IN THE EMPLOYMENT COURT
AUCKLAND

AC 34A/09
ARC 78/09

IN THE MATTER OF	an application seeking injunction to prevent illegal lockouts
BETWEEN	NEW ZEALAND DAIRY WORKERS' UNION Plaintiff
AND	OPEN COUNTRY CHEESE COMPANY LIMITED Defendant

Hearing: 25 September 2009
(Heard at Auckland)

Appearances: Simon Mitchell and Peter Cranney, Counsel for Plaintiff
Graeme Malone, Counsel for Defendant

Judgment: 30 September 2009

REASONS FOR ORAL JUDGMENT OF JUDGE B S TRAVIS

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[1] On Friday 25 September 2009 after a substantive hearing[1], including viva voce evidence, I issued a permanent injunction in the following terms:

> *[3] An injunction will issue restraining the defendant from locking out employees pursuant to its notice of 9 September 2009 or any other lockout notice intended to compel members of the plaintiff to accept individual terms of employment.*

[2] The following are my reasons for so doing.

[1] AC 34/09

Factual Findings

[3] The defendant, Open Country Cheese Company Limited ("the Cheese Company"), owns and operates a cheese and milk powder plant at Waharoa in the Waikato. The Cheese Company was formed in 2002 and in October 2008 was taken over by Open Country Dairy Limited ("the Dairy Company") and is now a 100 per cent owned subsidiary. The Cheese Company currently processes 1.6 million litres of milk a day from 307 dairy farms. The income to local farmers from the milk supplied is approximately $680,000 a day based on current payout predictions. The quantity of milk processed increases to a peak quantity about this time and then remains constant until about the end of December when it reduces through to the end of the seasons on 31 May. Some farmers supply milk all year.

[4] At the peak season the Cheese Company would usually have about 130 employees including management, administration and office staff, and seasonal, casual and contract labour. All of the employees of the Cheese Company are on individual employment agreements.

[5] The plaintiff, the New Zealand Dairy Workers Union ("the Union"), represents approximately 36 employees at work in the Cheese Company. The Union has had difficulty in organising the plant. Initially the Union representatives were not allowed access and the matter needed to be referred to the Employment Relations Authority. A determination of the Authority granting access has been challenged by the Cheese Company.

[6] On 25 June 2009 the Union initiated bargaining for a collective agreement in accordance with s42 of the Employment Relations Act 2000 ("the Act"). The intended parties to the collective agreement were the Union and the Cheese Company. The collective agreement was intended to cover all workers who are or who become members of the Union and they are engaged in a variety of work at the Cheese Cheese Company. The Union and the Cheese Company have been unable to reach agreement and on 28 August 2009 the Union gave notice of intention to strike

for 8 days, commencing at 6pm on 16 September and ending at 6pm on 24 September. There was no issue between the parties that the strike action taken by the members of the Union at the Cheese Company was lawful.

[7] In response to the Union's strike the Cheese Company issued a lockout notice for a period of 6 weeks commencing from 6pm on 24 September. The relevant part of that lockout notice reads as follows:

> ***NATURE OF THE LOCKOUT***
>
> *The nature of the lockout is a continuous and total lockout of all of the specified employees for the period specified below. The employees specified in the notice are members of the DWU and are engaged in bargaining for a collective employment agreement with the Company and the lockout is being undertaken with a view to compelling those employees to accept terms of employment offered by the Company.*

[8] I am satisfied from the evidence that at no time during the course of the bargaining had the Cheese Company ever stated the terms of a collective agreement that would be acceptable to it. The Cheese Company rejected the terms suggested by the Union. The only terms advanced by the Cheese Company have been on the basis of individual employment agreements.

[9] On Tuesday 15 September after a failed attempt at mediation the Union received an offer of settlement from the Cheese Company setting out its proposal to resolve the bargaining. This took the form of a reworded draft individual employment agreement, a copy of which was provided to the Court.

