Determination Number: CA 78/03
File Number: CEA 344/02

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

BETWEEN	National Union of Public Employees (Inc) (Applicant)
AND	The Richmond Fellowship New Zealand (Respondent)
REPRESENTATIVES	Andrew McKenzie, Counsel for Applicant Raewyn Gibson, Advocate for Respondent
MEMBER OF AUTHORITY	Helen Doyle
INVESTIGATION MEETING	19 June 2003
DATE OF DETERMINATION	17 July 2003

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] The applicant, The National Union of Public Employees ("NUPE"), says that its problem is whether or not the respondent conducted bargaining in good faith in terms of sections 4 and 32 of the Employment Relations Act 2000. NUPE alleges that the respondent was not engaging in good faith bargaining as required by those sections. Further NUPE says that the respondent engaged in surface bargaining.

[2] The respondent, The Richmond Fellowship New Zealand ("Richmond Fellowship") says that it has engaged in good faith bargaining.

The Background

[3] The applicant, NUPE, is a registered union under the Employment Relations Act 2000. At the time of the investigation meeting the number of NUPE members at Richmond Fellowship had increased from 19 members referred to in the amended statement of problem to about 26 members. There was some dispute about the exact number of members at any particular material time but there was general agreement that whether the national or regional number of overall employees is considered the proportion of employees who are NUPE members is relatively small. Richmond Fellowship has over 600 employees nationally. Approximately 150 of those employees are in Christchurch.

[4] Richmond Fellowship provides health and disability services with a community based philosophy. The services are provided to adults, young person and those with specialised needs.

[5] There is no existing collective agreement at the Richmond Fellowship. The Director of Operations, Southern, Chris Kalin, said that Richmond Fellowship always had concerns about

collective agreements. Some of these concerns are about flexibility and also that a collective agreement would not appropriately acknowledge that the Fellowship is "a not for profit" organisation.

Investigation Meeting

[6] A considerable number of documents were provided for the investigation meeting. Some of the individuals involved at the start of the bargaining process are no longer with the respective organisations. There was a restructuring of the Human Resources Department of Richmond Fellowship prior to October 2002 and this resulted in the loss of all the Human Resource staff. The organiser for NUPE involved in the bargaining also changed from Nadine Marshall to John Kerr. Mr Kerr attended meetings from July 2002 onward at Richmond Fellowship with respect to bargaining.

[7] On 11 February 2002 NUPE, on behalf of present and future members of the union employed by Richmond Fellowship, initiated bargaining. The notice had an incorrect date and an amended notice was sent dated 18 February.

[8] Two periods following the initiation of bargaining are relatively distinct in nature. The first was between February 2002 to October 2002 and then there was the period from October 2002 to the time of the investigation meeting.

February 2002 – October 2002

[9] The documents for the period following initiation of bargaining suggest that whilst there were meetings, NUPE was becoming increasingly concerned at the delays in finalising a bargaining process agreement that was in fact not signed until 11 October 2002. There had been 2 earlier versions of a good faith bargaining process but they had not been signed. One draft was dated 2 May 2002 and the other was noted post 28 June meeting.

[10] Mr Kerr attended a series of meetings at Richmond Fellowship after his appointment at which the need for a collective agreement was questioned. A meeting took place on 24 July 2002. Some insight into the debate about a collective agreement can be gained from the minutes taken at that meeting. The minutes provided inter-alia:

> *"Discussion occurred around the reasons NUPE consider a collective will benefit RF. We pointed out that their reasons are philosophical rather than realistic. They did not provide specific examples that held any weight. Nadine told us we did not want a collective agreement. Jacquie clarified that our preference has always been individual agreements and we ask NUPE to provide us with clear evidence of how a collective will benefit RF. Any argument by NUPE was countered by the change process and the fact that these things are happening already. NUPE did agree that things are obviously progressing and we are making changes.*
>
> *NUPE argued that their members choose a collective and we are blocking this. Again we asked for reasons why a collective will benefit RF.*
>
> *Discussion around training and how this is individualized and staff can negotiate their own needs/requirements. We require this, as well as flexibility in the way we employ staff and require them to work, in order to support clients effectively. NUPE argue this can still be done under a collective. A collective is preferable to them as it is less effort and paperwork for good outcomes. Members get a minimum set of agreements, in a transparent way.*

Mary advised that the members had no issue with the changes in ChCh, they just want a standard set of employment conditions.

