IN THE EMPLOYMENT COURT
AUCKLAND

[2016] NZEmpC 111
EMPC 187/2016

IN THE MATTER OF	an application for declarations and injunction
BETWEEN	MARITIME UNION OF NEW ZEALAND INC First Plaintiff
AND	HARRY VETE AND THOSE PERSONS LISTED IN THE SCHEDULE TO THE STATEMENT OF CLAIM Second Plaintiffs
AND	THE CHINA NAVIGATION COMPANY PTE. LIMITED Defendant

Hearing:	16 and 17 August 2016 (Heard at Auckland)
Appearances:	SR Mitchell, counsel, and J Lynch, advocate, for plaintiffs S Langton and R Tomkinson, counsel for defendant
Judgment:	22 August 2016
Reasons:	29 August 2016

REASONS FOR JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] These are the reasons for the judgment of the Court issued urgently on 22 August 2016.[1]

Background

[2] The second plaintiffs are seafarers (integrated ratings and associated crew) who are currently employed by Fletcher Concrete and Infrastructure Ltd trading as Golden Bay Cement (to which I will refer as Golden Bay). They crew the coastal bulk cement delivery vessel MV Golden Bay. The first plaintiff is the union of which the second plaintiffs are members. The case does not involve the vessel's officers or engineers.

[3] Golden Bay is to retire the MV Golden Bay from service and, in these circumstances, it says that the ship's employees are redundant and will be dismissed by it for that reason.

[4] Golden Bay has, however, entered into an agreement with the defendant, the China Navigation Co PTE. Ltd (China Navigation), to time charter (that is, lease the vessel complete with technical management and crew) on a long-term basis, a new replacement bulk cement delivery vessel in New Zealand. This is, or is to be named, "MV Aotearoa Chief". Golden Bay's agreement with China Navigation includes a provision that China Navigation is required to offer employment on that replacement chartered vessel to each of the second plaintiffs who have the required skill sets and competencies to perform seafarer roles on that vessel. China Navigation is the bulk cargo shipping arm of the international ship owning conglomerate known as Swire.

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[1] *Maritime Union of New Zealand Inc v The China Navigation Co PTE. Ltd* [2016] NZEmpC 104.

[5] China Navigation has, accordingly, made offers of work or employment[2] to the second plaintiffs but, on the advice of the Maritime Union of New Zealand (MUNZ), while expressing their wish to crew the new vessel, the second plaintiffs have rejected those offers of employment on individual employment agreements (what are known as ieas). The plaintiffs say that MUNZ has initiated collective bargaining for a new collective agreement to cover the employment of MUNZ members on the vessel. China Navigation has subsequently withdrawn the offers it made of ieas, although the defendant has agreed not to take any steps that might prejudice the second plaintiffs agreeing to take up China Navigation's offers, whether on that employer's terms or as otherwise may be negotiated. That stage will, however, be reached very soon as the vessel will need a crew from about 19 September 2016.

[6] China Navigation asserts, however, that although there has been, and continues to be, negotiation between it and the Union about MUNZ's desire for a collective agreement to cover its members on MV Aotearoa Chief, this is not "collective bargaining" as defined by the statute. That is said to be because the bargaining purportedly initiated by MUNZ, is not for a collective agreement that will cover two or more of China Navigation's relevant employees. Whether there is statutory collective bargaining taking place was one of the fundamental and disputed questions for decision in this case.

[7] Because of the imminent commissioning of the new vessel in China and the plaintiffs' desire to crew it for sea trials and on its delivery voyage to New Zealand, there is now a limited time in which to either settle employment agreement negotiations, or to have a judgment from this Court.

[8] Negotiations, assisted by a mediator, were planned to take place on 18 August 2016, after the scheduled hearing. Neither of these events could be arranged in reverse order as would have been preferable. In these circumstances, I agreed to postpone delivery of the Court's judgment until Monday 22 August 2016 to allow the parties the best opportunity, uninfluenced by a known legal outcome, to settle their differences without requiring the Court to deal with what is probably a temporary

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[2] The nature of the offer is a matter of dispute so I have used both expressions here.

and collateral issue of law. As noted in the interim judgment issued on 22 August 2016 which is now confirmed, I have assumed that no settlement was reached between 17 and 22 August 2016.

[9] In discussions with counsel at the hearing, it appears that an even greater impediment to settlement than the parties' wishes for a collective agreement or separate individual agreements, is the defendant's insistence on cumulative trial and probationary periods, or at least China Navigation's wish to be able to have the latter. That is irrespective of the fact that the second plaintiffs have all been performing essentially the same work for some time, albeit for another employing entity, on a different bulk carrier, and that China Navigation has already assessed them as being technically competent and qualified to perform the necessary roles on the new vessel. The defendant's wish to be able to impose a 90-day trial period under ss 67A and 67B of the Employment Relations Act 2000 (the Act), followed by a discretionary six-month probationary period under s 67, is very unusual, if not unique.

[10] As I said in court, however, this is not either an issue for decision by the Court or on which it would be appropriate to express a view: rather, it is a matter of negotiation and bargaining.

Plaintiffs' cause of action

[11] The plaintiffs' sole cause of action is that China Navigation's actions in offering ieas and, they say, on a 'take-it-or-leave it' basis, amount to an unlawful lockout of the second plaintiffs. They seek a declaration to this effect, an injunction preventing the defendant from continuing to lock out the employees unlawfully, and costs. It has been agreed that the application for injunction will not be pursued at this stage of the proceedings and that a declaration about whether there is a lockout will suffice to guide the parties to this dispute.

[12] I should add here that the defendant has agreed to treat four of the second plaintiffs undertaking catering work on the vessel as if they are so-called vulnerable employees under Part 6A of the Act. That is even although it may be arguable

whether they strictly qualify for the protections on transfers of undertakings under this Part of the Act. If these four employees accept a transfer to China Navigation, they will continue to enjoy the terms and conditions of employment they have currently with Golden Bay under a collective agreement with MUNZ. Indeed, China Navigation will become an employer party to that collective agreement in respect of those four employees. As matters stand now, however, the remaining 10 second plaintiff offerees will not continue on their current collective agreements' terms and conditions.

[13] China Navigation denies a lockout as defined in the Act and says that its obligations under its agreement with Golden Bay (and thereby indirectly with the second plaintiffs) have been met by offering them employment but which the second plaintiffs have failed or refused to accept.

The agreed facts

[14] The relevant facts are not in dispute between the parties and have been reduced to writing by them including references to relevant documents. It is appropriate that I set out in large measure the parties' statement of agreed facts and, where appropriate, I will then refer to documents or parts of documents that are relevant in determining the case. I will, however, add subsequently a chronology of these events as their sequence is significant to decision of the case.

> 1. The Defendant is a registered New Zealand Branch Office of a Singaporean domicile company. The Defendant operates internationally as a shipping company.
>
> 2. The First Plaintiff is a union registered pursuant to the provisions of the Employment Relations Act 2000.
>
> 3. The Second Plaintiffs are currently employees of Golden Bay Cement, a division of Fletcher Concrete and Infrastructure Limited **("Golden Bay")**.
>
> 4. Golden Bay currently operates a coastal vessel. That coastal vessel is to be decommissioned, and Golden Bay has entered into an agreement with the Defendant to build and operate a new vessel. The agreement is a Time Charter contract under which the Defendant supplies the new vessel, its technical and crew management. The new vessel (**"MV Aotearoa Chief"**) is currently being built in China

and is due to be completed at the end of September 2016. It is due to arrive in New Zealand in October 2016.

5. The terms and conditions of the Second Plaintiffs' employment with Golden Bay are contained in a collective agreement in force between Golden Bay and the First Plaintiff (**"Golden Bay CA"**). The Golden Bay CA contains employee protection provisions at clause 3.

6. Golden Bay has advised the Second Plaintiffs that they will be made redundant as a result of the Golden Bay vessel being withdrawn from service, and the operation of its coastal delivery of concrete will be contracted to the Defendant. Upon being made redundant, the Second Plaintiffs will be paid their redundancy compensation, regardless of whether the Defendant offers employment to them.

7. A dispute arose between Golden Bay and the First and Second Plaintiffs as to whether Golden Bay had complied with the provisions of the Golden Bay CA. That dispute was resolved at mediation, and a mediated settlement was entered into.

8. Clause 92 of the Time Charter contract sets out the Defendant's contractual obligations in respect of making offers of employment to the Second Plaintiffs.

9. There are two types of work for which the Defendant needs to employ persons on MV Aotearoa Chief, namely: (A) the delivery of MV Aotearoa Chief from China to New Zealand; and (B) the ongoing manning of MV Aotearoa Chief under the Time Charter contract.