[10] During the course of the strike the Union withdrew the strike notice and expected that their members would be able to return to work at 6pm on Monday 21 September 2009. By letter dated 21 September, from the Cheese Company's solicitors, the Union was advised that before and during the strike a number of serious incidents of sabotage had taken place and that the company considered these may have been undertaken by striking members with the knowledge or encouragement of the Union. It was alleged that some of the acts of sabotage, in

addition to causing significant economic harm, could have caused serious injury or death and the incidents were being investigated both by the company and the police. The striking employees were returned to full pay from the time the strike ended. That pay ceased when the lockout took effect at 6pm on Thursday 24 September.

[11] Members of the Union have alleged acts of intimidation on the part of the Cheese Company's management.

[12] Against this acrimonious background the legality of the lockout falls to be determined.

[13] The Union has alleged that the Cheese Company has employed or engaged persons to do the work that would most probably have been performed by the striking employees had they not been on strike. The Union alleges that this breaches the terms of s97 of the Act. On 21 September, under ARC 75/09, the Union commenced proceedings against the Cheese Company seeking a compliance order requiring the Cheese Company to cease and desist from employing or engaging replacement employees during the period of the current strike, any future strike, or any lockouts. Counsel for the parties sought urgency and a substantive hearing was set down for Friday 25 September. When the current proceedings were commenced by the Union on 23 September, counsel again sought urgency and agreed, in a telephone conference on 24 September, that the two matters should be heard together and that the evidence for one should be evidence for the other. Evidence was filed in the form of affidavits, with cross-examination of three deponents.

Relevant legislation

[14] The following sections of the Employment Relations Act were referred to by counsel in their submissions.

> ***Part 5 collective bargaining***
>
> ***31 Object of this Part***
> *The object of this Part is—*
>
> …
>
> *(aa) to provide that the duty of good faith in section 4 requires parties bargaining for a collective agreement to conclude a*

collective agreement unless there is a genuine reason, based on reasonable grounds, not to; and

…

33 Duty of good faith requires parties to conclude collective agreement unless genuine reason not to

(1) The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to.

*(2) For the purposes of subsection (1), **genuine reason** does not include—*

(a) opposition or objection in principle to bargaining for, or being a party to, a collective agreement; or

(b) disagreement about including in a collective agreement a bargaining fee clause under Part 6B.

…

Part 8 - Strikes and lockouts

80 Object of this Part

The object of this Part is—

(a) to recognise that the requirement that a union and an employer must deal with each other in good faith does not preclude certain strikes and lockouts being lawful (as defined in this Part); and

(b) to define lawful and unlawful strikes and lockouts; and

…

Interpretation

82 Meaning of lockout

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

(a) is the act of an employer—

(i) in closing the employer's place of business, or suspending or discontinuing the employer's business or any branch of that business; or

(ii) in discontinuing the employment of any employees; or

(iii) in breaking some or all of the employer's employment agreements; or

(iv) in refusing or failing to engage employees for any work for which the employer usually employs employees; and

(b) is done with a view to compelling employees, or to aid another employer in compelling employees, to—

(i) accept terms of employment; or

(ii) comply with demands made by the employer.

*(2) In this Act, **to lock out** means to become a party to a lockout.*

83 Lawful strikes and lockouts related to collective bargaining
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; …

Defendant's submissions

[15] Mr Malone, for the Cheese Company, submitted that s83, insofar as it is relevant, states that a lockout is lawful if it relates to bargaining for a collective agreement that will bind, each of the employees concerned. He submitted that the Union's contention was that because the Cheese Company's current position has been to offer to amend individual employment terms, the lockout is designed to force entry into individual employment agreements rather than a collective agreement and is therefore illegal. He submitted that this confused the outcome with the process. The fact that an employer offers, in the course of bargaining for a collective, individual employment agreements, does not mean that the lockout is unlawful. He accepted that although, in the present case, the last formal offer was for individual employment agreements, that offer was made in the course of bargaining for a collective agreement that will cover all of those who are locked out. He submitted that an employer may, in the process of bargaining for a collective, lawfully seek to have employees choose instead to accept individual employment agreements.