Nadine asked if RF prefers NUPE negotiate individually on behalf of their members and members remain on individual agreements, if this can meet the needs of the members. Jacquie replied that this was their decision, but they were entitled to do this on behalf of staff. The union must decide how to move forward.

The meeting closed approx midday.

Next meeting will be communication meeting (not bargaining). Date and time to be advised."

[11] In August 2002 NUPE members concerned at the delays in progressing collective bargaining agreed at a meeting to pursue negotiations with Richmond Fellowship for individual "composite" employment agreements.

[12] Mr Kerr wrote to Richmond Fellowship on 2 September advising of NUPE members desire to bargain for new individual employment agreements and indicating that NUPE were happy for that process to sit alongside the current bargaining for a collective employment agreement. Voting slips were enclosed with a further letter from Mr Kerr to Richmond Fellowship confirming that members wish to bargain for individual employment agreements.

[13] The then Human Resource Advisor Jacquie Monti responded to Mr Kerr by email dated 13 September. Ms Monti said in her letter:

"It is possible we are experiencing some confusion between us therefore we wish to make clear the following.

Bargaining for new individual employment agreements for NUPE members (our employees) may, or may not be, necessarily appropriate for each individual staff member (NUPE members) in the Adult Service Christchurch. This will be determined on an individual basis during interviews to take place shortly."

[14] Mr Kerr then proposed that mediation with the Employment Relations Mediation Service be arranged. In the absence of what he considered a satisfactory response from Richmond Fellowship he lodged a statement of problem with the Employment Relations Authority.

October 2002 onwards

[15] A good faith bargaining process was entered into and signed between NUPE and Richmond Fellowship on 11 October 2002 following mediation. NUPE issued a strike notice on the same day however, was persuaded to withdraw that notice so there could be a meeting for the purpose of bargaining. The strike notice was in relation to the fact that dates could not be provided for meeting times.

[16] From October 2002 Richmond Fellowship sought advice from Mark McGinn, a director of a company specialising in the provision of strategic human resource consultancy services. Mr McGinn was then asked to become the lead advocate in the bargaining team for the Richmond Fellowship.

[17] Mr McGinn said that he advised the Richmond Fellowship senior management team:

> *"the Employment Relations Act required certain minimal clauses in a collective agreement but these were not necessarily intrusive upon their philosophical issues."*

[19] A meeting took place on 24 October 2002. Mr McGinn was present along with Felicity Sidford who was Richmond Fellowship's then Director of Adult Services South Island and Mike Pratley, Team Leader, Adult Services Christchurch. Mr Kerr was also present and was accompanied by Mary Wauchop who was NUPE's delegate at Richmond Fellowship.

[20] NUPE tabled a number of claims at that meeting. Mr McGinn provided his handwritten notes taken from that meeting. There was some confusion as to whether Mr Kerr agreed to provide the claims subsequent to the meeting in writing or not. I accept his evidence on the point that he did make the offer to put his claims in writing but was not advised by anyone from Richmond Fellowship that it was necessary from him to do so. Had he been advised that Richmond Fellowship wanted to see the claims in writing then my impression of Mr Kerr was that he would have provided the claims in writing.

[21] There were two further meetings on 1 and 8 November 2002. There was further discussion on 1 November about the proposed coverage clause and on 8 November about Richmond Fellowship's desire for a very broad "flexibility" clause.

[22] There was a longer meeting on 14 November 2002. At this meeting Mr McGinn tabled on behalf of Richmond Fellowship a draft heads of agreement document. I am satisfied that the document was discussed and issues within it clarified at the meeting. The sum of $500.00 was offered if agreement was reached before Christmas. Mr Kerr told Mr McGinn that he would have to talk to the membership about the draft heads of agreement.

[23] When Mr Kerr presented the draft heads of agreement to the members of NUPE they were upset by the document and voted to take strike action on 13 December.

[24] Strike action took place on 13 December 2002. The bargaining team at Richmond Fellowship felt that the strike was lacking in impact and weakened NUPE's position.

