care" to clients in supported accommodation. She also describes how the defendant acquires clients who live in supported accommodation:

> 17. Pact is paid by the Ministry of Health and the Southern District Health Board to provide support staff to mental health clients and intellectual disability clients located within Southland, Otago and the West Coast.
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> 18. A person is deemed to be eligible for a residential care subsidy by a needs assessor/service coordinator and Pact is then paid for their support on a 24 hour basis. The individual's welfare benefit is then partially assigned to Pact to cover board, food and other outgoings normally paid for if the person was living independently.

[39] What is clear from this and other evidence is that the defendant is paid to support and care for clients in supported accommodation continuously because that is what those clients have been assessed as needing. I infer that continuity is necessary because unexpected events affecting clients may occur at any time. Support staff must therefore be immediately available at all times to deal with those events and assist the clients to work through them. It must be in the public interest that people with mental health issues or intellectual disabilities receive the support and care they need. The fact that the defendant's services are funded by public money reinforces that public interest. It follows that, if the required care and support

is absent or the level of it reduced because staff are not permitted to work, that must be contrary to the public interest.

[40] I conclude that, if the normal level of support and care for clients in supported accommodation is reduced or impaired by a proposed lockout, that will affect the public interest for the purposes of s 91(2)(a) of the Act.

[41] It follows that the defendant may only lock out workers engaged in its supported accommodation operations if notice is given in accordance with s 91(1) or if sufficient alternative staff are rostered on during the period of the proposed lockout to ensure that the support and care of clients is not affected. The defendant's ability to roster other staff to do the work of locked out employees will, of course, be constrained by s 97 of the Act.

[42] It may be that the defendant can manage its business so that services provided to clients in supported accommodation are unaffected by a lockout of support staff. I am not satisfied by the brief statement in Ms Carr's evidence, however, that this is so. I am therefore not satisfied that the defendant may lawfully lock out supported accommodation staff without giving notice in accordance with s 91(1).

Reason for lockout

[43] Mr Oldfield submitted that a further factor rendering the defendant's proposed lockout unlawful is that the demand underlying it was unclear, uncertain and incapable of acceptance. This submission was based on s 82(1) of the Act which defines a lockout:

> **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.

[44] Mr Oldfield's submission focused on paragraph (b) which defines the mental element required to constitute a lockout for the purposes of the Act. It is the same submission he made in *Service and Food Workers Union Nga Ringa Tota v Rendezvous Hotels (NZ) Ltd*[9]. In that case, the Chief Judge said:

> [14] There seems little doubt that the discontinuation of the employment of employees meets one of the definitions of a lockout under subs (1)(a). The plaintiff's first cause of action turns on compliance with subs (1)(b). The plaintiff says that it and its members cannot know what they must do to bring the lockout to an end and, in particular, whether the lockout has been done with a view to compelling employees to accept terms of employment or to comply with the employer's demands and, if either or both, what those terms of employment and/or demands are.
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> [15] Also relevant is s 4 of the Act which deals with the statutory requirement of parties such as these to deal with each other in good faith. Under s 4(1A)(b) these parties are required "to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative". Section 4(1A)(c) is also relevant. This subsection:
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> > "requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—
> > (i) access to information, relevant to the continuation of the employees' employment, about the decision; and
> > (ii) an opportunity to comment on the information to their employer before the decision is made. "
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> [16] These statutory requirements reinforce the plaintiff's position that the defendant has not communicated sufficiently clearly to the union and employees about its intention in proposing to lock them out and, in particular, to comply with s 82(1)(b) by specifying what it seeks to have them do and, by implication, how a lockout can be avoided or ended.
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> [17] It has long been the position that strikes and lockouts in employment are weapons of last resort. They inflict economic harm on the person or persons subject to them. The scheme of the legislation is, whilst allowing them to occur in specified circumstances, nevertheless to provide alternative means of achieving agreements and settlements short of the infliction of economic harm by strikes or, in this case, lockouts. It follows that employees proposed to be locked out, or locked out, should be given sufficient information to enable them to avoid such a consequence or to bring it to an early end if it has begun. I accept that the plaintiff has an arguable case that the defendant's communication about the lockout have been deficient in these circumstances. But that position has now been rectified by the

[9] [2010] ERNZ 154

> defendant's email of 20 June 2010 so that any further lockouts will not be unlawful on this ground.