[16] Mr Malone submitted that the bargaining process can result in at least three outcomes:

a) *a collective agreement is reached;*

b) *the parties agree that no change is made at all to the existing terms and conditions;*

c) *the parties agree that the terms and conditions are modified but that they are set out in individual agreements.*

[17] He submitted that each of these are outcomes from the collective bargaining process, but are achieved through that process, which is the process of bargaining for a collective employment agreement. He submitted, therefore, that the lockout notice was valid and not invalidated merely because the outcome it presently sought was an acceptance by the relevant union members of individual terms of employment.

Discussion

[18] I did not accept the submissions for the defendant. They did not deal with the full legislative context including s33 and the purpose of s83, or the authorities that have been decided in this area. I prefer and accept the submissions of counsel for the Union, upon which the following discussion is largely based.

[19] I found the lockout commencing on 24 September was unlawful as it was in breach of the provisions of s83. Participation in a lockout is not lawful if it does not relate to bargaining for a collective agreement that will bind each of the employees concerned. The defendant's lockout relates to bargaining for individual employment agreements. It appears from the definition within the lockout notice, and the evidence, that at no time has the defendant made any offer to employ the striking workers on the basis of a collective agreement. The evidence established that if members of the Union sought to end the lockout they would need to enter into individual employment agreements on the terms offered by the defendant, or remain on their current individual employment agreements.

[20] The Act distinguishes between collective bargaining under Part 5 of the Act, and bargaining for individual employees' terms and conditions of employment under Part 6. Bargaining for individual employment agreements is governed by s63(A)(2), which sets out the obligations of an employer offering an individual employment agreement, including providing the opportunity for employees to seek advice. There

is no obligation on parties negotiating individual employment agreements, akin to s33, requiring them to conclude an individual employment agreement. It is expressly provided in s33 that, in the absence of a genuine reason, based on reasonable grounds, the parties must conclude a collective agreement. Opposition or objection in principle to bargaining for, or being a party to, a collective agreement is not a genuine reason (s33(2)(a)). This is also reflected in s31(aa), the objects section which applies to collective bargaining in part 5 of the Act.

[21] The evidence of Timothy Robert Slade, the general manager of the Cheese Company, was that the Cheese Company has indicated that it saw no need for a collective agreement and prefers individual employment agreements. He went on to state "*It would also be fair to say that as a result of the incidents of sabotage that have occurred in recent weeks that the Company is more strongly opposed to a collective employment agreement than before*".

[22] The lockout notice relates not to bargaining for a collective agreement which will bind each of the employees concerned, but its nature is to compel the members of the Union to enter into individual employment agreements.

[23] The Court of Appeal considered the provisions of s83 in *Spotless Services (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc*[2]. The Court found at para 39:

> *For there to be a lawful lockout the employee's demand under s82(1)(b) must be linked to the particular lawfulness ground it asserts under s83 or 84. In addition, the justification under s83 or s84 must be the dominant motive for the lockout: see* Southern Local Government Officers Union Inc v Christchurch City Council [2007] 2 ERNZ 739 at para 51. *Thus, where the lockout is said to be lawful under s83, the dominant motive must be to further collective bargaining.*

[24] On the evidence before me the dominant motive of the Cheese Company in issuing the lockout notice was not to further collective bargaining. It was the

[2] [2008] ERNZ 609

opposite. The dominant motive of the lockout was to avoid collective bargaining and to deny the employees the benefit of s33. It required the employees to accept individual employment agreements and not a collective agreement and its intention was to conclude or terminate the collective bargaining for a collective agreement.