[25] A further meeting was arranged for 20 December 2002. Mr Kerr and Daniel Strong were present from NUPE. Mr McGinn arrived for the meeting alone. Mr McGinn said that he largely agreed with Mr Kerr's evidence about the meeting but "*felt omissions distorted the conversation*". I shall set out Mr Kerr's version of the meeting and then the context that Mr McGinn said it should be placed in.

[26] Mr McGinn arrived at the meeting casually dressed, carrying just a diary. Mr Kerr recalled he sat down facing the window. Mr Kerr said that the conversation went like so:

> *"Mark McGinn took the lead. He said that management reported how the recent strike action had had no impact and that they were less likely to show flexibility. He proposed that we "agree to disagree" as our respective positions were some way apart. He went to suggest that we "park the collective" and discuss individual terms and conditions. He said that management was unlikely to move in individual discussions although they might "potentially soften the words". Mark McGinn went on to say "…the message I'm getting is that management don't want a CEA, they are philosophically opposed to it, they accept they have to listen to your proposals but they're not going to move…". He [Mr McGinn] also said that he did not have the energy to continue the discussions."*

[27] Mr Kerr said that he did not agree with Mr McGinn but made notes and repeated back his understanding of what he had heard. Mr Kerr said that he had taken his response to the heads of agreement out of his file but put it back without giving it to Mr McGinn when he heard his

comments. Mr Strong confirmed that substantial work had been done prior to the meeting in response to the heads of agreement. Mr Strong and Mr Kerr were left with the impression that Richmond Fellowship was not interested in listening to or negotiating on the response.

[28] Mr McGinn said that his intention was to convey that the strike had been a non-event. He said that it was only on "potential show stoppers", like coverage, wages and flexibility that he had referred in relation to movement by Richmond Fellowship being unlikely. Mr McGinn said that he was advising Mr Kerr that Richmond Fellowship had no interest in creating disparity between groups of employees where non-union employees were continuing to engage in discussion about obtaining new individual agreements. He also said that he indicated that Richmond Fellowship had always believed in individual agreements and had not moved from its concerns about a collective agreement. Mr McGinn said that he indicated on behalf of Richmond Fellowship that they believed neither party had the energy to battle endlessly over terms it appeared unlikely to agree on.

[29] Mr Strong said that he was disappointed at the meeting on 20 December. He said that NUPE had made some reasonable suggestions in its response but that there was no room for negotiation. Mr Strong said that the phrase "show stoppers" was probably used on 20 December by Mr McGinn but he could not be certain.

[30] After the meeting further communication took place between Mr McGinn and Mr Kerr by email on 16 January 2003. Mr Kerr said in his email:

> *I met with delegates yesterday and they've provided me with feedback from the proposal you put to us on 20 December.*
>
> *Members are agreeable to adjourning collective bargaining for a period of no greater than one month in order to allow RF Fellowship to discuss members' terms and conditions on an individual basis. That gives us to 16 February.*
>
> *There is some need for you to clarify the term "park" which has been used by yourself and Mike Pratley with regard to your proposal. Our view is that "parking" collective negotiations does not mean bargaining is dissolved or abandoned, rather they are suspended for a period of time (our proposal is one calendar month). In the event of the matter of individual terms and conditions not being resolved Collective Bargaining could be resumed without NUPE having to re-initiate.*
>
> *There is also the matter of the ERA case. RF management have stated, through you on 20 December, they are not going to move on the Heads of Agreement proposal they have presented to us. This was stated before we had responded to that proposal. You said that while you were prepared to go on meeting you had little energy to do so as you had no scope for movement – in effect it was "take it or leave it". Our view is that this is counter to good faith bargaining and is a clear example of surface bargaining. You may wish to run this past RF management.*
>
> *Cheers,*
>
> *John Kerr*

[31] Mr McGinn responded and said:

> *I'm very disappointed at the way you have characterised our 20 December meeting. The learning I am prepared to take from this is that I have to be less trusting and ensure*

everything is reduced to formal written proposals and counter proposals. That is most certainly not how I prefer to work. C'est la vie.

