

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Catherine Griffin and Graham Latta (First Applicants)
And
New Zealand Amalgamated Engineering Printing & Manufacturing
Union (Second Applicant)

AND The Southland Times
a division of Fairfax New Zealand Limited (Respondent)

REPRESENTATIVES Tony Wilton, Advocate for Applicants
Jenny Gibbs, Counsel for Respondent

MEMBER OF AUTHORITY Philip Cheyne

INVESTIGATION MEETING 3 August 2004

DATE OF DETERMINATION 13 September 2004

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Catherine Griffin and Graham Latta work for the Southland Times which is now a division of Fairfax New Zealand Limited. They say that they each have an unjustified disadvantage personal grievance against their employer. Ms Griffin and Mr Latta are both members of the New Zealand Amalgamated Engineering Printing & Manufacturing Union Incorporated (EPMU). The grievances arise from the conduct of bargaining between EPMU and Southland Times. EPMU says that the Southland Times breached its duty of good faith by seeking to undermine union membership and collective bargaining. For its part, the Southland Times denies that it caused any grievance or breached its duty of good faith.

Background

[2] At relevant times, Ms Griffin was involved in bargaining for and then covered by a collective employment agreement. Mr Latta was employed from August 2000 under an individual employment contract. While a claim was made to extend coverage of the collective agreement to Mr Latta, the settlement did not result in that extension and Mr Latta remained bound by an individual contract. Nonetheless, EPMU represented him and other members not bound by the collective agreement and the bargaining resulted in an agreement over an additional payment to Mr Latta and others in the same situation.

[3] On or about 1 February 2001, EPMU initiated bargaining under the Employment Relations Act 2000 with Independent Newspapers Limited and its 10 subsidiary newspaper companies, including the Southland Times, for a multi-employer collective agreement (MECA). That bargaining reached a stale-mate and there was no resulting MECA. About August 2001, the



Southland Times approached the EPMU site delegate to ask about progress with bargaining and about conducting reviews for union members pursuant to their individual employment agreements. At the time, the contracts applicable to employees such as Ms Griffin and Mr Latta included provision for an annual review usually conducted about the employee's anniversary date.

[4] Mike Kirkwood is the EPMU organiser based in Dunedin, whose responsibilities include the Southland Times. The delegate contacted him and Mr Kirkwood then met with the Southland Times general manager (Blair Burr). After the meeting, Mr Kirkwood wrote to Mr Burr to confirm the outcome of the discussion as follows: *While we have no difficulty with reviewing wages, we do not think it is pertinent at the moment to discuss any other terms and conditions of workers individual agreements because of the initiation of bargaining for a collective agreement from the NZEPMU.*

[5] There followed bargaining between the Southland Times and EPMU for a collective employment agreement. Claims were exchanged in October 2001, negotiations commenced in December 2001 and concluded in May 2002. The outcome was a collective employment agreement binding on Ms Griffin and other union members with a term from 1 June 2002 to 30 May 2004.

[6] One issue not resolved until the end of the negotiations was the employees' claim for pay increases to be back-dated to 30 July 2001. EPMU eventually proposed a lump sum payment as an alternative way of addressing the claim for back-dating: see Mr Burr's letter of 14 May 2002 summarising the discussions held on 8 May 2002 and Mr Kirkwood's letter of 24 May 2002, which both refer to a lump sum payment instead of back-dating. The Southland Times agreed to a lump sum payment and the whole settlement was ratified soon after.

[7] In their attempts to resolve these employment relationship problems, the parties developed strongly held but different views about whether the lump sum payment that was agreed and paid represented back-pay. It is clear from the documented material mentioned above that the payment was made to resolve the claim for back-pay and that Southland Times appreciated at the time that that was how the payment was perceived by the employees and EPMU. The payment was obviously not back pay but it was an agreed sum in lieu of back pay.