10. The Defendant has not previously employed the Second Plaintiffs, or any other employees, to carry out the work described in paragraph 9 above.

11. Between December 2015 and April 2016, the Defendant provided to the Second Plaintiffs three "Crew Update" memoranda that explained the Defendant's intention to make offers of employment to them, and updated them on the progress of the construction of MV Aotearoa Chief.

12. On or around 31 May 2016, the Defendant made offers of employment to ten of the Second Plaintiffs, being Robert Stewart, Greg Carncross, Kevin Wright, Sheldon Dibble, Darryl Jacob-Black, Troy Pericles, William Bureham, Troy Silvester, Michael Lowther and Brian Davis (**"Offerees"**). The offers of employment were conditional upon the Offerees acceptance of terms and conditions contained in an individual employment agreement.

13. The Offerees were required to return a signed agreement by 30 June 2016, or the offer of employment would be withdrawn.

14. The Offerees have not accepted the terms of employment offered. The First Plaintiff has advised the Defendant that its members are willing to accept work with the Defendant, but that they do not wish to be bound by the terms of the individual employment agreement.

15. The Defendant has extended the date for acceptance of the offers of employment to 15 August 2016.

16. Included amongst the Second Plaintiffs are four employees engaged as cooks, and as stewards, namely Jacqueline Lyall, Tristan Tapelu, Graham Reynolds and Grahame Ingham (**"Protected Employees"**). The Defendant has agreed in the Time Charter contract to treat the Protected Employees as being covered by Subpart 1, Part 6A of the Employment Relations Act 2000.

17. On 9 June 2016 the First Plaintiff provided the Defendant with a document called "Notice Initiating Bargaining" (**"Notice"**). In the Notice, the First Plaintiff purports to initiate collective bargaining for a collective agreement with the Defendant.

18. Following the Notice, the parties entered into correspondence about the validity of the Notice as a notice initiating bargaining, and the ability to enter into a collective agreement, until the Defendant has at least two employees.

19. Other than the Second Plaintiffs, the Defendant has not made any offers of employment to, and has not already engaged anyone to perform, the types of roles named in the Notice.

[15] There are cross-references in the statement of agreed facts to documents in the common bundle. I propose now to set out, or in some cases summarise, the parts of those documents that are relevant to the case before the Court.

[16] Clause 3 of the Golden Bay Collective Agreement ("Employee Protection"), cl 3.2 requires Golden Bay, in circumstances such as those now faced by the parties, to:

> … as soon as is reasonably practicable, taking into account the commercial requirements of the business, commence negotiations with any potential new employer (the "other party") relating to any impact the restructuring may have to the employee.

[17] Clause 3.3 then requires Golden Bay to:

> … negotiate the arrangements that would apply to the employee in the event of restructuring, including determining whether the employee would transfer to the other party and on what terms and conditions of employment.

[18] Finally, in this regard, cl 3.6 provides:

> In the event that the Company cannot secure from the other party a commitment to offer employment on the same terms and conditions of employment in the same capacity and treat the service as continuous to all or

> any employees, then affected permanent crew employees, will, after consultation as provided in this clause with the union or other union(s) representing employees, be declared redundant. Redundancy compensation, as specified in Clause 31 below, shall be payable, unless otherwise agreed. Notwithstanding that redundancy is paid, this shall not prevent employee(s) from accepting employment on the terms offered by the other party.

[19] The new vessel's time charter between the plaintiff and Golden Bay sets out China Navigation's contractual obligations to make offers of employment to the second plaintiffs. Under cl 92 ("Crew") of the time charter document and under the subheading "Rider Clauses to MV "Aotearoa Chief" Charter Party dated: 20 November 2014", China Navigation is obliged to make to each of the employees of Golden Bay engaged on the MV Golden Bay "a written offer of a Crew Role and, subject to clause 92(h), that offer shall be on such terms and conditions as the Owner [China Navigation] determines in its discretion". The relevant provisions of the Charter Party include:

> (a) For the purposes of this clause 92:
>
> **"Crew Roles"** means the number and type of crew roles required to safely and efficiently operate the Vessel under this Charter Party, as agreed by the Owner and Charterer;
>
> **"Employees"** means those persons who are employed by the Charterer as the crew of the *MV Golden Bay* (whether already employed as at the date of this Charter Party or first employed by the Charterer in the Pre-Delivery Period), but excludes the Protected Employees;
>
> **"Pre-Delivery Period"** means the period commencing on the date of this Charter Party and ending on the date that the Vessel is delivered;
>
> **"Protected Employees"** means the Chief Cook and Chief Steward, who are employed by the Charterer as crew of the *MV Golden Bay*;
>
> **"Transferring Employees"** means those Selected Employees who accept the Owner's offer of employment and whose employment transfers to the Owner;
>
> **"Selected Employees"** means those Employees to whom offers of employment to a Crew Role are made by the Owner in accordance with this Charter Party.
>
> (b) During the Pre-Delivery Period the parties will, at the same time as agreeing the joint Ship Operating Procedure for the Vessel, agree the number and type of Crew Roles. In reaching that agreement the parties will have due regard to the Vessel specification, the anticipated sailing schedule for the Vessel, the anticipated Ship

Operating Procedure, any on-going crew requirements for *MV Golden Bay* and (when available) the detailed designs for the Vessel.

(c) Subject to clause 92(d), the Owner will make to each of the Employees a written offer of a Crew Role and, subject to clause 92(h), that offer shall be on such terms and conditions as the Owner determines in its discretion.

(d) The Owner is not required to make a written offer of employment for each of the Crew Roles from among the Employees if, and to the extent that the Owner reasonably determines that a particular Crew Role requires a skill set or competency that can not be fulfilled by any of the Employees without material additional training:

The Owner will make any determination or selection under this clause in consultation with the Charterer and in accordance with the consultation requirements of clause 92(p).

(e) During the Pre-Delivery Period the Charterer will provide the Owner with such information as the Owner may reasonably require in order to assess which of the Employees the Owner will offer Crew Roles in accordance with the Charter Party.

(f) On or before the date that is 4 months from the date of delivery of the Vessel, the Owner will notify the Charterer of the Selected Employees and will make written offers of employment to those Selected Employees within 15 working days of that notice.

(g) The Owner will make a written offer of employment to the Selected Employees offering employment with the Owner as from the date of delivery of the Vessel (or such earlier date as the parties may agree) and, subject to clause 92(h), that offer shall be on such terms and conditions as the Owner determines in its discretion.

(h) The offer of employment made by the Owner to the Selected Employees shall be on terms that:

i. ensure the Crew Role being offered is in the same capacity as the Selected Employee's role with the Owner, or in any other capacity that the Selected Employee is willing to accept;

ii. where applicable in respect of the Protected Employees conform with obligations under Part 6A of the Employment Relations Act 2000; and

iii. the offer shall be conditional on the Selected Employee irrevocably waiving any right to notice, payment of notice and payment of redundancy compensation from the Charterer in respect of the cessation of the Employee's employment with the Charterer.

(i) The Owner's offer of employment must be accepted by a Selected Employee by no later than 60 days before the date of delivery of the

> Vessel, after which date the offer will lapse and will not be capable of acceptance.
>
> (j) In the event that an offer of employment is accepted, employment with the Owner will commence on the date specified in the offer and, from that date, the Charterer will have no obligation to Transferring Employees, except for those obligations set out in this agreement.
>
> (k) It is agreed that the Charterer shall comply with all relevant contractual obligations of all Employees who are not Transferring Employees, including to pay redundancy payments (if any) and any accrued entitlements to leave as provided in the Employees' employment agreements.
>
> (l) It is agreed that the Charterer shall comply with relevant contractual obligations to Transferring Employees to pay accrued leave entitlements as provided in Employees' employment agreements and attributable to their service prior to their change in employment.

[20] China Navigation's offers of work or employment[3] to the crew of the MV Golden Bay made on or about 31 May 2016 included a form of iea, acceptance of which offer would be completed by signature and return of the iea before 30 June 2016.

[21] For the purpose of this judgment, there is no need to analyse any particular provisions of that form of iea. It is sufficient to say that it has not been accepted by any of the crew of the MV Golden Bay on the advice of MUNZ. That is at least in part because a collective agreement is sought for the employment of crew on the new vessel as has been the case on the MV Golden Bay.

[22] On 9 June 2016 the Union purported to initiate collective bargaining with the defendant. Turning to the s 42 notice issued by MUNZ, purporting to initiate collective bargaining with China Navigation, this follows the wording of that section and specifies that the intended coverage of the bargaining will be:

> … Bosun's/[Chief] IR's, IRs/Able Seamen, Catering Attendants/Stewards, Cooks, Deck and Engine Ratings working on vessels owned or managed working (sic) on China Navigation Co PTE Limited vessels.

