

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Spotless Services (NZ) Ltd (Applicant)
AND Service and Food Workers' Union (Respondent)
REPRESENTATIVES Richard Harrison, Counsel for Applicant, Employer
Lucie Highfield, Counsel for Respondent, Union
MEMBER OF AUTHORITY P R Stapp
INVESTIGATION MEETING 7 June 2002
DATE OF DETERMINATION 8 July 2002

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

1. Spotless Services (NZ) Ltd (Spotless) has lodged an employment relationship problem in the Authority that it wishes to resolve. The problem is an alleged breach of good faith in bargaining for a collective agreement where, during the bargaining process, the Service and Food Workers' Union (the union) made various approaches to Mid-Central District Health Board (Mid Central Health) in order to allegedly influence the bargaining process, undermine the bargaining and the authority of the applicant in the bargaining. Spotless relies upon:
 - (a) A letter addressed to the Chief Executive Officer of Mid-Central Health Mr Murray Georgel requesting assistance in the negotiations to achieve a better outcome in favour of the union.
 - (b) A standard form letter prepared by the union addressed to members of Mid-Central Health criticising the Spotless pay offer, seeking the Board's assistance with the negotiations and pressuring the Board to discontinue its contract for services with Spotless.
 - (c) A petition prepared and organised by the union addressed to the CEO and Mid-Central Health Board members seeking assistance and intervention in the bargaining process.

- (d) Public statements were made on behalf of the union to the news media that were allegedly untrue, in particular that Spotless had cut its employees' wages and conditions under its contracting arrangement with Mid-Central Health.
2. Spotless has requested that the problem be resolved with a determination from the Authority as to whether or not the union's conduct as described above was in breach of s.32(1)(d)(iii) of the Employment Relations Act 2000.
 3. The union denied breaching its obligations of good faith in relation to the bargaining that occurred with Spotless at Mid-Central Health. It specifically denied breaching s.32(1)(d)(iii) of the Employment Relations Act 2000.

The Facts

4. Spotless Services (NZ) Limited has a contract for service with Mid-Central Health Limited which has become Mid-Central Health District Health Board.
5. The Service and Food Workers' Union represents orderlies, cleaners and kitchen workers at three Mid-Central Health hospitals, namely Palmerston North, Horowhenua and Kimberley.
6. On 28 March 2001 the Union issued notice initiating bargaining. The collective employment contract covering the orderlies, cleaners and kitchen workers employed by Spotless Services (NZ) Limited expired on 1 April 2001.
7. On 29 and 30 May 2001, negotiation meetings occurred between the parties. A further negotiation meeting occurred on 13 June 2001. It is common ground that in June 2001 the Union members wrote to Mid-Central Health Board members. This was a standard letter prepared by the Union for its members (document 2). On 27 June 2001, David Lowe, Employee Relations Manager for Spotless, wrote to the Union's Mr Alastair Duncan, about the standard letter that staff were being encouraged to sign. It was Mr Lowe's view that this letter was designed to ask others not party to the negotiations to place pressure on his company to increase the wage offer. It was his opinion that clause 32(d) of the Employment Relations Act prohibited such action and requested Mr Duncan to ensure that such a breach of the good faith provisions did not occur.
8. The cleaners, catering and orderlies of Mid-Central Health wrote to Mr Murray Georgel on 6 July 2001. This letter pointed out the cleaners, catering and orderlies' view of the ability of the contractor to offer them what they called a decent pay rise, being a very real issue for

them. They requested a meeting be arranged between the Union and Mid Central Health. Thomas O'Neill of the Manawatu District Office of the Union who was accompanied by a number of delegates visited Mr. Georgel and proceeded to present him with a petition. Mr Georgel pointed out in a written letter dated 8 October 2001 that any petition should be addressed to Spotless and that he would ensure that Spotless received the petition.

9. In September 2001, Thomas O'Neill and delegates attended a Mid-Central Health (meet the candidates) meeting. Following this meeting, Mr O'Neill was interviewed by Anna Wallace from the *Manawatu Evening Standard* on the telephone, and subsequently an article appeared in that newspaper titled *Union Officials Ordered to Keep Out of Meeting*. David Lowe wrote on 28 September 2001 to Alastair Duncan about the article. The article reported that Mr O'Neill "*said workers' wages and conditions had been 'cut' under the contracting arrangement*". Mr Lowe wrote that assuming Thomas O'Neill's position had been accurately reported his comments were not at all helpful in resolving the negotiations. He sought clarification and explanation and assurance in regard to dealing in good faith by the Union in the negotiations. Mr Duncan responded on 4 October 2001 telling Mr Lowe that in his opinion the meeting in question was a public meeting of candidates for office in the upcoming local body elections. He stated that that was confirmed by the opening paragraph of the press clipping. He raised freedom of speech and robust debate as democratic rights and was most reluctant to be seen to condone limitations on those rights in regard to the points that Mr Lowe had raised in his letter. He told Mr Lowe that he was satisfied that the contribution by Mr O'Neill at that meeting was nothing more than a legitimate exercise of those rights.
10. A settlement was reached in the collective bargaining on 17 October 2001. On 30 October 2001 there was a letter from Alastair Duncan to David Lowe confirming settlement and ratification of the new collective employment agreement.
11. The parties attended mediation in regard to the employment relationship problem lodged by Spotless in the Authority but were unable to resolve the problem and thus it has been left to the Authority to provide the parties with a determination.