[8] The lump sum payment itself was set at \$600.00 for a full-time employee and \$300.00 for a part-time employee, payable to all union members including those not covered by the collective agreement (for example, Mr Latta). It was further agreed that the full payment was due to those who had joined the union on or before 31 July 2001 and a pro-rata payment was due to those who joined the union during the period under consideration (July 2001 to May 2002). There is an email from Mr Burr to Mr Kirkwood discussing this which is further evidence that for the purposes of their negotiations, the payment related to back-pay rather than some unspecified bonus payment.

[9] About November 2001, Mr Burr had discussed with his senior managers plans to introduce a performance bonus scheme applicable to all employees. Early in the negotiations, Mr Burr put forward a claim that employees covered by the collective agreement should have a performance bonus included in their remuneration package. That claim was further discussed during negotiations on 11 February 2002. EPMU rejected the claim and Mr Burr decided to abandon it.

[10] Mr Burr went to some trouble to keep non-union employees abreast of the progress with the collective agreement negotiations. He sent a memo dated 21 May 2002 to all Southland Times non-union staff. It says that *...the company has maintained a positive approach toward the negotiation process...and that Our most recent offer...included what we believe to be a very fair and reasonable base salary..., plus shift allowance, plus overtime and meal money.* It went on to say that the union indicated a general acceptance *...however they went on to ask for an across the board increase and back-pay in addition to what had already been discussed.* It expressed the company's concern that

....we will be unable to sustain these negotiations while the union team continues to take this approach, as you can well imagine it is extremely frustrating for the company's negotiating team who are keen to agree a deal is fair and reasonable for all concerned when the deal we're discussing keeps changing or being added to after our attempts to accommodate the union's changing claims.

[11] Mr Burr sent a further memo to all Southland Times non-union staff dated 31 May 2002. In that memo Mr Burr announced and gave details of the settlement. As to the lump sum payment, it said *Payment of a lump sum in recognition that union members have not had a salary review for between one to two years*. It went on to say:

Rest assured, I will ensure that none of you are disadvantaged through remaining on an individual employment agreement. Your reviews will continue as before, your personal performance will be rewarded and reflected in your salary, and your individual contribution to the performance of the company will be taken into consideration once the final figures are in for this financial year.

Once again, thank you for your support through this negotiation process and your ongoing efforts to ensure the success of The Southland Times.

Regards,

...

[12] No complaint is made by any of the applicants about the tenor of these communications. It is Mr Burr's next memo that is the centre of the problem. It is dated 4 July 2002 and addressed to *All Southland Times Individual Agreement Staff*. That is a mis-description of the actual recipients of the memo and the bonus payment it mentions. Mr Latta for example (and several other union members) were not bound by the collective agreement and were therefore on individual agreements, but it was never intended that employees such as Mr Latta would be entitled to the bonus scheme announced in the memo and none of the union members actually received the memo from the Southland Times. However, as happens, union members became aware of its contents almost as soon as the memo was delivered individually to the non-union employees.

[13] The memo announced a new salary and performance review process. It observed that annual reviews had not always been done in a timely fashion. To remedy that, the Southland Times decided as of 1 July 2002 to conduct reviews in the middle month of each quarter for all staff with anniversary dates during the quarter. It said that in addition to the annual review of base salary, the company was introducing an individual performance bonus as a component of the remuneration package. A scale was tentatively established: *Nil (under performers) - \$600 (meeting expectations) - \$900 (clearly exceeding expectations) - \$1200 (outstanding performers)*. The bonus payable (if any) would be set in consultation with the employee by the line manager.

[14] The final section of the memo read:

2001 – 2002 Performance Bonus

As many of you will know, The Southland Times Co. Ltd finished the proceeding 12 months strongly beating financial performance benchmarks of a number of previous years.

And while we do not have any formal mechanism currently in place to celebrate our success, I am very pleased to announce that all staff on Individual Employment Agreements are to receive a special one-off bonus payment of \$500 (full time 30 hours +) or \$250 (part time)

gross to reflect their personal contribution to the success of the company during the 2001 – 2002 financial year.