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[3] See *Maritime Union of New Zealand Inc v The China Navigation Co PTE. Ltd*, above n 1.

Chronology/sequence of significant relevant events

[23] This is important to the defendant's case.

[24] Offers of employment were made by China Navigation to the second plaintiffs by letter dated 31 May 2016. These were conditional offers of employment in a specified position or role with China Navigation and were "subject to your written acceptance of the terms and conditions of employment in the attached Individual Employment Agreement". The letter of offer continued:

> In accordance with the Employment Relations Act 2000, you are entitled to seek independent advice about the terms of your employment. We encourage you to do so.

[25] Offerees were then asked to initial and/or sign a copy of the letter of offer and to execute the iea by signature. They were advised: "If we have not received a signed contract by the above date [Thursday 30 June 2016] this offer is automatically withdrawn without further notification."

[26] Next, on 9 June 2016 MUNZ purported to initiate collective bargaining with China Navigation to cover the terms and conditions of the second plaintiffs' specified roles working on vessels owned or managed by China Navigation.

[27] Subsequently, by letter dated 13 June 2016, MUNZ wrote to China Navigation expressing appreciation that offers of employment had been made to its members but not consenting to the terms and conditions of the individual agreements. The letter continued:

> You will be aware that the union has initiated bargaining for a collective agreement. Members of the union wish to have collective terms of employment. The union seeks to commence bargaining at the earliest opportunity.

[28] The Union advised China Navigation that it considered that the terms and conditions of the ieas were "unreasonable" as was the defendant's act of requiring members to accept those conditions in order to be engaged on the vessel. MUNZ proposed bargaining for a collective agreement to resolve these issues.

[29] On 13 June, also, the defendant advised MUNZ that at that stage, it did not:

> … have any written acceptances of our offers of employment and, until we have two or more, our understanding is that, formally, bargaining cannot be initiated.
>
> We do expect, however, that we will receive those acceptances by the 30th June, and we do want to get the negotiations underway, so our suggestion is that we schedule a time in mid-July to discuss arrangements for bargaining (because we need to get on and do this), and once you have the requisite number of members' acceptances, you reissue the notices.

[30] On 15 June 2016 China Navigation further advised MUNZ that:

> As a starting point, CNCo does agree that it is desirable to get into negotiation as soon as possible with a view to concluding a collective agreement, and also wishes to avoid a debate around technical issues. With that said, CNCo has been advised that a precondition of a collective agreement is CNCo having at least 2 employees (as per the statutory definition). CNCo accepts that, for present purposes, an employee need not have commenced work – it will be sufficient to have been offered and accepted work with CNCo.
>
> In order to avoid any irregularity, and to ensure we can employ the candidates to whom we have offered employment, CNCo therefore wishes to proceed with seeking and obtaining acceptances of offers of employment under an IEA (if we don't get acceptances in the timeframes to which we need to work, then we will need to make offers to others). However, CNCo couples this with an assurance that it is willing to negotiate a collective agreement with MUNZ to cover such "employees" as a priority.

[31] A negotiating meeting was then suggested for 7 July 2016.

[32] MUNZ replied to China Navigation by letter of 21 June 2016 confirming that 7 July 2016 would be a suitable time "for a bargaining meeting". After contesting China Navigation's assertion that formal collective bargaining could not commence until there were at least two employees of China Navigation and asserting that employment need not have commenced for its members to employees for the purposes of bargaining, MUNZ continued:

> I note that you are now approaching members of the union requiring them to accept work conditional on accepting terms and conditions of employment. Given that bargaining for a Collective Agreement is in place, these actions of the company are a breach of Section 32(1)(d)(iii) of the Act, and are actions that undermine bargaining. In addition, it is unlawful for the company to be bargaining with members directly. The union considers that the company action is in breach of Section 32(1)(d)(i) and (ii) of the Act.

> … The members of the union are all willing to accept work with the company. They should not be required to accept the terms and conditions of employment dictated by the company in order to do so.

[33] Beginning on 29 June 2016, the correspondence between the parties was undertaken by their lawyers. This consisted largely of positional statements advancing contested assertions of law. However, by their letter of 29 June 2016, China Navigation's lawyers confirmed that the expiry date for acceptance of iea offers would be extended to 14 July 2016 and that, in the meantime, the parties would attend a "bargaining" meeting on the afternoon of 6 and the day of 7 July 2016. That letter noted that China Navigation's agreement to attend that meeting was without prejudice to its ability to assert that bargaining had not been lawfully initiated. MUNZ was also invited to refer two disputes, which it had raised (but details of which are not before the Court), to the Employment Court for hearing and declarations on an agreed statement of facts. China Navigation also accepted, through its lawyers, that it would have to, and therefore proposed that they attempt to, resolve those matters by mediation before a hearing.

[34] MUNZ responded through its counsel by letter of 11 July 2016. This was after the parties had met on 6-7 July 2016 without resolution. Mr Mitchell asserted in his letter:

> At least two of the transferring employees are covered by the provisions of Part 6A of the Act. Their terms and conditions of employment therefore continue. Those employees do not need to sign employment agreements. Given that they will be employed, there is no basis for your client to submit that they do not have employees.

[35] China Navigation subsequently extended the expiry date for acceptance of the offers of ieas until 19 July 2016, the day following the then scheduled mediation involving the parties.

[36] That extended date was subsequently further extended to 19 August 2016, the day after a further scheduled mediation session between the parties.

Reliance by the plaintiffs on the Time Charter Party

[37] Although their entitlement to do so was not addressed as an issue of law by either counsel, the plaintiffs rely to a substantial extent on the obligations of China Navigation to Golden Bay in relation to the offering of work or employment on the new vessel. Those obligations arise under the Charter Party, a contract between Golden Bay and China Navigation. In particular, the plaintiffs rely on the words of cl 92(c) of that contract that, subject to cl 92(d), China Navigation "… will make to each of the Employees a written offer of a Crew Role and, subject to clause 92(h), that offer shall be on such terms and conditions as the Owner determines in its discretion."

[38] Clause 92(d) is not in issue in this case: China Navigation's ability not to make a written "offer of employment for each of the Crew Roles from among the Employees …" has not been triggered because China Navigation has now determined that each of the second plaintiffs has the required skill set or competency without material additional training.

[39] Clause 92(c) is also subject to (h) which requires that a crew role being offered is in the same capacity as the selected employee's role with Golden Bay; that where applicable there is to be compliance with Part 6A of the Act; and is conditional also on a waiver of remuneration compensation rights which were subsequently amended in a dispute which was settled between MUNZ and Golden Bay, the effect of which is that all integrated ratings departing the MV Golden Bay will be eligible for redundancy compensation from Golden Bay.

[40] The phrase "Crew Role" in cl 92 (set out above) refers to the number and type of crew required to safely and efficiently operate the vessel as agreed between China Navigation and Golden Bay. "Employees", as referred to in the Charter Party document, "means those persons who are employed by the Charterer [Golden Bay] as the crew of the *MV Golden Bay* …". Finally, cl 92(a) defines "Selected Employees" as meaning "those Employees to whom offers of employment to a Crew Role are made by the Owner [China Navigation] in accordance with this Charter Party."

[41] These elements of the Charter Party are important, not only to the defendant's case, but also because Mr Mitchell asserts for the second plaintiffs that they have been offered, and have accepted, work on the new vessel (and so fall within the definition of "employees" under the Act), even if the terms and conditions of their employment to do that work have not yet been settled.

A 'take-it-or-leave-it' offer of employment?

[42] Mr Mitchell for the plaintiffs argues that the offers made to the second plaintiffs on 31 May 2016 were unlawful and unfair because they were non-negotiable: that is, they were (and still are) 'take-it-or-leave-it' offers.

[43] I do not interpret the evidence and, in particular, the documents in this way. The letter dated 31 May 2016 accompanying what constituted offers of employment to the second plaintiffs, does not refer expressly to China Navigation's preparedness to bargain about these individually. However, there are features of what happened which have persuaded me that these were not 'take-it-or-leave-it' offers of employment.

[44] The first is that the offerees were given an opportunity, and indeed urged, to seek professional or other advice about the terms and conditions offered. There was sufficient time for them to have been able to do so. They were also invited to contact a representative of the company "[if] you have any questions about any part of the agreement …".

[45] Although Mr Mitchell submitted that the invitation to take independent advice about the terms offered should be construed narrowly as being only for the purpose of ensuring understanding of China Navigation's terms and conditions, I interpret that more broadly. It was, at least by strong implication, an offer of an opportunity to negotiate about those terms and conditions offered.

