IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 80/07
5081410

BETWEEN	SOUTHERN LOCAL GOVERNMENT OFFICERS UNION INC Applicant	
AND	CHRISTCHURCH CITY COUNCIL Respondent	

Member of Authority:	H Doyle
Representatives:	Peter Lawson, Counsel for Applicant Susan Hornsby-Geluk, Counsel for Respondent
Submissions received:	23 April and 7 June 2007 from the respondent 27 April and 11 June 2007 from the applicant
Determination:	16 July 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The respondent, Christchurch City Council, applies to have this employment relationship problem removed to the Employment Court at Christchurch for hearing and determination under s.178 of the Employment Relations Act 2000.

[2] The respondent relies on the grounds under s.178(2) of the Employment Relations Act 2000 as set out below:

- An important question of law is likely to arise in the matter other than incidentally;

- The case is of such a nature and of such urgency that it is in the public interest that it to be removed immediately to the Court;

- That it is appropriate for the Court to determine the matter.

[3] The applicant, Southern Local Government Officers Union Inc opposes the application for removal to the Court on the basis that there are insufficient grounds for having the matter removed to the Court and that the Authority should accordingly decline the application.

[4] The applicant and respondent lodged initial submissions and then supplementary submissions with respect to the removal application.

Issues

[5] The issues that arise from this application and which need to be considered in determining the matter are:

- Is there an important question of law likely to arise in this matter other than incidentally? The importance of a question of law has to be measured in relation to the case in which it arises. The question of law will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of it or a material part of it – *Hanlon v. International Educational Foundation* [1995] 1 ERNZ 1.

- Is the case of a nature and of such urgency that it is in the public interest that it be removed immediately to the Court?

- Is it appropriate for the Court to determine the matter?

What is the nature of the employment relationship problem?

[6] The applicant in its original statement of problem set out the problems that it wishes the Authority to resolve. There has been an amended statement of problem lodged and served but it does not amend the nature of the problems set out in the original statement of problem.

[7] The problems to be resolved by the Authority are:

- Declaratory orders relating to the lawfulness of a partial lockout of members of the applicant employed as animal control officers

(alternatively known as dog control officers) by the respondent Council which they allege to have been unlawful pursuant to s.86 of the Employment Relations Act 2000; and

- The recovery of lost wages withheld from the animal control officers as a result of the aforesaid alleged unlawful partial lockout; and

- The recovery of compensation for the animal control officers for the unlawful removal of the benefit of employment during the aforesaid lockout; and

- The recovery of wages of the animal control officers relating to a period whilst they attended a meeting with their Union to seek advice and assistance in respect of the lockout notice issued to them by the respondent.

[8] The respondent replied and gave its view of the problem and said amongst other matters:

- The notice of the lockout dated 7 December 2006 was lawful in that:

  (i) The lockout fell within the definition of *lockout* in s.82 of the Employment Relations Act 2000;

  (ii) It related to bargaining for a new collective agreement in terms of s.83 Employment Relations Act 2000;

[9] The respondent also made a counterclaim that:

(a) The dog control officers were unlawfully on strike from 5 December 2006, when the applicant stated that the dog control officers would no longer deal with after hours call outs for Akaroa on the basis of health and safety concerns.

(b) The applicant's actions were not rendered lawful by operation of s.84 of the Employment Relations Act 2000, as there were no health and safety concerns which were sufficient to justify a strike on the grounds of health and safety.

(c) The respondent is entitled to remedies in relation to the unlawful strike.

[10] There was also a supplementary statement in reply and counterclaim lodged in response to the amended statement of problem. It did not change the nature of the reply to the problem set out above.

Is there an important question of law likely to arise in this matter other than incidentally?

[11] Mr Lawson said that the unlawfulness of a partial lockout was authoritatively determined by the Full Court of the Employment Court under the Employment Contracts Act 1991 in *Witehira v. Presbyterian Support Service (Northern)* [1994] 1 ERNZ 578. Further, Mr Lawson submits that the relevant provisions of the Employment Relations Act 2000 are not different in a material way to the legality of the actions that the respondent relies on.

[12] In *Witehira*, the Court reviewed the relevant legislation and case law with respect to the definition of a lockout. The Court found that the partial lockouts of the type in *Witehira* where employees were not paid their penal rates but still required to perform their full duties, including night, weekend and public holiday work, were not lockouts at all but rather a unilateral variation of the applicant's employment contract.

[13] The Court in *Witehira* held at p.602:

> *Indeed to uphold the defendant's position as valid would consign employees in New Zealand to a position scarcely superior to serfdom for their employer could at any time after the expiry of a collective employment contract reduce their pay and conditions to any level it saw fit under the guise of applying pressure to secure acceptance of future terms of employment or compliance with the employer's other demands made in negotiation. It is quite clear that it is not competent for an employer to do so while requiring performance in full of an employee's duties.*

[14] The Court of Appeal has upheld the approach of the Full Court in *Witehira* in *Transportation Auckland Corp Ltd v. Marsh* [1997] ERNZ 532 (CA).