Determination

12. The applicant relies upon s.32(1)(d) of the Employment Relations Act 2000 that imposes an obligation that the Union and the employer:
 - (i) recognise the role and authority of any person chosen by each to be its representative or advocate; and.....

- (iii) must not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining.
13. In this problem, Spotless relies on incidents that it says allegedly breached the obligations of good faith involving the Union communicating with Mid Central Health, the motive being to undermine the bargaining or authority of Spotless in the bargaining.
 14. In this regard, the specific incidents relied upon involve the union arranging a standard form letter being sent by union members to members of the Mid-Central Health Board (document 2). It is not in dispute that the union prepared the letter for its members and arranged contact details of Board members. The next incident involved a letter on the union's letterhead being addressed to the CEO of Mid-Central Health dated 6 July 2001 and signed by union members (document 5). The third incident involved a petition organised by the respondent that was delivered by Thomas O'Neill and union delegates to the CEO Mid-Central Health on 5 October 2001 (document 6). Spotless contends that public statements which were inaccurate and not agreed beforehand by it was another form of communication from the union that occurred during the course of the negotiations (documents 7 and 7A).
 15. It was contended that these communications had the common purpose to pressure the employer to change its position in the negotiation through the involvement (direct or indirect) of Mid-Central Health, the employer's client. The Union accepts that the relevant section under the Act is s.32(1)(d)(i) and (iii). The matter for determination is whether the Union undermined or did anything that was likely to undermine the bargaining or the authority of Spotless in the bargaining.
 16. The witnesses who gave evidence before the Authority were: David Lowe Employee Relations Manager, John Ripplingham Health Manager Spotless, Alastair Duncan National Bargaining Co-ordinator for the Union and Thomas O'Neill Manawatu organiser of the union.
 17. This was a matter that was in the public environment involving a third party, Mid Central Health, whom the union and its members approached with a standard form letter, a letter to the CEO Mid Central Health, a petition and public statements in the media.
 18. The issues raised related to the contracting out of services by Mid Central Health.
 19. S.32 (1) (d) relates to the conduct of the union and the employer. There is nothing to prevent the union and its members commenting publicly on issues of public concern, even although collective bargaining was taking place between the union and the employer.

20. There was no sufficient evidence produced before the Authority that the communications complained about undermined or did anything that was likely to undermine the bargaining or the authority of the Spotless negotiators and the employer.
21. This is because in this case:
- Contracting out is a public issue.
 - Mid Central Health Board Members and in particular the CEO did not have or take on any direct role in the negotiating process.
 - The Spotless contract with Mid Central Health was not proven to be put at risk by the union and its members to impact on the bargaining.
 - The parties settled the collective employment agreement.
 - The application of s. 32 (1) (d) and the definition of “bargaining” under s. 5 of the Act. The definition does not extend to third parties. Section 32 (1) (d) regulates the behaviour between the employer and the union and the employer and its employees (members of the union) in the course of the bargaining. Therefore the argument advanced by Spotless that it would be in trouble if it communicated directly with the union members for the reverse to apply where the union and its members approach Mid Central Health who provides Spotless with its contract, does not assist it in this case.
 - Evidence has to support the words “likely to”, which require a real probability or significant risk of action undermining the employer. That did not happen in this case. From the evidence the action of the union and its members cannot support the allegation that the employer’s authority in the bargaining was undermined or the risk it would be undermined. The actions were open and transparent. There was no injury, weakening or wearing down of the authority of Spotless or of the bargaining. The union was not trying to bargain directly or indirectly with Mid Central Health Board members and/or the CEO but to convey pay concerns. Even if an unfavourable interpretation was placed on the incidents being relied upon by Spotless Mid Central Health referred the union back to Spotless. Mid Central Health took a firm stand. No damage appears to have been done.
 - The final matter relates to the media and in this case it seems the media comments were made in the general context of the contracting out issue in regard to the bargaining and any mistakes were not proven to have been made deliberately and maliciously by Mr. Thomas.

- Spotless believes that the union's motive and actions were calculated to persuade or change its position through Mid Central Health. It believes that was enough for a breach of good faith. I hold the following does not support the claim. The actions of Mid Central Health were not to get involved, rightly and properly. Mid Central Health was a third party. The contracting out issue is a public issue and a contractual issue between Spotless and Mid Central Health that was separate to the employment relationship.
 - At no stage was the role and authority of the persons representing Spotless not recognised, for example in the correspondence, in the media, with Mid Central Health and, a settlement of the collective employment agreement was reached.
22. Therefore I hold that there has been no breach as claimed of s.32 (1) (d) (i) and (iii) of the Act.
23. That is not to say in different circumstances contact with a third party, which does become involved in the bargaining process could result in a breach of good faith. Indeed care has to be taken in regard to any communications involving the purpose of the comments and the conveying of the facts.
24. As a general term this sort of issue involving third party communication should be included in the provisions of a code of good faith relevant to the circumstances of the union and employer and any agreement about good faith under s.32 (3) (a) and (b) of the Act. I know that there have been attempts made by the parties to sort this out. However the best place for the parties to do this is in mediation and I would encourage them back to mediation for this purpose. I grant leave to return to the Authority on this problem if the need arises.
25. The matter of costs is reserved.

P R Stapp
Member of Employment Relations Authority