[25] Strict compliance with s83 is required. In *Air New Zealand v Flight Attendants and Related Services New Zealand Association Inc*[3], the Employment Court found that it was arguable in an interim injunction application that a strike notice was illegal because it applied to two collective agreements rather than bargaining for a single collective agreement. The Court stated at p777:

> *However giving a single notice indicating that each group was intending to take strike action not necessarily for their own collective agreement which would bind each of the employees of that particular group, and by providing a composite list of names of the employees who were intending to strike, the defendants have given the plaintiff a strong argument that the strike would not be lawful under s83. The plaintiff has accordingly established a strongly arguable issue to be tried.*

[26] In *McCulloch v NZ Fire Service Commission*[4], Chief Judge Goddard considered the situation of a lockout in similar circumstances to the present case. The employer sought to have individual employment contracts for some members of a union, as well as a collective employment contract for others, in response to the union's attempt to negotiate a collective employment contract for all its members. The Court found that the aim of the defendant was to induce its employees, or most of them, to work for it on completely different terms to those on which they were currently employed. It found that there was a threatened lockout. The lockout was not unlawful under s63 of the Employment Contracts Act 1991, the predecessor to s86 of the 2000 Act. The Chief Judge found that the lockout was unlawful under s64(1)(b) of the 1991 Act, which is materially identical to s83(b)(i) of the 2000 Act, and stated at p398:

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[3] [2002] 2 ERNZ 770
[4] [1998] 3 ERNZ 378

> *However, a lockout that is not unlawful under s63 is not necessarily lawful. To be lawful it must also relate to the negotiation of a collective employment contract for the employees concerned. It is true that the defendant has proposed that there should in future be regional collective employment contracts for fire officers but it has also proposed that senior fire officers – that is to say, some of the present firefighters and CST members – will be employed on individual employment contracts. Therefore, the lockout does not relate exclusively or even principally to future proposed collective employment contracts "for the employees concerned": s64(1)(b). It is not enough that it relates to proposed collective employment contracts for some of the employees concerned, if it does not relate to such contracts for others of the employees concerned.*

[27] There is a somewhat controversial rule of statutory interpretation, not relied on by the Union, that once certain words in an enactment have received a judicial interpretation and that same expression is then re-enacted in later legislation, the legislature must be deemed to be endorsing the interpretation: see Statute Law in New Zealand 4th ed JF Burrows and R I Carter, p194, citing *Barras v Aberdeen Steam Trawling & Fishing Co Ltd*[5] in support. The rule would not support an interpretation that was clearly wrong, see: *Flaherty v Girgis*[6]. Here the interpretation of Chief Judge Goddard could be said to have been endorsed by the passing of ss31(aa) and s33.

[28] This view is consistent with the Court of Appeal's recent decision in *NZ Amalgamated Engineering, Printing & Manufacturing Union Inc v Witney Investments Ltd*[7] where it observed at para [93]:

> *In 2004, a key change was introduced to s 33. The old s 33 provided that the duty of good faith in collective bargaining did not extend to a requirement to conclude a collective agreement. Under the new s 33, there is a positive obligation on a union and employer bargaining for a collective agreement to conclude an agreement unless there is a genuine reason, based on reasonable grounds, not to do so. Section 33(2) provides that a*

[5] [1933] AC 402; [1933] All ER 52 (HL)
[6] (1987) 71 ALR 1 (HCA)
[7] [2007] ERNZ 862; [2008] 2 NZLR 228

genuine reason does not include "opposition or objection in principle to bargaining for, or being a party to, a collective agreement".

Conclusion

[29] I found that the purpose of the lockout was not to further bargaining for a collective agreement for the employees concerned, but was intended to compel employees to accept individual employment agreements on the defendant's terms. To be lawful under s83 as a lockout, the employer must lockout to obtain a collective agreement, not to avoid one.

[30] For these reasons, I issued a permanent injunction, after inviting counsel to address the appropriate wording.

[31] Costs have been reserved and if they cannot be agreed may be the subject of a memorandum, the first of which is to be filed and served within 30 days, with the response to be filed and served within a further 21 days.

B S Travis
Judge

Judgment signed at 1pm on 30 September 2009