Your email makes absolutely no mention of the conversation we had concerning our agreement, that an agreement over a collective agreement appeared highly unlikely given the distance the parties were apart. It makes no mention of my comment that RF were concerned that whilst protracted negotiations were going on, your members were getting nothing whilst non union members were progressing terms and conditions.

The failure to mention these points and then position our Heads of Agreement as take it or leave it is not only unfair, but a gross distortion of what actually happened. You had every right to respond but clearly agreed that it was appropriate to take to your members our discussion about parking the collective bargaining.

I fear that our relationship is damaged. I intend to advocate with RF management that it withdraw its offer to "park" the collective (and the following engagement in individual Terms and conditions discussions with members and you as their representative) and resume collective bargaining. Clearly you have the right to respond to those Heads of Agreement, we need to listen to those responses and take matters forward from there. I will advise as to RF instructions ASAP.

Regards

Mark

[32] After that exchange Mr McGinn withdrew his offer on behalf of Richmond Fellowship to discuss individual terms and conditions of employment with NUPE members and advised NUPE that Richmond Fellowship wished to resume bargaining. There was no response from Mr Kerr. In a letter from Mr McGinn dated 19 May 2003 the offer to discuss individual terms and conditions with NUPE members was reintroduced and NUPE has agreed on behalf of members to take that up.

Good Faith and the Employment Relations Act 2000

[33] The object of the Employment Relations Act 2000 as set out in section 3 is to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship. Section 3 sets out various ways this can be done including by acknowledging and addressing the inherent inequality of bargaining power in employment relationships; and by promoting collective bargaining.

[34] The parties to an employment relationship, in accordance with section 4 are to deal with each other in good faith and must not, directly or indirectly, do anything to mislead and deceive each other; or that is likely to mislead or deceive. The duty of good faith applies to bargaining for a collective agreement.

[35] Section 32 sets out what the duty of good faith in section 4 requires a union and employer bargaining for a collective agreement to do.

[36] Section 33 provides that the duty of good faith does not require a concluded collective agreement.

Discussion

[37] In investigating this problem I was mindful that the possibility of future collective negotiations between the parties still exists. I encouraged Ms Gibson and Mr McKenzie at the start of the meeting to see if there could be some resolution of the employment relationship problem. The parties then discussed the matter for an hour or so but could not reach agreement.

[38] I have considered the whole course of conduct between NUPE and Richmond Fellowship rather than focusing on any one particular aspect. I accept as submitted by Ms Gibson that there were meetings between NUPE and Richmond Fellowship during the period from February 2002 to 11 October 2002. Looking carefully at the documentation it is clear that during that period a process for conducting the bargaining in an effective and efficient manner was not agreed to and signed off. Further there was no commencement of the exchange of claims for consideration and response.

[39] It is necessary to ask why it took almost 8 months for NUPE and Richmond Fellowship to enter into a process for conducting bargaining in an effective and efficient manner.

I have taken the following documents into account in answering that question:

- Minutes of a meeting on 9 April reflecting that Richmond Fellowship propose a working party process over a three-month period with NUPE to look at key issues prior to commencing collective bargaining. One of the working party themes was to be collective v individual employment agreement. A working party was unacceptable to NUPE as set out in the letter from Nadine Marshall to Paul Bradley, the then Director of Human Resources at Richmond Fellowship dated 16 April 2002.

- Letter dated 22 May 2002 from NUPE asking Richmond Fellowship to confirm its position that it did not wish to enter into discussion regarding a pre-bargaining protocol and that it did not wish to enter into collective bargaining. Response from Richmond Fellowship dated 31 May advising that Richmond Fellowship is committed to a good faith approach to discussion with NUPE and enclosing minutes of meeting of 9 April and noting in relation to the second point that "*it is not correct to assume this to be the case. We understand the process and we are attempting to work through it in good faith. We are well aware of our obligations under sections3, 4 and 32 of the Employment Relations Act 2000."*

- Letter from Richmond Fellowship dated 11 June stating that it did not see the need for the services of the mediation service and that it would be available for a discussion on a pre-bargaining protocol.