This bonus is in addition to any personal performance bonus you may receive through the new annual review process.

I also want to take this opportunity to thank you for your efforts and support throughout the past year, it is much appreciated and is a major contributor to what drives the company forward to the levels of performance I know we are capable of.

Please don't hesitate to approach your departmental head if you would like any further information.

Kind Regards,

Signed

B. D. Burr

General Manager

[15] It was not intended that the union staff on individual agreements would be entitled to the 2001-2002 bonus despite the wording in the memo. Indeed, Mr Latta's evidence is predicated on the basis that the memo was not addressed to and did not include him, because he says that he was hurt by the inference that he and the other union members had not contributed to the success of the company during the 2001-2002 financial year and were not to be thanked for their efforts in the same manner as the non-union employees. Ms Griffin gave similar evidence about how she felt as a result of the same inference drawn by her. I also note Mr Burr's evidence that he did not communicate to the union staff his thanks for their *...efforts and support throughout the past year...*, that it was *...very much appreciated...and...a major contributor to what drives the company forward.*

Analysis and conclusions

[16] The breach of good faith claim is that Southland Times sought to undermine union membership and collective bargaining.

[17] Parties to an employment relationship, such as between a union and an employer, must deal with one another in good faith. That duty specifically applies to bargaining for a collective agreement but also applies generally while the relationship subsists: see the Employment Relations Act 2000 section 4(5). In *Carter Holt Harvey Ltd v National Distribution Union Inc* [2002] 1 ERNZ 239, the Court of Appeal said: *Good faith connotes honesty, openness and absence of ulterior purpose or motivation. In any particular circumstances the assessment whether a person has acted towards another in good faith will involve consideration of the knowledge with which the conduct is undertaken as disclosed in any direct evidence, and the circumstantial evidence of what occurred.*

[18] In the present circumstances, the question becomes whether Mr Burr acted honestly, openly and with an absence of ulterior purpose or motivation when sending the memo dated 4 July 2002 to non-union employees. As noted earlier, Mr Burr presented a claim for employees represented by EPMU to have a performance bonus included in their remuneration. The proposal was not identical to that set out in the July memo because it made provision for EPMU involvement. Nonetheless, EPMU on behalf of members rejected the proposal. The bonus scheme as announced simply represented a finalised version, modified to reflect the fact that a section of the employees had

rejected any involvement. Given that, it is difficult to see that Mr Burr could have had any ulterior purpose or motivation in respect of the new appraisal and bonus scheme. In his words he wanted to help...*cement the company's relationship with the staff in the sense of getting them to identify with the company's goals and vision...and also improve the performance of the company by incentivising improvements in employees' performance.* These and similar things said by him are the usual points made in favour of discretionary performance payments and there is no reason to doubt the sincerity of Mr Burr's expressed beliefs in that respect. The union staff were not part of this because they rejected it.

[19] That said, I am troubled by an aspect of Mr Burr's decision to pay a bonus regardless of performance in respect of the financial year 2001/2002. The context includes the fact that the Southland Times decided not to undertake annual salary reviews for union staff even though EPMU advised there was no objection to doing so. That hiatus continued for about a year, but in the meantime non-union staff had salary reviews as usual. On 21 May 2002, Mr Burr sent a memo to *non-union staff* in which he criticised the union negotiation team's approach of asking for an *across the board increase and back-pay in addition to what had already been discussed.* The negotiations then progressed to a settlement proposal that was ratified on or about 30 May 2002. Mr Burr then sent a memo dated 31 May 2002 to *non-union staff* to tell them the details of the settlement including the lump sum payment. He went on to say: *Rest assured, I will ensure that none of you are disadvantaged through remaining on an individual employment agreement. Your reviews will continue as before, your personal performance will be rewarded and reflected in your salary, and your individual contribution to the performance of the company will be taken into consideration once the final figures are in for this financial year.* Next on 4 July, Mr Burr announced the *special one-off bonus payment* payable in respect of the previous year's company performance and the discretionary performance bonus tied to all future performance assessments. Mr Burr told me that the "*special one-off bonus*" was payable to non-union staff regardless of their individual performance because they had no mechanism to assess performance. However, the same could be said of the performance bonuses for the 2002/2003 financial year which, on Mr Burr's evidence, were paid to non-union staff in respect of reviews conducted from July 2002.