[46] It is true, as Mr Mitchell submits, that ss 60A and 63A(2) require an "employer" in China Navigation's circumstances to do at least four things in relation

to prospective employment on ieas. However, I consider those requirements fulfilled in respect of the offers of ieas.

[47] First, a prospective employee must be provided with a copy of the intended employment agreement under discussion. That was done in this case. Second, the prospective employer must advise the employee that he or she is entitled to seek independent advice about the intended agreement. That, too, was done in this case. Third, the prospective employer must give the employee a reasonable opportunity to seek that advice. That, too, was done in this case by allowing a period of about one month to do so. Finally, under s 63A(2)(d), China Navigation was required to "consider any issues that the employee raises and respond to them". I infer that this has occurred during and following the "bargaining" between the parties but that no agreement has yet been reached.

[48] There is no specific requirement in these circumstances to "bargain" although that may be implicit in the fourth requirement to consider and respond to any issues raised by the prospective employee. In this case, the evidence, so far as it goes, establishes that by extending the dates on several occasions for "bargaining" discussions with the Union as the representative of each of its individual members and discussing the proposed agreement, China Navigation has fulfilled its statutory obligations. These arise where there is no current collective agreement coverage of the intended work and ieas have been offered. There is no suggestion by the plaintiffs that China Navigation has not considered the issues raised by the Union and/or has not responded to them, particularly on what I understand are the trial period/probationary period issues. That China Navigation has not agreed to amend or delete those terms and conditions of its proposed iea does not mean that it has not complied with the statute's obligations to negotiate about the contents of such an agreement if called upon to do so. Here I have the impression that the dispute between the Union, for itself and on behalf of its affected members, and China Navigation has been at least as much about having terms and conditions established by collective rather than by individual agreements.

[49] Nor do I accept Mr Mitchell's argument that what was offered to the second plaintiffs (and counsel submits subsequently accepted by them) on 31 May 2016 was

work or a 'role' which constituted a contract of service but the details of which (the employment agreement) were for later negotiations and settlement. Unlike the only other scenario supported by case law in *Baker v Armourguard Security Ltd*,[4] it is clear from the letters of offer of 31 May 2016 to the second plaintiffs that they were offered work or a role or employment (it does not matter how this is described) conditionally. That condition was the acceptance of the terms and conditions offered in the form of agreement or as might subsequently be altered in bargaining over the following month or so before the withdrawal of those offers. I should address this earlier case at this point because of the reliance placed upon it by the plaintiffs.

Baker v Armourguard

[50] *Baker* was a case in which the employer of staff lost its contract for certain work as a result of a re-tendering process and gave the employees notice of dismissal for redundancy. The successful tenderer, a competitor of the employees' original employer, invited the employees to apply for positions with it as the replacement contractor. Following an application and interview process, the successful tenderer wrote to each of the employees confirming that their applications had been successful. The letter of advice set out core terms and conditions of employment relating to rates of pay, working hours, annual holidays and the provision of a uniform. Subsequently, the new contractor wrote again to the employees enclosing a job description, a proposed individual employment contract and further uniform details.

[51] A union representing the employees sought a meeting with the management of the new contractor at which the union presented a draft collective agreement. The new contractor refused to negotiate about this document but agreed to discuss some amendments to its form of proposed individual employment contract. As the contract transfer date was pending and uninterrupted work cover was needed, the management of the new contractor advised each of the individual employees that it required them to assent, virtually immediately, to its form of amended individual employment contract but which such employees could only, at best, have seen some hours previously. When the new contractor had heard nothing from the employees

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4 *Baker v Armourguard Security Ltd* [1998] 1 ERNZ 424.

or the union by the specified time, it appointed other employees who had been unsuccessful applicants for the positions when they had been advertised earlier.

[52] In a claim that the employees had been dismissed unjustifiably by the new employer, the defendant argued that they had not been dismissed because they had never been employed. It said that no employment contracts had ever come into existence. The employees argued that they had been offered positions which they had accepted although they were negotiating variations to those contracts. They also submitted that even if they had not been offered and accepted employment, they were nevertheless "employees" as defined in s 2 of the Employment Contracts Act 1991 as being "person[s] intending to work", that is, persons who had been offered and had accepted employment.

[53] The claim before the Court was an urgent application for interlocutory injunction and the Court's judgment was delivered on the following day.

[54] The Court considered that the plaintiffs had a strong arguable case, having no doubt that the employees had been offered work which they had accepted. Although it concluded that the terms of the offer were "sketchy", they were capable of being accepted on the basis that while the defendant was to settle the job description, the iea would still need to be negotiated.

[55] The Court in *Baker* concluded (as "elementary to employment law") that there was an important distinction between formation of an employment contract itself and the formation of its terms. The Judge held that an employment contract could be formed in an informal way by conduct and words: there was no requirement for writing at the formation stage. The Court held that the prospective new employer had confused negotiation of detailed terms (yet to be settled) with the formation of the contract which had occurred.

[56] Further, the Court held that the new contractor was not entitled to insist on acceptance of its form of individual employment contracts before the work started, principally because these were not part of its original offer. Importantly, however, that was to be distinguished from the situation in which the offer had been

conditional on concluding the individual employment contract before work began but this had not occurred. The Court held that it was its duty, once a relationship had been established, to give effect to the contract and not to defeat the parties' intention by allowing one of them to rely on "technicalities".

[57] Even allowing for the urgent hearing and decision of the application and that it concluded only that there was a strong arguable case for the plaintiffs, the facts in *Baker* are distinguishable from those now before the Court in this case. The new employer's written offer of employment in *Baker* included sufficient essential terms and conditions and although indicating that an individual employment contract would be sent subsequently, invited acceptance of the offer of employment on the terms and conditions set out in that first letter. Another indication of the acceptance of the offer of employment was a workplace roster showing the plaintiffs by name as scheduled to work on specified dates over the next month-and-a-half.

[58] On this issue, the pertinent conclusion of law in *Baker* is at lines 15 and following on page 432 of the report as follows:

> It is elementary to employment law that there is an important distinction between the formation of the employment contract itself and the formation or articulation of its terms. The employment contract can be and often is formed in an informal way by conduct, or words of agreement and conduct. There is no requirement for writing at the formation stage. The formation of the terms of the contract, by contrast, has been described by one leading academic writer as a "dynamic and cumulative process which is perhaps not properly described as formation of the contract of employment" (M R Freedland, *The Contract of Employment*, 1976 at p 12). At p 20 the author speaks of the parties' "mutual undertakings to maintain the employment relationship in being which are inherent in any contract of employment properly so called". I am afraid that the defendant lost sight of this distinction and confused negotiation of the detailed terms with the formation of the contract. The plaintiffs' conduct is more consistent with acceptance of employments and, for that reason, negotiation of its terms than with negotiation of whether they were to enter into a contract at all. After all, they did not have to apply for these jobs but they did, and they had no reason not to accept employment as accepting it would not prejudice their chance to continue to negotiate the detailed terms.

[59] As already noted, the judgment in *Baker* is distinguishable from the circumstances of this case and cannot be relied on as authority for Mr Mitchell's proposition that the second plaintiffs were offered and accepted work on minimal but sufficient terms and conditions to constitute contracts of service although not an

employment agreement which could be negotiated and settled later. Not only are the essential constituents of a contract of service absent in this case, as they were found arguably to have been in *Baker*, but China Navigation's offers of employment to the second plaintiffs were conditional upon their acceptance of the terms and conditions of employment contained in a form of iea tendered to them at the same time. The defendant's and the second plaintiffs' wish for an employment relationship is not the same as the offer and acceptance of work which constitutes a contract of service, even if the detailed terms and conditions may be subject to further negotiation.

The statutory law about lockouts

[60] The plaintiffs' single cause of action relies on only one part of the definition of an act constituting a lockout in s 82(1)(a) of the Act. They say that China Navigation's relevant act is its refusal to bargain collectively and to insist upon the crew's agreement to accept its form of iea before they can work for the company, as being:

> (a) … the act of an employer—
> …
> (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 … to—
> (i) accept terms of employment; or
> (ii) comply with demands made by the employer.

[61] Relevant to this is the definition of "employee" in s 82, by reference not only to s 5 but also to s 6 of the Act, because China Navigation says that the second plaintiffs are not its employees. The relevant part of s 6 ("Meaning of employee") provides in subs (1):

> (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
> (b) includes—
> …
> (ii) a person intending to work; …

[62] The phrase "person intending to work" is itself defined in s 5 as meaning "a person who has been offered, and accepted, work as an employee …".