[45] As is apparent from the last sentence of this passage, the case was not decided on this ground and what the Chief Judge said is *obiter dicta*. As a reasoned and thoughtful analysis of the issues involved, however, it is worthy of respect and serious consideration. Mr Oldfield relied on this passage and invited me to apply it in this case. Specifically, Mr Oldfield submitted that the demands made by the defendant in the notices given to employees were uncertain, unclear and incapable of acceptance. On that basis, he submitted that the proposed lockout was unlawful.

[46] It is immediately apparent that the definition of a lockout in s 82 is in two parts: an action and a state of mind. Those two components are linked by the expression "with a view to". That expression is the key to the analysis of the section for the purposes of this case. Is it sufficient that the employer has the state of mind or motivation for its action described in paragraph (b) or must that also be effectively communicated to the affected employees?

[47] As noted earlier, s 5 of the Interpretation Act 1999 provides that "the meaning of an enactment must be ascertained from its text and in light of its purpose". The ordinary meaning of the words "with a view to" requires only a subjective state of mind. There is no reference to communication in s 82. Mr Oldfield's submission therefore inevitably relies on the proposition that the purpose of s 82 requires that it be implied into paragraph (1)(b) that the employer's state of mind be effectively communicated to the affected employees. It also requires a construction of s 82 which renders an employer's action unlawful if that requirement is not met.

[48] It is not appropriate to read this extended meaning into s 82. Indeed, it would be inconsistent with the scheme of this part of the Act to do so. In reaching this conclusion, I am guided very much by the decision of the Court of Appeal in *Spotless Services (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc (No 2)*[10]. In that case, the Chief Judge held that there is no lockout in terms of s 82 unless the demand made by the employer is lawful, that is one the employer was entitled to make. On appeal, the Court of Appeal said:

[10] [2008] ERNZ 609.

Is a lawful demand a jurisdictional gate?

> [37] The Chief Judge held that an employer's demands must be lawful for a lockout to come within s 82(1)(b)(ii) of the ERA. We do not agree. The scheme of the ERA is that s 82 provides a definition of lockout. The definition contains two elements. 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.
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> [38] There is no qualifier to the word "demands" in s 82(1)(b)(ii). We see no reason to read one in. Unlike Chief Judge Colgan, we do not see any significance in the change from "any demands" in s 62 of the ECA 1991 to "demand" in s 82 of the ERA (see para 25 above). In our view, it is the sections of the ERA that follow s 82 and not s 82 itself that deal with whether lockouts are lawful or unlawful. Lawful lockouts are those that come within ss 83 and 84. Unlawful lockouts are defined (non-exclusively) in s 86.
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> [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 Govt Union v Christchurch CC [2007] ERNZ 739; (2008) 8 NZELC 99,117, at para 51. Thus, where the lockout is said to be lawful under s 83, the dominant motive must be to further collective bargaining. Where the lockout is said to be lawful under s 84, the dominant motive for the lockout must be the health and safety grounds covered by that section. This means that Chief Judge Colgan could not rule on the lawfulness of the lockout without considering Spotless' demands in light of its health and safety justification under s 84. He wrongly viewed s 82 as a jurisdictional gate through which an employer must pass before getting to justification under s 83 or s 84.
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> [40] In the end, there will often not be too much difference between the Chief Judge's approach and ours. If an employer'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 ss 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. We now examine whether the demands made by Spotless fell into that category.

[49] The key conclusion recorded in this passage is that whether a lockout is lawful or unlawful is not to be determined under s 82 but rather under ss 83, 84 and 86. In this case, the action proposed by the defendant was with a view to persuading

the affected employees to cease their strike action and to persuade the plaintiff unions to return to bargaining on certain terms or to accept its last offer. As those objectives clearly fell within the scope of s 82(1)(b), what the defendant proposed to do was a lockout by definition. That proposed lockout was lawful under s 83 of the Act. It related to bargaining for a collective agreement that would bind the employees concerned and there is no evidence to suggest that it was unlawful under s 86. The demands made were ones which the defendant was lawfully entitled to make and which the plaintiff unions and affected employees could lawfully meet.