- NUPE presents a paper at a meeting on 24 July following a request from Paul Bradley, that NUPE give preliminary advice on why a collective would improve the conditions of employment arrangement for NUPE members. The minutes of the 24 July meeting confirm that the paper from NUPE did not provide Richmond Fellowship with evidence of how a collective will benefit it. When NUPE argue that their members choose a collective and the Fellowship is blocking that it is noted in the minutes that *"Again we asked for reasons why a collective will benefit RF."*

- Correspondence from NUPE in September advising that NUPE members wanted to bargain for individual employment agreements.

[40] It is not in dispute that Richmond Fellowship had a preference for individual agreements for its employees. I find that much of the meeting time prior to October 2002 was spent discussing the

merits of a collective agreement or other matters like communication rather than attempting to reach agreement with respect to a process for conducting the bargaining and then bargaining for a collective agreement. In September there was advice from NUPE that its members wanted to bargain for individual employment agreements and that caused some confusion for Richmond Fellowship.

[41] I am satisfied that it was not really until Mr McGinn's involvement and advice in October 2002 that Richmond Fellowship felt that they could sign a good faith bargaining process and commence bargaining with NUPE.

[42] Meetings then took place to exchange respective claims and seemed to be progressing satisfactorily until December 2002. There were two significant events in December 2002. The first was the strike action on 13 December 2002 in relation to the members' reaction to the draft heads of agreement and the second was the meeting on 20 December.

[43] Whilst there was some dispute about the discussion on 20 December I find that there was reference to the following:

- The preference of Richmond Fellowship for individual employment agreements and an indication that management did not want a collective agreement.

- A suggestion that the collective be "parked" and there be a discussion of individual terms and conditions of employment.

- An indication that Richmond Fellowship were required to listen to proposals but were not going to move. I accept Mr McGinn's evidence that this statement was limited to "show stoppers" such as coverage, wages and flexibility. The probable use of the phrase was supported by Mr Strong's evidence and those issues were key ones between the parties.

[44] The matters that are relevant to whether or not NUPE and Richmond Fellowship in bargaining for a collective agreement dealt with each other in good faith are set out in section 32 (3) of the Employment Relations Act 2000:

> 32(3) The matters that are relevant to whether a union and an employer bargaining for a collective agreement are dealing with each other in good faith include—
>
> (a) the provisions of a code of good faith that are relevant to the circumstances of the union and the employer; and
>
> (b) the provisions of any agreement about good faith entered into by the union and the employer; and
>
> (c) the proportion of the employer's employees who are members of the union and to whom the bargaining relates; and
>
> (d) any other matter considered relevant, including background circumstances and the circumstances of the union and the employer.

Determination

[45] The Employment Relations Act, the code of good faith and the agreement about a good faith bargaining process entered into between NUPE and Richmond Fellowship all contemplate bargaining for a collective agreement.

[46] Richmond Fellowship and NUPE signed a good faith bargaining process on 11 October 2002 that provided under the heading Scope:

"The parties agree to bargain in good faith with a view to reaching agreement on a Collective Employment Agreement as per the notification of initiation of bargaining."

[47] Whilst Richmond Fellowship remained concerned about collective agreements, bargaining with NUPE should have been about the contents of a collective agreement not whether there should be a collective agreement or an individual employment agreement. The issue of collective agreement or individual employment agreement dominated the interaction between Richmond Fellowship and NUPE from February 2002 until October 2002. From that point onward Richmond Fellowship agreed to bargain in good faith with a view to reaching agreement on a collective employment agreement.

[48] On 20 December 2000 Mr McGinn I find, indicated the preference that Richmond Fellowship had for individual employment agreements and advised that Richmond Fellowship did not want a collective agreement. There was also a suggestion to "park the collective" and discuss individual terms and conditions. What Mr McGinn conveyed was contrary to the agreement that Richmond Fellowship had entered into with NUPE to bargain with a view to reaching agreement on a collective employment agreement. That good faith agreement is one that I can take into account by virtue of section 32 (b) of the Employment Relations Act 2000 as a matter relevant to whether or not NUPE and Richmond Fellowship were dealing with each other in good faith.

[49] I do not find that Richmond Fellowship's action in expressing that they did not want a collective agreement and suggesting individual negotiations consistent with good faith bargaining. Richmond Fellowship cannot say they were relying on NUPE's expressed interest in September with respect to individual employment agreements. That expression of interest was before the good faith bargaining agreement signed in October 2002. I find, in this respect, that Richmond Fellowship was in breach of its duty to bargain in good faith. In reaching this view I have also taken account of the previous dealings between NUPE and Richmond Fellowship.