[20] It is difficult to escape the conclusion (and I find) that Mr Burr also intended the *special one-off bonus payment* to ensure that the non-union staff did not see themselves as missing out on the lump sum payment that had just been made pursuant to the EPMU negotiations. That is why Mr Burr was keen to characterise the lump sum payment as unrelated to back-pay so it could be suggested that EPMU members had also received a bonus. The result is that in deciding on and announcing the *special one-off bonus payment*, Mr Burr was at least partly motivated by a desire to discourage the view that employees would benefit by being union members. It was intended to undermine confidence in the recently concluded collective bargaining. I find that was an *ulterior motive* in the sense mentioned by the Court of Appeal in the *Carter Holt Harvey* case, so the Southland Times thereby breached its obligation under section 4 of the Act to deal in good faith with EPMU.

[21] The remedy sought by the applicants for the breach of good faith is a declaration that in making the *special one-off bonus payment* only to employees who were not members of the EPMU, the Southland Times breached its good faith obligations to EPMU. I make that declaration.

[22] Both Ms Griffin and Mr Latta say that the inference that they did not personally contribute to the success to the Southland Times is an unjustified action by the employer which affected their employment to their disadvantage.

[23] I agree with the submissions by counsel for the Southland Times that the simple act of not paying the 2001/2002 bonus to Ms Griffin and Mr Latta when they had no contractual entitlement

to it or even to be considered for a payment cannot amount to an unjustified disadvantage grievance: see for example *Alliance Freezing Company (Southland) Ltd v NZ Amalgamated Engineering etc IUOW* [1989] 3 NZILR 785 and the other similar cases referred to by counsel.

[24] However, the argument was advanced on the different footing that Mr Burr was saying that Ms Griffin and Mr Latta had not contributed to the previous year's good performance, causing them to feel hurt. Mr Burr did not intend or foresee any personal slight to staff such as Ms Griffin and Mr Latta who were not sent the memo. Mr Burr did not tell Ms Griffin and Mr Latta how much they had contributed to the same success of the Southland Times but I find that Mr Burr nonetheless thought they had and he did not make a distinction in that regard between union members and other staff. It must be appreciated that the more combative context of collective negotiations perhaps does not lend itself to the sort of effusive message that accompanied the bonus announcement for non-union staff. Throughout, Ms Griffin and Mr Latta knew full well the extent of their contribution to the performance of the Southland Times and those views were unaffected by not receiving the sort of communication that was directed to the non-union staff. Accordingly, I find that there was no action or inaction by the Southland Times that disadvantageously affected the employment of Ms Griffin and Mr Latta.

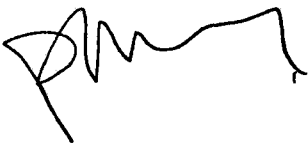
[25] Section 160 (3) of the Act empowers the Authority to concentrate on resolving an employment relationship problem rather than treating a matter in the manner described by a party. Under that power, and if there had been sustainable grievances, I would have resolved the problem by reference to the breach of good faith rather than by remedying grievances, because the problem is about the relationship between EPMU and the Southland Times, not between individual employees and their employer.

Conclusion

[26] I make the declaration sought by EPMU.

[27] Ms Griffin and Mr Latta do not have sustainable grievances.

[28] Costs are reserved. Each party has enjoyed a measure of success so they may think that costs should lie where they fall but I will reserve costs to be dealt with by an exchange of memoranda if there is any disagreement between the parties.



Philip Cheyne
Member of Employment Relations Authority