[63] The first question for decision is whether, in law, the defendant's actions can be categorised as a lockout.[5] A similar (but not materially identical) question was determined recently by a full Court in *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd*.[6] The plaintiffs rely upon this judgment of the Employment Court. An appeal against the Employment Court's decision has recently been heard in the Court of Appeal but judgment has been reserved. Such is the urgency with which this case must be decided that it is not practicable to await the Court of Appeal's judgment.

[64] However, even if the judgment of the full Court in *AFFCO* is upheld on appeal on the question of continuous or discontinuous employment, the facts of this case distinguish it from *AFFCO*. In *AFFCO* it was necessary for the plaintiffs to establish that the employees who were offered work by AFFCO were current employees when their employer insisted on new terms and conditions of employment including on individual agreements. That was based on a conclusion that the employees were not seasonal workers on discontinuous employment agreements but "permanent" (albeit seasonal) employees of AFFCO during the off-season when their services were not required or paid for. A finding to this effect was the necessary substructure for the employer's actions, in insisting upon acceptance of its terms and conditions in ieas, to amount in law to a lockout.

[65] In this case, however, the second plaintiffs have not ever previously worked for China Navigation. They have, however, worked for, and currently continue to work for, the operator of the coastal bulk cement carrier that delivers Golden Bay's cement from its production works to distribution points at coastal ports, as will the MV Aotearoa Chief. If, as all parties wish, the second plaintiffs are engaged to work on the new replacement vessel, the essence of their current employment on MV Golden Bay in the sense of what they do now, will remain. That is part of the context in which the Court must determine whether those employees are, as defined in law, "employees" of China Navigation and also whether China Navigation is an "employer".

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5 Employment Relations Act 2000, s 82(1)(a).

6 *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd* [2015] NZEmpC 204.

Do the statutory consequences of a lockout assist in its definition?

[66] Mr Langton, counsel for the defendant, pointed to s 96 of the Act, emphasising that locked out employees are not entitled to any remuneration unless the lockout is unlawful. Counsel highlighted the inaptness of that consequence of interpreting the current situation between these parties, as a lockout. The second plaintiffs are not entitled to any remuneration from China Navigation in any event, being still currently employed and paid by Golden Bay. In the same category is the statutory consequence at subs (2) which dictates that after work resumes following a lockout, an employee's continuous service entitlements remain in effect, presuming thereby that there was or may have been some accumulated service before the lockout began. So, Mr Langton submitted, neither s 96(1) nor (2) can apply to a "prospective employee".

[67] Although I accept that these two provisions about the consequences of a lockout will apply in cases where strikers are current employees of an employer, they do not preclude potential employees from being strikers. These sections will simply have no application in the latter case. Prospective employees will not be entitled to remuneration because there is not yet any wage-work bargaining entitling them to remuneration. They will not have any continuity of service entitlements because service will not yet have commenced. There may be many instances of current employees who have no continuity of service entitlements, but this does not detract from their status as being locked out. I regard these provisions as being neutral, that is not pointing either towards or away from the plaintiffs' argument that, in s 82, "employer" and "employee" include the prospective versions of these roles in all the circumstances of this case.

[68] Mr Langton submitted that if, as he categorised the plaintiffs' case, the making of an offer of employment on the terms and conditions contained in a draft iea could constitute a lockout, this would restrict potential employers in a 'greenfield' situation from engaging work if all that was required was for those prospective employees to refuse and claim that, thereby, they were being locked out. This would, counsel submitted, effectively preclude employers from making offers of employment to other candidates and would, if there was a lockout, restrict such

employers from engaging others to perform the work pursuant to the lockout-breaking provisions in s 97. In these circumstances, counsel submitted, a new employer would have little choice but to accede to the demands of the original candidates and their union and enter into a collective agreement, counsel submitted on the terms set by the union. Mr Langton submitted that such an outcome would go well beyond one of the objectives for the act of promoting collective bargaining by undermining a new employer's ability to choose to whom it would make offers and on what terms and conditions. Such a situation would, counsel submitted, be contrary to s 33 which now provides that it is not among the duties of good faith to require a collective agreement to be concluded. Such a situation, Mr Langton argued, would also have the effect of elevating the rights of original offerees to those of existing protected employees under Subpart 1 of Part 6A of the Act, notwithstanding the absence of a statutory or contractual basis for this.

[69] I do not accept these arguments.

[70] Although it is strictly unnecessary to decide whether these statutory elements tend to indicate that prospective employees can or cannot be the subject of a lockout because I have so concluded on other grounds, I consider that they do not preclude an extended definition of the words "employee" and "employer" under s 82. In this case, it is an important part of the context that China Navigation wishes to engage the second plaintiffs to crew the MV Aotearoa Chief. It is not seeking to engage employees from an open, level-playing-field market in which applicants for employment may or may not be union members. Here, the second plaintiffs are offerees of, not merely applicants for, employment. Although an employer may, in compliance with the statute, lock out in theory potential employees and thereby place pressure on them to agree to its terms and conditions of employment, that does not mean that those employees (and their union) are placed in a preferential situation, as Mr Langton appears to argue. To the contrary, such employees may indeed be disadvantaged in that their negotiation strength is weakened. More fundamentally also, in this case, China Navigation has pre-approved the second plaintiffs for employment without the need for them to have what would otherwise be the assessments required of other applicants. Nor is it a situation either of such pressure being applied to China Navigation that it will accede to locked-out employees'

demands or that it will have to agree to a collective agreement, contrary to s 33 of the Act. Although Mr Langton is right to this extent that the second plaintiffs are in an advantageous position in this case, I do not accept that any advantage elevates them above the position of the four second plaintiffs who are protected employees under Subpart 1 of Part 6A of the Act. None of these contentions just summarised is persuasive of the defendant's submission that there cannot be a lockout of prospective employees.

Are the second plaintiffs "employees" who can be locked out?

[71] The plaintiffs' strongest arguments for the existence of a statutory foundation of a lockout (being that the second plaintiffs are "employees") is, first, that which was touched on by the full Court in the *AFFCO* judgment. The plaintiffs' second argument for an extended definition of "employee" to cover prospective employees, is the application of s 5(1) of the Interpretation Act 1999 to that word used in the Employment Relations Act.[7] Can the second plaintiffs who have, until now, undertaken essentially the same work of crewing a coastal vessel engaged exclusively in loading, conveying and discharging bulk cement around the New Zealand coast, fall within the definition of "employee" under s 82 of the Act? In these circumstances, can China Navigation be an "employer"? This second question will be answered necessarily by the first because of the definition of employer as a person employing an employee(s).

[72] This decision relies, first, on the statutory qualification of all definitions of words and phrases in s 5 of the Employment Relations Act "unless the context otherwise requires". As the full Court put it at [115] of the *AFFCO* judgment:

> Can it be said that the "context" of the use of the words "employee" and "employer" in s 82 of the Act defining a lockout requires a different meaning to that provided in ss 5 and 6? Does the context of bargaining (especially collectively) mean that the words "employer" and "employee" and the plurals of those referred to in s 82(1), mean not only persons who have currently an employment relationship under s 4(2)(a) of the Act but also persons who have had previous relationships of seasonal employment and who are both wishing to engage in a further seasonal employment relationship after a seasonal lay-off? In that analysis, the reality of both the

[7] Interpretation Act 1999, s 5(1): "The meaning of an enactment must be ascertained from its text and in the light of its purpose."

> applicable history between the parties, and the relevant contents of the collective and/or ieas which governed their previous relationship as defined by ss 5 and 6 of the Act, will be relevant. …

[73] This is, of course, not a seasonal employment case and is not one where there have been previous employment relationships between China Navigation and the second plaintiffs. Nevertheless, do the particular circumstances of the divestment by a business (Golden Bay) of one part of its operations (shipping bulk cement) to a new employer who proposes engaging the same employees on essentially the same tasks, albeit on a different vessel, mean that the second plaintiffs are, in law and for the purpose of a lockout, "employees" of China Navigation?

[74] This argument for the plaintiffs involves adopting the extended definition of "employee" in s 5 of the Act beyond the statutory definition of "a person intending to work"[8] which means "a person who has been offered, and accepted, work as an employee …".[9] That, in turn, invokes the opening words to the Act's interpretation section:[10] "In this Act, unless the context otherwise requires …".

[75] As the full Court noted at [111] of *AFFCO*, s 6, which addresses whether someone is an "employee", this requires the Court to determine "the real nature of the relationship between them" and the requirement under subs (3) that the Court must consider "all relevant matters" including any that may indicate the parties' intentions.