[50] NUPE also claimed Richmond Fellowship engaged in "surface bargaining". NUPE say that Richmond Fellowship was simply going through the motions of bargaining without genuinely engaging with an open mind. Whilst there was some evidence from the exchange on 20 December in this respect I am not sufficiently satisfied following my investigation to conclude that Richmond Fellowship did engage in surface bargaining up to that point. There was a proposal put forward by Richmond Fellowship on 14 November and there was an offer of $500 if a collective agreement could be agreed to before Christmas. I also note that Richmond Fellowship was willing during that time to produce information to NUPE under section 34 of the Employment Relations Act 2000 about the scope of settlement with non-union employees.

[51] I am of the view, however, that the position adopted by Richmond Fellowship on 20 December was "take it or leave it" at least, in relation to wages, coverage and flexibility. There is a difficulty with that approach. It is not consistent with the duty of good faith. Mr McGinn on behalf of Richmond Fellowship could not consider in an open-minded way the response by NUPE to the heads of agreement without compromising Richmond Fellowship's expressed position that there would be no movement in those key areas. In light of that discussion there was also a very real risk that from 20 December onward any bargaining would simply be going through the motions. Neither Mr Strong nor Mr Kerr believed as a result of that discussion that Richmond Fellowship was interested in listening and negotiating further.

[52] I agree with Ms Gibson that the proportion of employees who are NUPE members and to whom the bargaining relates are small. That is a relevant factor although the breaches of good faith that I have identified are not issues of resource, availability to meet or operational environment. Mr McGinn said in his evidence, at paragraph 12, about the interaction between NUPE and Richmond Fellowship up until his involvement in October:

> *Up until that time the contact between NUPE and Richmond Fellowship had addressed many issues including ways it might work with NUPE that fell short of a collective agreement. In essence I did not see alternative arrangements to a collective as a delay strategy. I saw them more as an alternative option to develop trust, in a sense a "try before you buy" approach.*

This overlooks however the value of both parties making an effort to reach agreement with genuine negotiation and the requirements of section 32 of the Employment Relations Act 2000. The process of genuine negotiation builds mutual trust and confidence.

[53] Finally, one of the matters that concerned me is that NUPE members on the face of it appear to be in a worse position as a result of the initiation of bargaining for a collective agreement compared to other employees who are not members of NUPE. They were closed out of individual discussion for terms and conditions of employment for some months and NUPE considered further collective bargaining in light of the 20 December discussion pointless. This seems inconsistent with the concern Mr McGinn expressed at the meeting on 20 December that Richmond Fellowship had no interest in creating disparity between groups of employees.

Conclusion

[54] NUPE and Richmond Fellowship did not enter into an arrangement as soon as possible after the initiation of bargaining setting out a process for conducting bargaining in an effective and efficient manner as required by section 32(1) of the Employment Relations Act 2000. This was, I find, largely because of Richmond Fellowship's preference for preserving the status quo of individual employment agreements. I do not think it helpful to make a specific finding of a breach of good faith as following Mediation in October 2002 and the advice to Richmond Fellowship by Mr McGinn a good faith bargaining process was signed and meetings took place for exchange and response to claims.

[55] I find that the suggestion on 20 December by Mr McGinn to "park the collective" and enter into individual negotiation coupled with an indication that Richmond Fellowship did not want an collective agreement to be inconsistent with the duty of good faith and a breach of good faith obligations by Richmond Fellowship.

[56] I find that the advice by Mr McGinn on 20 December that there would be no movement by Richmond Fellowship in key areas between the parties to be a breach of good faith.

Remedies

[57] Remedies will depend on the current situation between NUPE and its members that was somewhat unclear at the end of the investigation meeting. I discussed this with Mr McKenzie and Ms Gibson. It seems appropriate to reserve leave for the applicant to make submissions if necessary with respect to remedies once consideration of the determination has taken place.

Costs

[58] I reserve the issue of costs.

Helen Doyle
Member of Employment Relations Authority