[50] This conclusion makes it unnecessary for me to decide whether the notices given to staff did adequately inform them of the extent of the lockout and what they must do to bring it to an end. It is, however, appropriate to make some comment about communication of the terms of a proposed lockout.

[51] It will usually be in the employer's interest to make it perfectly plain to affected employees what its demands are and what must be done to satisfy them. While a lockout is intended to inflict economic harm on employees, it usually affects the employer also, such as by lost production. The employer therefore wants its demands to be met as soon as possible and that is assisted by clear and unambiguous communication.

[52] If communication is particularly deficient, it may be that there is no basis on which to determine what the reason for the employer's proposed action is. In that case, it might be argued that the action was not a lockout. Such was the initial argument in the *Rendezvous Hotel* case. As that case demonstrated, however, any such deficiencies can be remedied easily and even informally.

[53] As the Chief Judge observed in the *Rendezvous Hotel* case, it is part of the obligation of good faith to be communicative and, where the continuation of employees' employment is in question, the employer must also discharge the specific obligations under s 4(1C) of the Act. Failure to do so may render the employer liable to a penalty under s 4A.

[54] Finally, it is worth noting that, unlike the definition of lockout in s 82, the corresponding definition of a strike in s 81 of the Act requires no particular intention at all. Rather, the requirement is that the action involved be that of a number of employees who have expressly or impliedly agreed to act in concert. Any such combined action will be a strike for the purposes of the Act, regardless of the reason or reasons for which the action may be taken. Even action taken for no reason may be a strike. Like s 82, s 81 is concerned only with definition and not with lawfulness. As with lockouts, whether a strike is lawful or unlawful is dealt with in ss 83, 84 and 86.

Conclusions

[55] In summary, my conclusions are:

(a) The supported accommodation facilities operated by the defendant are "residential welfare institutions" for the purposes of Schedule 1 of the Act and are therefore essential services. Any lockout of employees engaged in operating those facilities must comply with s 91 of the Act.

(b) The Community Support Workers employed by the defendant are not engaged in an essential service.

(c) Activity Support Workers employed by the defendant will be engaged in an essential service to the extent that they are part of the operation of the supported accommodation facilities. Otherwise, they will not be engaged in an essential service.

(d) The action proposed by the defendant in its notices to employees of 20 October 2011 was a lockout.

(e) On the evidence before the Court, the proposed lockout of supported accommodation staff would have affected the public interest.

(f) To the extent that the proposed lockout was of employees engaged in the operation of the supported accommodation facilities, the lockout

was unlawful because the requirements of s 91 of the Act had not been met.

(g) Otherwise, the proposed lockout was lawful.

[56] The issues involved in this case are not easy and open to genuine differences of opinion. The parties have behaved responsibly and appropriately in bringing those differences to the Court for resolution. Guided by the conclusions I have reached in this decision, I expect that the parties will be able to ensure that their future actions are lawful without the need for a formal injunction. At a practical level, any further strike or lockout action should be based on fresh notices drafted in light of this decision. I reserve leave, however, for either party to seek further guidance as to the application of the conclusions I have reached regarding the particular circumstances of the defendant's operations or to apply for the issue of a formal injunction based on those conclusions. That leave will be reserved for a period of 15 working days after the date of this decision. Any issues which arise after that time will need to be the subject of new proceedings.

Costs

[57] All parties in this proceeding have been successful to an extent. It is also a case where issues have been resolved which should assist all parties in their future relationships. For those reasons, my initial inclination is not to make an order for costs. If either party wishes to seek an order for costs, a memorandum should be filed and served within 20 working days after the date of this decision. The other parties will then have a further 15 working days in which to respond.

A A Couch
Judge

Signed at 2.00 pm on 17 November 2011