[76] Relevant considerations in this exercise of determining whether the second plaintiffs are to be considered as "employees" of the defendant, include the contractual obligation on China Navigation (to Golden Bay) to offer work to the second plaintiffs; its wish to engage them as employees on its new vessel evidenced by it offering them work; and the essentially very similar work to be performed on both vessels, the only real differences being the larger and more modern vessel and on which their employer is a different legal entity.

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8 Employment Relations Act 2000, s 6(1)(b)(ii).
9 Section 5.
10 Section 5.

[77] As in the case of *AFFCO*, the plaintiffs here rely in their argument that the second plaintiffs are in law "employees" of China Navigation, on the judgment of the Court of Appeal in *Tucker Wool Processors Ltd v Harrison*.[11] There, an extended meaning was given to that word to cover persons engaged in collective bargaining for a collective contract but who had not then been offered and accepted employment. In that regard, the circumstances in the *Tucker* case were more similar to those in this proceeding than were those in *AFFCO*.

[78] There are, however, some potentially distinguishing features of *Tucker* which call for deeper analysis of that judgment. These include the differences between the respective legislative regimes (the Employment Contracts Act 1991 and the Employment Relations Act 2000) and the particular provisions with which the Court of Appeal in *Tucker* dealt, which are either absent from the current legislation, or are not in issue in this case. Mr Langton relied on these differences to distinguish the application of *Tucker* to this case.

[79] The relevant question posed by the Court of Appeal in *Tucker* was whether Part II of the Employment Contracts Act applied to what the Court described as prospective employees. Part II of that Act dealt with bargaining, the equivalent of the now collective bargaining sections in the Employment Relations Act. The Court of Appeal's analysis of this question commences at [37] of its judgment which is contained at pages 908 and following of the ERNZ report. The Court of Appeal concluded that the context of Part II of the Employment Contracts Act did require another definition of the word "employee" than set out in the definition section (s 2). At [44] Keith J, delivering the judgment of the Court, wrote:

> More generally (subject to the next issue about the extent of the obligation to negotiate), we can see no compelling reason for distinguishing between prospective and actual employers and employees in Part II - nor for that matter in Part I concerning freedom of association. Those parts are distinguished by their subject-matter from the later substantive parts of the Act, which are essentially concerned with issues arising *after* the employment relationship has been established: Part III with personal grievances, Part IV with enforcement and Part V with strikes and lockouts. Even then one of the provisions of Part IV - s 57(1)(a) - draws no such distinction in respect of the precontractual stage.

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[11] *Tucker Wool Processors Ltd v Harrison* [1999] 1 ERNZ 894.

[80] Counsel for the appellant employer in *Tucker* having conceded that the provisions of Part I of the 1991 Act were not confined to situations where an employment contract had been formed, the judgment of the Court of Appeal in *Tucker* at [45] continued:

> We cannot see how the provisions recognising and conferring freedom of association can sensibly apply generally if the closely associated provisions for negotiation and bargaining are then confined to persons who are already in an employment relationship.

[81] The Court held at [46] that there were at least three further elements of that Act's Part II (bargaining) which supported the broader reading of the words "employees" and "employers":

> One is the practical difficulty or at least the oddity that would arise were the union representing actual employees also to be representing prospective employees. … Consider for instance the operation of the provisions of s 16 for establishing procedures for the ratification of the settlement. On the appellant's argument in this case, the validating purpose and effect of s 16 would be undermined.

[82] The second feature indicating a broader definition of the words in *Tucker* was s 20 which regulated the conclusion of such contracts, now agreements. Subsection (3)(b), addressing the classes of person with whom an employer might negotiate in negotiations for a collective agreement, provided: "If the *employees* so wish, any authorised representative of the employees." Subsection (4) provided that every collective agreement was to be in writing.

[83] At [48] of the Court of Appeal's judgment in *Tucker* it was said:

> Subsection (4) on its face applies to every collective contract but in the immediate context of s 20 the provision, on the appellant's theory, might be limited to variations of existing contracts or a new collective contract with existing employees. There would be no sense in that.

[84] The third factor referred to supports a broader interpretation of then s 21 which dealt with "New employees". In the event that a collective agreement contained a term allowing coverage extension to other employees employed by any employer bound by it, any such other employee was entitled, in addition to the employees who were parties to it, to become a party to, and be covered by, that

collective agreement. That was if that employer and any such other employees agreed. At [50]-[51] the Court of Appeal dealt with this third factor as follows:

> [50] The reference to "employee" in that provision must mean, or at least include, prospective employees. On any fair reading the provision could not be limited to the case of existing employees moving from an individual to a collective contract.
>
> [51] To conclude, the words "employee" and "employer" are used in Parts I and II of the Act and in particular in ss 12(2) and 20(3)(b) as a convenient shorthand. They may, as appropriate, include prospective employers or employees.

[85] There are several regime-specific differences between the two Acts. However, I consider that the generality of the Court of Appeal's findings in relation to collective bargaining and the ability of it to cause what would otherwise not be statutorily defined as employees to be so, applies in principle also to the circumstances of this case under the Employment Relations Act. In particular, it applies to the meaning of the words "employee" and "employer" in s 82 where collective bargaining has been instituted.

[86] Following the reasoning of the Court of Appeal in *Tucker*, I conclude that the word "employee" (and therefore logically the word "employer") includes, in s 82, a prospective employee and a prospective employer. The principles underlying this conclusion in *Tucker* survive the differences between the two regimes and remain sound for the purposes of s 82.

[87] Finally, under s 82(1)(b), there is the requirement that China Navigation's act or acts must be done with a view to compelling the second plaintiffs (if they are "employees") to accept terms of employment or to comply with demands made by China Navigation as employer. Certainly the company wishes to compel the second plaintiffs to accept the terms of employment that it has offered them, so that this final test of whether the action amounts to a lockout, has been met. Mr Langton conceded that this would be so if he was unsuccessful in persuading the Court that the second plaintiffs are not employees.

[88] As noted, however, the plaintiffs' difficulties are with the s 82(1)(a) tests, at least one of which must be established before there can be a lockout, even assuming

that s 82(1)(b) is established. Here, the only s 82(1)(a) test relied on by the plaintiffs is s 82(1)(a)(iv). The crucial phrase therein is "work for which the employer usually employs employees".

The defendant's arguments on the "work for which the employer usually employs employees"

[89] Mr Langton initially accepted that if the second plaintiffs become persons intending to work and therefore meet the definition of "employee", and if the defendant then refuses to allow them to start work, for example by requiring that they sign another form of iea, then this would meet the definition of lockout under s 82(1)(a)(iv). That is because at that point of the employer's demand, an employment relationship has been formed, that the definition of work for which the defendant usually employs employees would be satisfied. That, in turn, is because the defendant accepted initially that the requirement of "usually" in relation to the work for which the defendant employs employees, can encompass the current position independently of the past: that is, commencing once the employer has at least one employee who has been engaged.

[90] Upon reflection, however, Mr Langton felt compelled to argue that the notion of "usually" connoted a repetition or a continuity of conduct so that there would need to be a history of employment as well as a current engagement of at least one employee. In that sense, Mr Langton also accepted that the word "usually" includes elements of being customary and habitual.

Work for which the employer usually engages employees?

[91] Even if the plaintiffs had been successful in establishing all of their other arguments leading to a conclusion of a lockout, this is where their case fails. China Navigation's actions cannot amount to a lockout in law unless this part of the statutory test is met, which it has not been.

[92] The work for which the plaintiffs must show that China Navigation usually employs employees, is the work of integrated ratings on the new vessel. Because

China Navigation has not previously employed integrated ratings on a vessel to operate in New Zealand waters, and because it does not do so at present, Mr Mitchell was driven to argue that, in essence, the word "usually" must be interpreted to mean "will usually" so that when employment of the second plaintiffs commences, it will "usually" then and thereafter employ employees as integrated ratings.

[93] I do not accept that the phrase used by Parliament is open to that interpretation. Quite apart from not using a phrase such as "usually employs or will usually employ" in the statutory definition of a lockout, as Parliament could have done, the other relevant definitions of a lockout do not include future hypothetical events, the existence of which will depend upon an agreement or agreements to employ employees that may not ever be consummated. China Navigation's desire to employ the second plaintiffs as integrated ratings is more than a mere wish alone. It is a wish to do so on the terms and conditions on which it seeks to engage employees. Although it may want the second plaintiffs to work for it, if the conditions attaching to that wish are not able to be fulfilled, then it may try to find an alternative crew of integrated ratings who will agree to those terms and conditions of employment contained either individually or collectively, and who are unwilling or unable to persuade it to modify those terms and conditions.