[15] Section 62 of the Employment Contracts Act 1991 provided a definition of lockout as below:

> *62.* ***Definition of lockout*** *–*
>
> *(1) In this Act the term 'lockout' means the act of an employer –*

> *(a) In closing the employer's place of business, or suspending or discontinuing the employer's business or any branch thereof; or*
>
> *(b) In discontinuing the employment of any employees, whether wholly or partially; or*
>
> *(c) In breaking some or all of the employer's employment contracts; or*
>
> *(d) In refusing or failing to engage employees for any work for which the employer usually employs employees –*
>
> *with a view to compelling any employees, or to aid another employer in compelling any employees, to accept terms of employment or comply with any demands made by the employer.*
>
> *(2) In this Act, the expression 'to lockout' means to become a party to a lockout.*

[16] The Court observed in *Witehira* at p.601:

> *What then is meant by the reference in s.62(1)(b) and (c) to discontinuing employment partially and to breaking some, or all, of the employment contracts? It must mean discontinuing and breaking to the extent that no work is done during the discontinuance or breach by the employees locked out. It is perhaps possible for an employer to have a partial discontinuance by saying to the whole, or a part, of its workforce that they are to come to work 4 days a week instead of 5, that they will be locked out on the fifth, and such action would sit quite comfortably within s.72 if they were not paid " in respect of the period of the lockout", that is to say, for the fifth day. Where, however, the lockout is for an indeterminate period in the sense that it is not possible to separate any period during which employees are locked out from any period during which they are not locked out, it seems difficult to suggest that they are then locked out at all.*

[17] The meaning of *lockout* in s.82 of the Employment Relations Act 2000 differs in one important aspect from s.62 of the Employment Contracts Act 1991 in that the reference to *wholly or partially* has been removed from s.82(1)(a)(ii) of the Employment Relations Act 2000:

> *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 employee; 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 lockout means to become a party to a lockout.

[18] There has been no case law to date about the effect of the removal of those words in s.82. Ms Hornsby-Geluk submits that a partial lockout comprising a reduction in pay and corresponding reduction in work would be capable of constituting a lawful lockout under the Employment Contracts Act 1991 based on the observations of the Full Court in *Witehira.* The critical issue she submits is why the words *whether wholly or partially* were removed from s.82 of the Employment Relations Act 2000.

[19] Ms Hornsby-Geluk provides an example where commentators have speculated that the reason for removal of the words *whether wholly or partially* is to reinforce the illegality of partial lockouts. Ms Hornsby-Geluk says that this view is reinforced by the debate which took place at Select Committee stage. In her submissions, she refers to the *Report of the Department of Labour to the Employment and Accident Insurance Legislation Select Committee.* The report provides that several submissions were received which either requested that the words from the Employment Contracts Act 1991 be reinstated or, alternatively, that partial lockouts be specifically prohibited. Ms Hornsby-Geluk set out the response of the Select Committee to the submissions and it is clear that the issue was one of significant interest to employers and employees.

[20] Mr Lawson submits that the issue of whether the partial lockout was lawful or not is secondary only to the issue of whether the partial lockout was otherwise lawful based on the following grounds:

- It did not relate to the bargaining for the new collective agreement, in that the issues involved have not been subject to bargaining.

- That the lockout was not about persuading the employees to agree to a new or amended term of any new collective agreement to be entered into in the future, but to secure an immediate change of their employment conditions as a variation to their existing collective agreement.

- That it related not to the bargaining but to a dispute of interpretation and operation of the existing collective agreement.

- That it related to a lawful refusal to do additional work that had not hitherto been performed by dog control officers on health and safety grounds.

[21] Mr Lawson submits that if the Authority determines that the partial lockout could otherwise be deemed to be lawful, it may be appropriate at that time for the Authority to use its discretion to refer a question of law to the Employment Court.

[22] I have carefully considered Mr Lawson's submissions. I accept that there will have to be an assessment of the factual background in this matter. A question of law as to the lawfulness of the lockout, clearly arises in this case. I have considered whether the question of law is an important one. I find that there is an important question of law about the lawfulness of a lockout where there is a partial reduction in pay and corresponding partial reduction in work under the Employment Relations Act 2000. The question of law could be decisive in this matter and certainly will be strongly influential in bringing about a decision.

[23] The approach suggested by Mr Lawson, whereby the Authority determines whether the partial lockout was otherwise lawful and only then, if necessary, considers referring a question of law to the Court about the lawfulness of partial lockouts under the Employment Relations Act 2000 is not the appropriate approach to take in this case. I have reached that view on the basis of the finding that there is an important question of law and the additional time that would be required to investigate the matter without determining that question of law and then referring the question of law to the Court. Although I would not consider the matter to be of extreme urgency there will be public interest in the question of law for employment law generally and not just for the parties.

[24] I have considered whether there are any good and sufficient reasons not to exercise the discretion to order removal of the matter. I do not find reasons exist not to exercise my discretion to order removal of the case.

[25] For issues of practicality the respondent's counterclaim should also be removed.

Determination

[26] I have set out the reasons above why I am of the view that this is a case that should be removed to the Employment Court. The file should be removed in its entirety to the Court.

[27] This matter is to be removed to the Court in its entirety for hearing and determination without prior investigation by the Authority.

Costs

[28] The issue of costs will no doubt be dealt with at an appropriate time by the Court.

H Doyle
Member of the Employment Relations Authority