[94] Mr Mitchell submits that the statutory requirement for the employees to be engaged "for any work for which the employer usually employs employees" in s 82(1)(a)(iv) "can include prospective work that the second plaintiffs will be engaged to usually perform". Counsel submits that this section can and should be interpreted to include, as an element of a lockout, prospective employees being refused work that they will usually perform once engaged. This is said to be consistent with a purposive interpretation of the section, as the Court of Appeal concluded should be the approach, when dealing with strikes and lockouts, in *New Zealand Dairy Workers Union Inc v Open Country Cheese Ltd.*[12] Albeit the interpretation of another section of the Act, the *Dairy Workers* case turned on the construction of the words "employ" and "engage" under s 97(2) of the Act which relates to strike and

[12] *New Zealand Dairy Workers' Union Inc v Open Country Cheese Co Ltd* [2011] NZCA 56, [2011] NZLR 350.

lockout breaking. The purposive interpretation of these words is illustrated at [28] of the judgment of the Court of Appeal materially as follows:

> … the words "employ" and "engage", when read in the light of the purpose of s 97(2), refer to the employer's use of the other persons, irrespective of its legal relationship with them. In terms of s 97(2), the question then is: Did the Cheese Company use other persons to perform the strikers' work — that is, the work normally undertaken by them for its benefit? The section's concern is with the employer's acts or omissions — not those of another entity or that entity's relationship with the replacement workers. What is required is an objective inquiry into the purpose, nature and effect of their work, assessed by reference to all the relevant circumstances.

[95] Returning to this case, Mr Mitchell submits that it is consistent with the purpose of the legislation, that prospective employees are treated as employees for the purpose of collective bargaining provisions; that the lockout provisions apply to prospective employees; and that the work referred to in s 82(1)(a)(iv) should be interpreted to mean the work usually to be performed by those employees.

[96] Even applying a purposive approach to the requirement for usual engagement of employees and in context of the legislation generally, I do not agree that the phrase "usually employs employees" requires extension, in the case of s 82, to mean "will usually employ employees" where there is no historic or current employment of employees. "Usually" has historic (and arguably current) meanings. One determines whether something is "usually" done by reference to past and current practice. In the absence of past and current practice, it cannot be said that what might be done habitually in the future alone, is "usually" done. It is on this reef that the plaintiffs' case is stranded, even if all of the other necessary constituents for a lockout may be able to reach a safe haven.

Unlawful lockout - decision

[97] Although accepting that for the purpose of the s 82 definition of a lockout, the second plaintiffs are "employees" and that, again for this purpose, China Navigation is an "employer", the defendant's presentation of identical forms of iea to the prospective employees that are negotiable, does not constitute a lockout. That is ultimately because the essential statutory precondition under s 82(1)(a)(iv) is not and cannot be satisfied. While China Navigation may currently be refusing or failing to

engage employees, that is not a refusal or failure in respect of "any work for which the employer usually employs employees". There is no evidence of such a usual practice by China Navigation. Future or prospective or potential employment of the second plaintiffs, or others, cannot fulfil the requirement that, in June 2016 and following, the defendant usually employed and/or is currently employing employees for this kind of work (seafaring) by integrated ratings. As I have already concluded, also, China Navigation's offers of employment are not stark 'take-it-or-leave-it' offers.

[98] Whether that condition precedent under s 82(1)(a)(iv) to a lockout being established in law is deliberate or a legislative oversight, cannot be the concern of the Court. As the law stands, if a so-called greenfield employer, which cannot be shown to usually engage employees for this work, refuses to bargain with prospective employees even to the extent of insisting on employment terms and conditions stipulated for by it in individual agreements (and is not breaching a contractual arrangement such as the Time Charter Party in this case), that conduct does not amount to a lockout.

[99] Nor can it be said, as is one of the plaintiffs' fall-back arguments, that the defendant's acceptance of four current employees of Golden Bay to transfer to the new vessel as if they were so-called vulnerable employees under Part 6A of the Act, means that China Navigation now has more than two employees and so may be said to usually offer employment to ships' crews in New Zealand.

[100] That is because Part 6A says that such employment relationships commenced "on and from the specified date" (s 69I(2)(a)). "Specified date" is defined in s 69I(4) as the date on which the restructuring takes effect. That has not yet been reached. The MV Golden Bay continues to operate on the New Zealand coast for Golden Bay and the four cooks/stewards the subject of the Part 6A procedure will not be transferred to the employment of China Navigation until their work on MV Golden Bay ceases and they take up duties on the MV Aotearoa Chief. The exact date of this changeover is not clear but what can be said with certainty is that it has not yet occurred and will not do so for several weeks, if not a month or so at least.

[101] It follows, therefore, that China Navigation's stance in this dispute is not a lockout (let alone an unlawful lockout) and cannot be restrained. It follows that the plaintiffs' application must be and is refused.

Pre-work collective bargaining initiation

[102] Although this is not a cause of action pleaded specifically by the defendant, China Navigation's case in resisting the existence of a lockout relied significantly on its assertion that collective bargaining had not been initiated. Further, decision of this issue, which was fully argued between the parties, will assist them to progress the important issue of settling terms and conditions of agreement by which the second plaintiffs will crew the new vessel as both parties wish. So assisting parties to employment relationships is one of the unique functions of this Court: it is in pursuit of the statutory objective of establishing and promoting successful employment relationships. For these reasons, and because the lockout argument did not address the fundamental dispute between the parties, I determined that the parties are currently in collective bargaining, the Union having lawfully initiated bargaining with China Navigation.

[103] In deciding whether unions can initiate collective bargaining and sign collective agreements with an employer which will thereafter engage employees on the collective agreement, the legislation must be interpreted, in part, in the context of current employment practice.

[104] Although possibly unique in the coastal shipping sector, what China Navigation proposes to do is now a not infrequent example of new business establishment in New Zealand. This is known colloquially as a 'greenfield' business. Entities, either local or foreign, often establish themselves for the first time in New Zealand with a clear business plan which includes engaging employed staff. Such business plans also include quite detailed timetables to prepare for commencement of the new business operation on a specified date. There is a myriad of arrangements to be made in such circumstances including leasing of premises, obtaining licences if necessary, registration of an appropriate local legal entity etc.

[105] In circumstances where, as here, the new business enterprise will replace an existing similar enterprise which currently employs staff, the planning will often include a means of appointing at least some of those existing staff with skills and experience to work in the new enterprise. In many cases, the terms and conditions of employment of those existing staff will be fixed by a current collective agreement with a union or unions. Aside from those existing employees who may be subject to Part 6A of the Act on a transfer of an undertaking, a new enterprise's planning will include how terms and conditions of employment of its new staff will be set. As in this case, many of those staff will wish both to continue to be union members with their basic terms and conditions fixed by a collective agreement, and will wish to have continued employment with the new entity, preferably on no less advantageous terms and conditions than they current enjoy.

[106] Those are generally the circumstances of this case. Golden Bay currently employs integrated ratings on its bulk cement delivery vessel. These employees are members of MUNZ and are subject to a current collective agreement. They wish to continue work as integrated ratings on the new coastal bulk delivery vessel to be used by Golden Bay. Their suitability for doing so, in terms of qualifications and experience, has been confirmed by China Navigation which wishes to employ them, no doubt for their skills and experience which will be transferrable to a larger and more modern vessel, albeit one that may not require so many crew members. It is unremarkable, therefore, that MUNZ, as the union representing those crew members, will wish to bargain collectively with China Navigation for a collective agreement setting the basic terms and conditions of its members' future employment which is mutually desired.

[107] Orderly collective bargaining, and the desirability of a smooth transition between the two different shipping operations, mean that if there is to be collective bargaining, it should take place as part of that planned commencement of business in New Zealand of the new enterprise. Logically, therefore, this should take place before China Navigation's operations commence and allowing sufficient time for collective bargaining to conclude.

[108] It follows that this is the context in which the collective bargaining provisions of the Act should be interpreted, if it is open to the Court to do so on the words and phrases used by Parliament. That is, to apply s 5 of the Interpretation Act (text in light of purpose) and, if necessary, the appropriate flexibility allowed by the opening words of s 5 (Interpretation) of the Employment Relations Act, "… unless the context otherwise requires …" in relation to words and phrases specifically defined within the legislation.

[109] China Navigation's argument about the lawfulness of MUNZ's initiation of bargaining turns on the plaintiffs' assertion that the Act requires that an employer have two or more employees at the time that bargaining is initiated and who will be covered by the collective bargaining. The Union says that, properly interpreted, there is no such requirement, although it concedes that, for there to be an effective collective agreement with that employer, the employer will have to have two or more employees covered by it for the collective agreement to operate.

[110] There is nothing expressly in the relevant provisions relating to collective bargaining and its initiation that requires the existence of two or more employees of the employer the subject of a notice initiating bargaining before that initiation can be lawful. Section 40(1) allows for collective bargaining to be initiated by one union with one employer, as is the case here if China Navigation meets the definition of "employer".

[111] The time restrictions on initiating bargaining under s 41 are not in issue in this case.

[112] The notice given by MUNZ to China Navigation on 9 June 2016 complies with s 42(2) in that it was in writing, signed by the Union, identified each of the intended parties to the collective agreement and identified the intended coverage of the collective agreement.

[113] No obligation arose under s 43 requiring the employer to notify other employees of the initiation of collective bargaining because there were no other employees at that stage: put another way, MUNZ purported to represent all of the

integrated ratings whom China Navigation wished to employ and to whom it had made offers of employment.

[114] So, the defendant's argument turns, essentially, on whether it was, on 9 June 2016, an "employer". In determining this, I rely on the reasoning used to conclude that the second plaintiffs are "employees" (and China Navigation an "employer") for lockout purposes under s 82.

[115] That is defined in s 5 as being "a person employing any employee or employees …". "Employee" is itself defined by s 6 materially as "any person of any age employed by an employer to do any work for hire or reward under a contract of service …".

[116] Section 6(2), in turn, requires the Court to determine the real nature of the relationship (between the second plaintiffs and the defendant) to determine "whether a person is employed by another person under a contract of service …". That, in turn, requires a further inquiry as to whether the use of the present tense in these definitions also encompasses, in appropriate circumstances, the use of the future tense so that, for example, whether the phrase "whether a person is employed by another person under a contract of service" extends to "whether a person is [or will be] employed by another person under a contract of service".

[117] For the same reasons leading to the conclusion that "employer" may mean a prospective employer for the purposes of s 82, I conclude that a similar meaning is required for that word in s 40 and following relating to collective bargaining.

[118] The defendant is correct that a collective agreement, to have legal force and effect, must cover the employment by an employer party to it, of more than one employee. But that is not to say that where, as here, it is clear that multiple employees will be covered if they are engaged by China Navigation as integrated ratings, China Navigation must nevertheless now have at least two or more current employees who will be covered. To so interpret the legislation would be to negate the ability of unions to negotiate for collective agreements with new enterprises establishing themselves in New Zealand or in a particular field, as is the case of

China Navigation. It is correct, as China Navigation says, that if two of the second plaintiffs accept its offers of employment on ieas, and thereby become "person[s] intending to work" as defined, the defendant will then have the requisite number of employees to permit collective bargaining to be initiated. However, that does not mean in my view that lawful collective bargaining cannot be initiated before that position is reached.

[119] Although the opening words of s 40 refer only to "bargaining", this clearly relates to collective bargaining.

[120] The provisions of s 40 and other relevant subsequent sections must be interpreted in light of the relevant objects of the Act. These include, at s 3:

> The object of this Act is—
> (a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship—
> (i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and
> (ii) by acknowledging and addressing the inherent inequality of power in employment relationships; and
> (iii) by promoting collective bargaining; and
> (iv) by protecting the integrity of individual choice; and
> …
> …
> (b) to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively.

[121] In relation to Part 5 of the Act under which s 40 falls, the relevant objects of that Part include:

> The object of this Part is—
> (a) to provide the core requirements of the duty of good faith in relation to collective bargaining; and
> …
> (d) to promote orderly collective bargaining; and
> (e) to ensure that employees confirm proposed collective bargaining for a multi-party collective agreement.

[122] Section 40 provides materially:

> **40 Who may initiate bargaining**
> (1) Bargaining for a collective agreement may be initiated by—
> (a) 1 or more unions with 1 or more employers; or
> (b) 1 or more employers with 1 or more unions.
> (2) However, bargaining for a collective agreement may not be initiated by an employer (whether alone or with other employers) unless the coverage clause will cover work (whether in whole or in part) that is or was covered by another collective agreement to which the employer is or was a party.

[123] The word on which the first argument turns is "employers" in subs (1)(a). That is because "employer" is defined in s 5 as "a person employing any employee or employees …". That is, of course, subject to the qualifier "unless the context otherwise requires". Both words ("employer" and "employee") stand or fall together on this question.

[124] So, interpreting and applying the sections about collective bargaining following initiation, Mr Mitchell for the plaintiffs is correct that there is no express requirement that a union must have, as members to be covered by the bargaining, two or more current employees of the employer to whom notice is given. That is not the same thing as it being necessary for there to be two or more employees to be covered by the collective agreement. That will be necessary to give effect to it, but is not a prerequisite to collective bargaining.

[125] Other statutory provisions relevant to whether there is currently collective bargaining include the following.

[126] Section 51 (ratification of collective agreement) prohibits a union from signing a collective agreement or a variation of it unless that has been ratified in accordance with a ratification procedure notified by the Union to "the other intended party or parties to the collective agreement of the process for ratification by the employees to be bound by it …". Similarly, if the words "employee" or "employees" can mean a prospective employee or prospective employees, then the requirement for ratification may be fulfilled before affected employees are engaged or commence work.

[127] Nor does s 52 necessarily require a minimum of two existing employees at the initiation of bargaining before a collective agreement can come into force. It

allows for a collective agreement to come into force on a date specified in it which may be either before or after the date of its execution following ratification. That is conferred by subs (2) which says that "… a collective agreement may provide that one or more of its provisions have effect from 1 or more dates before or after the date on which the agreement comes into force."

[128] The immediate context in which the Court must decide whether collective bargaining has been initiated lawfully under the Act does not preclude an interpretation of the words "employer" and "employee" as prospective employer or prospective employee. But that is not the test under the qualifying words of s 5. The test is that the context of the statute and its application in practice require another, or extended, definition for the second plaintiffs and the defendant to fall within these descriptions.

[129] As the Court of Appeal concluded in *Tucker*, and applying the statute practicably to what are now common instances of 'greenfield' employment, I conclude that the circumstances do require this extended meaning of the words "employer" and "employee" (and their plurals) to the statutory provisions affecting the initiation and conduct of collective bargaining. To do otherwise would frustrate the statutory purpose of orderly and effective collective bargaining in pursuit of the further statutory purpose of building productive employment relationships, of promoting observance in New Zealand of the principles underlying ILO Convention 98 on the Right to Organise and Bargain Collectively.[13]

[130] There is no statutory requirement that, at the point of a union initiating collective bargaining, it must do so representing two members who are then currently employees of the employer. The law requires that, to be effective, a collective agreement must cover the employment of two or more employees of the employer bargained with and party to the collective agreement but that is a requirement that applies later in time than the initiation and conduct of collective bargaining.

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[13] Employment Relations Act 2000, ss 3 and 31.

[131] So, for these reasons, I find against the defendant's arguments that lawful collective bargaining has not been initiated in this case, and find for the plaintiffs on that issue.

If at least two employees are required for collective bargaining, do the four employees protected under Part 6A meet that test?

[132] The plaintiffs' fall-back argument is that, the parties having agreed to treat the two cooks and the two stewards on the MV Golden Bay as protected or vulnerable employees under Part 6A of the Act, who have been offered a transfer from Golden Bay to China Navigation on their existing terms and conditions, constitute that minimum number of two employees for collective bargaining to commence.

[133] Although not now requiring decision to resolve the case, I will nevertheless deal briefly with this argument.

[134] Assuming (contrary to my decision) that a minimum of two employees may be required, those persons who have been offered transfers under Part 6A do not constitute current employees of China Navigation and will not do so until the date of their transfer. That will be when they cease working for Golden Bay on the MV Golden Bay and commence work for China Navigation on the MV Aotearoa Chief. That point has not yet been reached and is unlikely to be reached until a little less than a month hence. The current position is that although such employees will be offered a transfer, that has not yet occurred. There must also be an acceptance or acceptances of that offer or those offers by those four employees. Even then, employment with China Navigation will not commence until the transfer date.

Summary of judgment

[135] For the foregoing reasons, I concluded:

- The defendant's offers of employment to the second plaintiffs made on 31 May 2016 did not and, to the extent that they remain open, do not constitute a lockout of the second plaintiffs.

- The fact that the defendant has elected to treat four of the second plaintiffs as transferees from Golden Bay to China Navigation, pursuant to Part 6A of the Employment Relations Act, does not mean that the defendant currently has two or more employees allowing both for collective bargaining to take place and for a collective agreement to become applicable.

- The first plaintiff lawfully initiated collective bargaining with the defendant on 9 June 2016 so that the parties' current status is that they are in collective bargaining and must, therefore, comply with the statutory obligations attaching to this status.

GL Colgan
Chief Judge

Judgment delivered at 4 pm on 29 August 2016